



**Appeal number: TC/2016/04397**

***INCOME TAX – penalties for late payment – extension of filing deadline by HMRC - reasonable excuse – Sch 56, Finance Act 2009 – appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**IAN WHITTLE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ALEKSANDER**

**The Tribunal determined the appeal on 30 December 2016 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 15 August 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 21 October 2016, the Appellant's Reply dated 16 November 2016 (with enclosures), and the Appellant's further evidence filed on 9 December 2016.**

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## DECISION

1. This is an appeal by Mr Whittle against penalties for the late payment of income tax for the tax year ended 5 April 2014 under paragraph 1, Schedule 56, Finance Act 2009 (“Schedule 56”). A first penalty arises if tax is unpaid after the expiry of 30 days from the due payment date, a second penalty arises if tax is unpaid 5 months after the first penalty date, and a third penalty arises if tax is unpaid 11 months after the first penalty date. In each case, the penalty is 5% of the tax unpaid (paragraph 3, Schedule 56).

2. However, under paragraph 23, Schedule 56, a penalty does not arise if the taxpayer has a reasonable excuse for his default and the taxpayer puts right the failure without unreasonable delay after the excuse has ended. Insufficiency of funds or the reliance on another person cannot be a reasonable excuse.

3. In the case of Mr Whittle, according to HMRC’s computer records, penalties were assessed as follows:

(1)	First penalty	5 January 2016	£76.00
(2)	Second penalty	5 January 2016	£76.00
(3)	Third penalty	23 February 2016	£76.00.

### Procedure

4. On reading Mr Whittle’s Notice of Appeal, HMRC’s Statement of Case and Mr Whittle reply, there were some factual issues which were unclear - relating to HMRC’s cancellation of late filing penalties and extension of time for filing tax returns. I therefore invited Mr Whittle to file copies of all of his correspondence with HMRC evidencing these issues, he filed a copy of a letter from HMRC of 11 November 2015 and a copy of his self-assessment statement dated 10 September 2015 under cover of an e-mail dated 9 December 2016.

### The law

5. Under s8 Taxes Management Act 1970 (“TMA”), HMRC may by notice given to any individual, require that the individual completes and files a tax return. Section 7, Interpretation Act 1978 provides that, unless the contrary is proved, if a letter is properly addressed and posted pre-paid, service is effected at the time at which the letter would be delivered in the ordinary course of post.

6. The filing date for tax returns is 31 January following the end of the tax year (or 31 October in the case of non-electronic returns). Different time limits apply in particular circumstances, none of which is relevant here.

7. s9 TMA requires tax returns to include a self-assessment of the tax payable. However, the requirement is waived under sub-section (2) if the return is filed by 31 October (or within two months of the s8 notice, if that notice is given after 31 August).

5 8. In circumstances where no self-assessment is included in a tax return, sub-section (3) provides that HMRC may make the assessment on behalf of the taxpayer on the basis of the information in the return. This could occur, for example, because of a failure by the taxpayer to complete the return properly, or because the taxpayer has filed his tax return by 31 October. An assessment made under sub-section (3) is  
10 treated as if it were a self-assessment included in the tax return (s9(3A)).

9. There is no express power in the TMA for HMRC to extend the filing deadline for tax returns. Any extension can only be given pursuant to HMRC's general powers of collection and management under s5(1) Commissioners for Revenue and Customs Act 2005.

15 10. Section 59B TMA governs the due dates for payment of tax. The relevant provisions of that section are as follows:

(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of  
20 assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A or 59AA of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

25 shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below [...]

[...]

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six  
30 months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

35 the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.

40 11. The provisions of s59B(3) are not relevant in this case, so the requirements of s59B(4) apply, and the tax is payable on or before 31 January following after the end of the tax year (namely 31 January 2015 in respect of the 2013/14 tax year).

12. The amount of tax payable is the difference between the amounts of tax already paid by the taxpayer in respect of the tax year (for example under PAYE or by instalment payments), and the amount of tax shown as payable in the self-assessment included in the tax return.

## 5 Background facts

13. The background facts are for the most part not in dispute, and I find them to be as follows.

14. According to HMRC's computer records, a notice to file a tax return for the tax year 2013/14 was issued by HMRC and posted to Mr Whittle on 6 April 2015.

10 15. There is nothing to suggest that HMRC's records are wrong, and I therefore find that on the balance of probabilities, the notice to file a tax return was posted to Mr Whittle on 6 April 2014. Unless Mr Whittle can prove to the contrary, service of that notice was effected at the time that the notice would have been delivered in the ordinary course of post – a few days later (the precise date is not relevant to this appeal). Although Mr Whittle states that the notice was not received, this statement is not supported by any evidence. The evidence before me is that letters from HMRC generally reached Mr Whittle, and there is nothing to suggest that the s8 notice would not have reached Mr Whittle as well. Therefore, on the balance of probabilities, I find that the s8 notice was delivered to Mr Whittle, and was received by him within a few days of 6 April 2014.

16. On 9 October 2015, Mr Whittle wrote to HMRC with a complaint. Not all of the correspondence relating to the complaint was provided to me, but Mr Whittle provided a copy of HMRC's letter of 11 November 2015 which responds to his complaint. From the limited correspondence before me in evidence and the timing of the complaint, I surmise that the complaint arose as a result of the imposition of late filing penalties, and that Mr Whittle was under the (mistaken) belief based on information apparently on the HMRC website that he was not required to file a tax return for 2013/14. HMRC in their letter stated that "I have thoroughly reviewed your Self Assessment record and [...] all penalties have been cancelled". The letter went on to state:

35 "I have viewed the HMRC website which confirms that if you or your partner received an income of over £50,000 you will be subject to the Higher Income Child Benefit Charge and a Self Assessment Tax Return is required. I have enclosed a printout of the guidance taken directly from the HMRC website which confirms this.

40 As previously advised by my colleague, the 2013-14 and 2014-15 Self Assessment Tax Returns need to be completed and returned to us. Under the circumstances, I have extended the filing dates for both returns to 31 December 2015 as per your request to complete paper Self Assessment Tax Returns."

17. Mr Whittle's tax return for 2013/14 was received by HMRC on 14 December 2015. It did not include a self-assessment of his tax liability.

18. As the s8 notice was given before 31 August 2014, I find that Mr Whittle was required to include a self-assessment in his tax return. As he did not, HMRC calculated Mr Whittle's tax liability from the figures given in Mr Whittle's tax return. The liability was calculated as being £1539.58.

5 19. In his e-mail dated 9 December 2016, Mr Whittle confirmed (and I therefore find) that the tax calculated and assessed by HMRC in respect of 2013/14 has not been paid. Mr Whittle in his submissions asserts that he has disputed this amount, and that his dispute is still under review – however no correspondence (other than  
10 HMRC's letter of 11 November 2015) or other evidence relating to this dispute was provided to me by Mr Whittle.

20. On 21 March 2016, Mr Whittle appealed to HMRC against the penalties for late payment on the following grounds:

(1) "as previous correspondence between HMRC and myself would indicate that there are no monies outstanding or due"

15 (2) "these letters include the agreement that no penalties are to be imposed as none are due"

(3) "there is a counter-claim for monies owed to myself and by HMRC which are now overdue for payment"

20 (4) "if you are unable to process this request within 14 days I reserve the right to impose further penalties in line with those suggested by HMRC i.e. £100 per letter and 12p per day interest".

21. A decision letter rejecting the appeal was sent to Mr Whittle on 21 April 2016. Mr Whittle accepted HMRC's offer of a review on 19 May 2016. Mr Whittle's covering letter to his review application included the following submissions:

25 "The "reasonable" excuse [...] remains that there was no requirement to complete a tax return for 2013/14, and therefore no deadlines can be applied and no penalty for late submission or any perceived tax owed would result.

30 Once a tax return was requested (even though I still maintain that the HMRC website at the time did not require a return as proven on more than one occasion) I fulfilled this obligation within the timescales set and therefore I maintain once more that no penalties can be justified.

35 As a result of the tax return for 2013/14, it was claimed that some tax was due and this has subsequently been disputed – as a result until this is resolved no penalties can be reasonably imposed."

22. HMRC wrote to Mr Whittle on 18 July 2016 with the conclusions of the review and upholding the penalties. The reasons for upholding the penalties were as follows:

40 "1. Your income for the year was in excess of £50,000 and either you or your partner claimed Child Benefit. You therefore met the Self Assessment criteria for return completion during 2013-2014 and have been advised of this on a number of occasions.

The legal obligation to make a return is created when the “Notice to file a return” or paper Return, a notice under s8 TMA 1970 is issued, the customer is legally obliged to complete that return.

5 2. I agree that the filing date was extended to 31 December 2015, and that you submitted your completed return before this date. However the extension to the filing deadline does not alter the payment date for the year which remains unchanged at the statutory due date for the year, 31 January 2015.

10 3. The decision to cancel the late filing penalties following HMRC’s agreement to extend the filing deadline has no bearing on the late payment penalties, as advised in point 2 above.

15 4. The tax due for 2013-2014 has been calculated based upon the entries you made on the return. As advised by HMRC, on 29 February 2016, if you feel that the calculation is incorrect, you need to make the appropriate amendment to the return. Until such time, the tax remains due and payable.

20 Self-assessment is based upon voluntary compliance so it is essential that those who do pay the right amount of tax at the right time feel confident that the system does not reward non-compliance in any way. Penalties and interest are designed to cancel the immediate financial advantage for those who pay late over those who pay on time.”

23. The review officer considered whether there were any special circumstances justifying a reduction in the penalties, and concluded there were none.

25 24. On 15 August 2016, Mr Whittle notified his appeal to the Tribunal. The grounds of appeal set out in his Notice of Appeal are long and overlap. A summary of the grounds are as follows:

30 (1) The main overriding reason is that it is impossible to consider or agree whether additional income tax should be paid or refunded by January 2015, if it has not been agreed that the Tax Return for the year in question has a deadline for return by December 2015. On this basis alone, it is inconceivable that a rationale decision to impose a penalty is correct.

(2) A review cannot be independent if it is conducted by another HMRC officer

35 (3) No notice to file a tax return had been received by Mr Whittle (and no proof of receipt had been given by HMRC), and therefore he was under no obligation to file a return.

(4) Mr Whittle asserts that he is entitled to a tax refund for 2013/14, and that there is no consensus on whether money is payable by Mr Whittle to HMRC or payable to Mr Whittle from HMRC.

40 (5) The point made by the HMRC review officer relating to the amendment of the 2013/14 tax return (point (4) in the review decision letter) is irrelevant. In Mr Whittle’s opinion, a repayment is due from HMRC to him, and it is not possible to make any amendment to the return as no formal document either electronic or paper was actually completed.

(6) HMRC's decision is due to poor administration and record keeping.

25. The Notice of Appeal also requests a number of remedies relating to the internal administration of HMRC, which are outside my powers to give. This decision is restricted solely to the question of the penalties assessed on Mr Whittle, and whether they should be upheld or cancelled.

### **Penalty and reasonable excuse**

26. Contrary to the requirements of s9 TMA, Mr Whittle did not include a self-assessment in his tax return for 2013/14. Instead HMRC calculated and assessed the tax payable. By virtue of s9(3A) TMA, this calculation is treated as a self-assessment included in Mr Whittle's tax return.

27. By virtue of s59B, the due date for the tax shown as payable in HMRC's calculation was payable on 31 January 2015. Late payment penalties are payable under paragraph 1, Schedule 56, as Mr Whittle had not paid this tax by 30 days from the due payment date ("first penalty date"), nor by 5 months after the first penalty date, nor by 11 months after the first penalty date.

28. In each case, the penalty is 5% of the tax unpaid. (paragraph 3, Schedule 56). For these purposes, the amount of the unpaid tax is the amount of tax calculated by HMRC, namely £1539.58. The penalty in each case is 5% of this amount, namely £76.95. Each of the penalty determinations issued by HMRC were for £76.00, and I therefore find that they were correctly calculated.

29. Paragraph 16, Schedule 56 provides that a liability to a penalty does not arise for a failure to make a payment if there is a reasonable excuse for the failure. Where a taxpayer had a reasonable excuse for the failure, but the excuse ceased, then the taxpayer is treated as only continuing to have an excuse if the failure is remedied without unreasonable delay once the excuse ceased.

30. In this case, HMRC "extended the filing dates for [the return] to 31 December 2015". They did not extend the due date for payment of tax.

31. As the return was not filed by 31 October, Mr Whittle was required to complete the self-assessment in his tax return under s9 TMA. However, Mr Whittle failed to comply with the requirements of s9 and did not include a calculation of the tax due. I note that it was clearly within Mr Whittle's capability to calculate the tax due, as he submits that he has done so and says that a refund of tax is owing to him.

32. HMRC calculated the tax on his behalf, and that calculation is treated as a self-assessment included in the tax return (s9(3) and s9(3A) TMA).

33. The difficulty that Mr Whittle faces – as stated in his submission – is that the statutory due date for the payment of the tax falls before the date on which that amount of tax is calculated. This happened because HMRC extended the date for filing his tax return and self-assessment in a manner that was inconsistent with the scheme for filing tax returns and paying tax as set out in the TMA. There is no

express power in the TMA for HMRC to extend filing deadlines, and the extension was made under their collection and management powers in the Commissioners for Revenue and Customs Act 2005. Because this extension was made outside the provisions of the TMA, one consequence is that inconsistencies arise between the filing date (as extended), and the payment due date (which was not extended).

34. Given these circumstances, I consider that Mr Whittle had a reasonable excuse for paying the tax due after the due payment date. However, this excuse ceased, at the earliest, on 31 December 2014. This is because, had Mr Whittle complied with his obligations under s9, he would have calculated the tax payable by that date when he completed his self-assessment, and would have been able to pay the tax due by the time of the extended filing date. Alternatively, the excuse would have ceased, at the latest, by the date on which he received HMRC's calculation and assessment of the tax payable.

35. I can only allow Mr Whittle's appeal on the basis of a reasonable excuse if Mr Whittle's failure to pay the tax due is remedied within a reasonable time of his excuse ceasing (paragraph 16(2)(c), Schedule 56). As at 9 December 2016, Mr Whittle still has not paid any of the tax shown as due in the self-assessment. On any basis, any excuse that Mr Whittle might have had for not paying his tax by the due date expired a long time ago.

36. I also find that HMRC's decision that there were no "special circumstances" for the purposes of paragraph 9, Schedule 56, was not "flawed".

### **The Appellant's grounds**

37. Mr Whittle raised a number of grounds in his Notice of Appeal, to which I now turn.

*The main overriding reason is that it is impossible to consider or agree whether additional income tax should be paid or refunded by January 2015, if it has not been agreed that the Tax Return for the year in question has a deadline for return by December 2015.*

38. I have addressed this ground in dealing with the question of whether Mr Whittle had a reasonable excuse for his failure to pay the tax calculated by HMRC. It is clear from HMRC's letter of 11 November 2015 that he was required to file his tax return by 31 December 2015.

39. I would also mention that the statement in HMRC's letter of 11 November 2015 that "all penalties have been cancelled" is clearly only intended to refer to penalties previously imposed for Mr Whittle's failure to file a tax return by the relevant deadline. It cannot mean that any penalties that might arise in consequence of any other defaults would also be cancelled.

*A review cannot be independent if it is conducted by another HMRC officer*

40. “Independent” was obviously never intended to mean independent of HMRC. It meant a review by another HMRC officer whose line of management was independent of the original assessing officer.

5 41. There was never any obligation on Mr Whittle to accept the offer of a review by another HMRC officer. If he considered that such a review was pointless, he did not have to accept the offer – although I note that Mr Whittle did in fact accept the offer of a review.

10 42. In any event, Mr Whittle has a right of appeal against HMRC’s decision to this Tribunal (which Mr Whittle has exercised). And this Tribunal is, in every sense, independent.

*No notice to file a tax return had been received by Mr Whittle (and no proof of receipt had been given by HMRC), and therefore he was under no obligation to file a return.*

15 43. I have found that Mr Whittle did in fact receive the notice to file a tax return. Mr Whittle asserts that there was information included in HMRC’s website that he interpreted to mean that he was not required to complete a tax return. As “screen grabs” of the offending pages were not included in Mr Whittle’s submissions, I am in no position to reach any conclusion on this point. But I would make the following observations. It is the requirements of the law (in particular the provisions of the  
20 TMA) that govern both HMRC’s and Mr Whittle’s obligations, not HMRC’s website. However, to the extent that Mr Whittle followed guidance on HMRC’s website, he might have a “reasonable excuse” for his actions, even if that guidance was wrong as a matter of law. But once Mr Whittle had received HMRC’s letter of 11 November 2015, it would have been clear that he needed to file a tax return, and any reasonable  
25 excuse based on incorrect guidance on the website would have ceased.

44. Mr Whittle did in fact file his tax return for 2013/14 (although without the self-assessment) which was received by HMRC on 14 December 2015.

*Mr Whittle asserts that he is entitled to a tax refund for 2013/14, and that there is no consensus on whether money is payable by Mr Whittle to HMRC or payable to Mr  
30 Whittle from HMRC.*

35 45. Mr Whittle misunderstands the self-assessment system. Under self-assessment, it is up to Mr Whittle to calculate the tax he believes that he has to pay (or the amount of any refund to which he believes he is entitled), and include this amount in the self-assessment in his tax return. If HMRC have any queries about his calculation, they can open an enquiry into the return – and there is then a formal process for dealing with any amendments that HMRC may wish to make, including the possibility of an appeal to this Tribunal. But absent any formal enquiry into the return, the figures in the taxpayer’s self-assessment will stand – there is no process for achieving a “consensus”.

46. In this case, Mr Whittle did not include a self-assessment tax calculation in the tax return, and HMRC undertook the calculation on his behalf based on the figures in the tax return. As Mr Whittle chooses not to complete the self-assessment calculation, he cannot complain about HMRC undertaking the calculation on his behalf using their powers in s9(3) TMA. If Mr Whittle disagrees with HMRC's calculation, his remedy is to file an amended tax return, including a self-assessment based on his own calculation of the tax he believes is payable (or repayable). If HMRC have any questions about the amended return, they can open an enquiry into it.

10 *The point made by the HMRC review officer relating to the amendment of the 2013/14 tax return (point (4) in the review decision letter) is irrelevant. In Mr Whittle's opinion, a repayment is due from HMRC to him, and it is not possible to make any amendment to the return as no formal document either electronic or paper was actually completed.*

15 47. As stated above, if Mr Whittle believes that he is owed a tax refund by HMRC, he should file an amendment to his tax return, and include a self-assessment calculation setting out the tax he believes is repayable to him. If HMRC have any questions about the amended return, they can open an enquiry into it.

20 48. His submission that it is not possible to make any amendment to the return is incorrect. The process for filing an amended return is set out on HMRC's web site (see <https://www.gov.uk/self-assessment-tax-returns/corrections>).

49. I note that Mr Whittle chose not to include his calculation of the amount of tax repayable to him with his submissions, and I am therefore in no position to make any assessment of the merits of Mr Whittle's submission that he is entitled to a tax refund.

25 *HMRC's decision is due to poor administration and record keeping.*

50. There is no evidence before me of poor administration or record keeping by HMRC. To the contrary, the records included with HMRC's statement of case appear to be entirely in order.

### **Conclusion**

30 51. My decision is to uphold HMRC's assessment of late payment penalties and dismiss the appeal.

35 52. 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.

**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 3 JANUARY 2017**

10 Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 30 March 2017