



TC05774

**Appeal number: TC/2013/02697
TC/2013/04369**

***TAX RETURN- LATE FILING AND PAYMENT PENALTIES---
WHETHER UNEMPLOYMENT, STRESS AND INABILITY TO PAY IS A
REASONABLE EXCUSE OR SPECIAL CIRCUMSTANCE - NO -
APPEAL DISMISSED***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TERENCE MCCABE

Appellant

- and -

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

TRIBUNAL: JUDGE IAN HYDE

The Tribunal determined the appeal on 6 April 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 11 April and 25 June 2013 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 2 February 2017.

DECISION

1. This decision concerns two appeals against penalty notices issued under 55 Finance Act 2009, the first for the late filing of the tax return for the year ending 5 April 2011 and the second for the late payment of the associated tax. References in this decision to the “appeal” is to both unless stated otherwise.

2. This appeal has been stood over pending the decision of the Upper Tribunal in *Donaldson v Revenue and Customs Commissioners* which having been decided ([2014] UKUT 536 (TCC)) was then appealed to the Court of Appeal. The decision of the Court of Appeal has now been released ([2016] EWCA Civ 761) and permission to appeal by the taxpayer to the Supreme Court refused and so this appeal was set down for determination.

Facts

3. On 26 January 2012 a tax return for the year ending 5 April 2011 was issued by HMRC to the appellant.

4. The due date for payment of the tax was on or before 31 January 2012.

5. On 29 May 2012, the return not having been filed by the filing date of 2 May 2012, HMRC issued a notice of penalty assessment under paragraph 3 of schedule 55 Finance Act 2009 in the amount of £100.

6. On 6 November 2012 HMRC issued two notices of assessments under paragraphs 4 and 5 of schedule 55 Finance Act 2009 being

(1) A 3 months late filing penalty of £900 being a daily penalty of £10 a day for 90 days.

(2) A 6 months late filing penalty of £300

7. The appellant calculated his own tax and HMRC received the tax return on 5 December 2012 showing £7,484 of tax due on a capital gain arising in the year.

8. On 11 December 2012 HMRC

(1) Increased the six month late filing penalty by £74 to £374 being 5% of the £7,484 tax due under return.

(2) Under paragraph 3(2) schedule 56 Finance Act 2009, issued a penalty assessment for 5% of the tax unpaid

(3) Under paragraph 3(3) schedule 56 Finance Act 2009, issued a penalty assessment for 5% of the tax unpaid 5 months

9. On 19 February 2013 HMRC issued a penalty assessment for £346 being 5% of the tax unpaid 11 months after the penalty date of 31 March 2012

10. On 4 December 2012 the appellant appealed to HMRC against the late filing penalties and on 7 January and 8 March 2013 appealed against the late payment penalties.

5 11. On 19 December 2012 and 8 March 2013 HMRC issued decisions to the appellant rejecting his appeals and offering a review.

12. On 12 January 2013 the appellant requested a review of both decisions.

13. On 14 March and 28 May 2013 HMRC notified the appellant of the outcome of the review upholding the decisions and the penalties.

10 14. On 11 April and 25 June 2013 the appellant appealed to the Tribunal against all the penalties.

15. In summary, HMRC have raised assessments of £1,374, being a combination of fixed and daily penalties, because the appellant filed his return late and £1,094 for failing to pay the tax on time.

The appellant's arguments

15 16. The appellant objects to the penalties on two related grounds.

17. First, the appellant argues that he has been unemployed which has caused stress which has meant he has acted out of character. The appellant has always completed his tax return and paid his tax on time but when he was made unemployed he could not bring himself to complete his tax return. The unemployment led to stress, a lack of
20 sleep, constant headaches and anxiety about money. In the 17 months from December 2011 to April 2013 the appellant has only had five months of temporary work.

18. Second, the appellant says that he is struggling to pay the original debt and cannot afford to pay the penalties or the interest. The appellant says that his unemployment and lack of resources is due to a severe recession. He is struggling to support his
25 young daughter, with no income or any government support.

19. The appellant has also asked for the interest due on the late paid tax to be waived or reduced.

HMRC's arguments

20. HMRC argue that the appellant's grounds are not sufficient to discharge the
30 penalties. It is essential that taxpayers file their returns and pay their taxes on time and that the system should not reward non-compliance. Penalties are therefore imposed for late filing and payment. The appellant was warned about penalties in the guidance notes accompanying the tax return.

21. As to the appellant not being able to afford to pay the penalties, HMRC say that
35 that is not a defence whether as a reasonable excuse or a special circumstance. The tax payable arose from a capital gain and so the appellant's income position has no relevance and a taxpayer is expected to keep money aside to pay the tax due.

22. HMRC argue that interest is a statutory charge and cannot be waived.

Legislation

23. In order for the appellant's arguments on penalties to succeed they must amount to a reasonable excuse or special circumstances within schedules 55 and 56.

24. Schedule 55 which applies to failure to file a return, provides that a penalty may be reduced if there are "special circumstances". Paragraph 16 of Schedule 55 provides;

"(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..."

25. Further, there is a defence to the imposition of penalties if there is a "reasonable excuse". Paragraph 23 provides;

"(1) liability to a penalty under any paragraph of this Schedule does not arise in relation to the failure to make a return if the person satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the failure

(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..."

26. Schedule 56, which applies to failure to pay tax, includes identical provisions, being paragraph 9 and 16.

Decision

27. I note as a preliminary point that, whilst this appeal was stood over pending the appeal in *Donaldson*, the appellant is not challenging the penalties on the grounds argued in *Donaldson*, that is to say HMRC's procedure for issuing automatic late filing penalties did not satisfy the conditions imposed by Schedule 55. In any event I note that the taxpayer's arguments were dismissed by the Court of Appeal in *Donaldson* and that decision is binding on me.

28. On the question of late filing penalties, only the appellant's first argument about the stress caused by unemployment affecting his ability to manage his tax affairs is relevant. Whilst the circumstances are no doubt stressful, this does not displace the appellant's obligation to file his tax return on time. The appellant has not produced any medical evidence of incapacity and he was able in this period to seek and take on employment.

29. On the question of late payment penalties, both of the appellant's arguments are potentially relevant. I am not persuaded that the stress of unemployment excuses late payment, the point being essentially the same as the issue of late filing. The argument about insufficiency of funds is more difficult. Schedules 55 and 56 are very clear - subject to one exception, inability to pay is neither a reasonable excuse nor a special circumstance.

5 30. Insufficiency of funds cannot therefore be a special circumstance. However, paragraph 16 of schedule 56 allows for a reasonable excuse for late payment where insufficiency of funds is “attributable to events outside the person’s control”. The appellant’s argument couched in these terms must be that the recession and consequent lack of job opportunities are events outside of his control.

10 31. The standard to be applied in determining whether a taxpayer has a reasonable excuse is that of a taxpayer with a responsible attitude to his duties as a taxpayer and I am not satisfied that applying that standard the appellant has a reasonable excuse. The appellant’s period of unemployment as described by the appellant is the period of 17 months from December 2011 to April 2013 during which the appellant had only had five months of work. The due date for payment of the tax was 31 January 2012, some two months into the appellant’s period of unemployment.

15 32. The appellant’s tax liability derives from a chargeable gain of £43,180 – an amount marginally in excess of the appellant’s gross income for the 2011 year as recorded in his tax return - but there is no evidence as to the nature of the asset sold or the use to which the proceeds were put. He was still in employment - presumably at the same level of income as before - until November 2011 and the appellant has produced no evidence as to why £7,484 of these proceeds was not available in January 2012. A responsible taxpayer would have known he had to pay the tax and
20 should have been able to retain the amount of the tax.

33. I do not accept that inability to find employment is for the purposes of paragraph 16. However, even if it is, in the current circumstances the appellant does not satisfy the broader test of a having reasonable excuse. A responsible taxpayer would have paid the tax due on the capital gain in January 2012.

25 34. On the question of interest no authority has been presented to me that this Tribunal has power to reduce any interest charge and so the appellant’s argument is dismissed.

35. I therefore dismiss the appellant’s appeal.

30 36. 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)”
35 which accompanies and forms part of this decision notice.

40 **IAN HYDE**
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2017