



TC05733

Appeal number: TC/2013/02256

*INCOME TAX – penalty for failure to make returns – whether reasonable
excuse or special circumstances – held no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW EDWARDS

Appellant

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT

The Tribunal determined the appeal on 27 March 2017 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 23 March 2013 (with enclosures) and HMRC's Statement of Case (with enclosures including letters from the Appellant to HMRC dated 31st July 2012 and undated, requesting a review of the decisions to charge a penalty) acknowledged by the Tribunal on 31 January 2017.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the tax year ended 5 April 2011 on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012.
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012.
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012.
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:
 - (1) He argues that there was a “reasonable excuse” for any failure to submit the return on time.
 - (2) He argues that, owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.

Findings of fact

4. Mr. Edwards’ return was due on 31 January 2012. The return was received on 18 January 2013. This has been shown by HMRC’s records and is not disputed by the Appellant.

Discussion

5. Relevant statutory provisions are included as an Appendix to this decision.

I have concluded that the tax return for the 2011 tax year was submitted on 18 January 2013. It should have been submitted by 31 January 2012. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

6. Mr Edwards’ submits that the circumstances surrounding the late submission of the return amount to either a ‘reasonable excuse’ or ‘special circumstances’. The situation was as follows:

7. His bookkeeper passed away. No date is given for this other than ‘in 2011’. Subsequent people Mr Edwards appointed to deal with his affairs proved unsatisfactory. Mr Edwards first wrote to HMRC to tell them about this on 31 July 2012.

8. Mr Edwards’ wife was ill in 2010, resulting in a hospital admission and Mr Edwards needing to spend considerable time with her. In addition Mrs Edwards had

been working in the business but was advised by her doctor to cease being involved in the business as it was damaging her health.

9. The Tribunal has not been provided with specific dates regarding either of these circumstances.

10. The law on reasonable excuse is set out in para 23 of Schedule 55 Finance Act 2009 and shown in the Appendix.

11. There is no definition of 'reasonable excuse'. Whether or not a person had 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. HMRC contend that it means that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts.

12. Taking the first ground of appeal (death of the bookkeeper and problems with subsequent accountants) I consider that the death of the bookkeeper in 2011 does not, by itself, constitute a sufficient reasonable excuse, as the tax return was not filed until 18 January 2013. It is clear that the failure was not 'remedied without undue delay'.

13. It is clear from 23 (2) (b) that reliance on any other person (the subsequent bookkeepers) is not a reasonable excuse unless Mr Edwards 'took reasonable care to avoid the failure'.

14. The lack of specific dates in this case hampers Mr Edwards' case on these grounds. In his letter requesting HMRC to review the case he says '[due to his wife's illness] it was only at the end of 2012 I went to have a meeting with my last accountant'.

15. I do not consider that Mr Edwards has shown he 'took reasonable care to avoid the failure' given the return was due on 31 January 2012 and the meeting with his accountants took place in late 2012.

16. The second ground of appeal surrounds the illness of Mr Edwards' wife. Again no specific dates have been provided. The Tribunal accepts that this must have taken a great deal of time and attention. However, the Tribunal does not consider, in the absence of specific evidence surrounding dates, that the illness which arose in 2010 [which we have not considered necessary to detail due to the publication of this decision, but we accept to be severe and subsisting over some unspecified period of time] was such that it existed to such severity for the entire period 31 January 2012 to 18 January 2013 as to prevent the filing of the tax return throughout this period.

17. I have considered the possibility of 'special circumstances'. Para 16 of Schedule 55 Finance Act 2009 gives HMRC the power to reduce a penalty due to special circumstances. The Tribunal's power with regard to special circumstances is limited to considering whether HMRC have considered it, and if so, whether their decision was 'flawed' in the judicial sense that no reasonable person would make that decision.

18. HMRC have considered special circumstances in this case and decided not to reduce the penalty. They have taken into account the situation outlined above under the 'reasonable excuse' consideration. I do not consider their decision to be flawed.

Conclusion

19. For the reasons set out above, I affirm HMRC's decision to issue the 3 penalties that are the subject of this appeal.

Application for permission to appeal

20. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

RELEASE DATE: 30 MARCH 2017

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APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

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(1) P is liable to a penalty under this paragraph if (and only if)—

- 10 (a) P's 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 P specifying the date from which the penalty is payable.

15 (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)—

- 20 (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).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

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25 (1) P is liable to a penalty under this paragraph if (and only if) P's 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—

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

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

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35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
- 5 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 10 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- 15 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 20 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- 25 (5) In any case not falling within sub-paragraph (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.
- 30 (6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

- 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 P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

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(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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16—

(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—

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(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—

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(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

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(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—

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(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

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