



TC05898

Appeal number: TC/2013/06486

*INCOME TAX – penalty for failure to make returns- Whether reasonable
excuse for late submission of self-assessment tax return-No*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CERRIANN JACKSON

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA AIT**

The Tribunal determined the appeal on 24 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 December 2012 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 9 February 2017 The Tribunal wrote to the appellant on 13 February 2017 indicating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days. No reply was received.

DECISION

5 1. The appellant is appealing against penalties totalling £1,200 that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit [an annual self-assessment return] 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 or around 14 February 2012.

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 7 August 2012

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 7 August 2012. This penalty is calculated as £10 per day commencing 3 months after the penalty date. As the penalty date is the day after the return is due in this case 1 February 2012 the daily penalties commence 3 months later on 1 May 2012 and are imposed for each day the return remains outstanding for a maximum of 90 days. 1 May to 29 July 2012 is 90 days. The return was not received by HMRC until 17 August 2012

20 The appellant has not appealed the late filing penalty of £100.

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) The appellant’s agent argues that the relevant return was submitted late but on 25 April 2012.

25 (2) He argues that there were problems with HMRC’s servers during April 2011 and that the submission most likely “timed out”.

(3) He argues that there was a “reasonable excuse” for any failure to submit the return on time.

30 (4) He argues that, owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.

(5) He argues that both their client and their employee genuinely believed that the return had been submitted in April 2012 and quotes the case of *Leachman v HMRC* [2011] UKFTT 261 where a genuine belief was considered to be a reasonable excuse.

35 He argues that the burden of proof in penalties has to be beyond reasonable doubt and quotes the ruling in the European Court of Justice in *Jusilla v Finland*

Findings of fact

4. A self-assessment return form for the tax year ended 5 April 2011 was sent by HMRC to the appellant on 6 April 2011. The filing date was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return.

5 5. A letter from the appellant's accountants dated 20 August 2012 accepts that the return was late and that a £100 late filing penalty was due. This explains why that penalty was not included in the Notice of Appeal.

6. A printout attached to that letter shows that on 25 April 2012 the appellant's return for the period ending 5 April 2011 was partially completed but not submitted.

10 7. HMRC received the appellant's electronic return on 17 August 2012.

8. Appellant's submissions

The appellant's accountants Argent Associates Ltd. wrote to HMRC on 20 August 2012 appealing against the late filing penalty for 2010/2011. The letter included

15 "Miss Jackson came to see us on the 20th of April 2012 after receiving a late filing penalty notice for the sum of £100. Having examined Miss Jackson's paperwork we compiled and completed her accounts over the next two days. This data was then entered in to the HMRC online Self assessment on the 25th April by a new clerical staff member. Unfortunately he failed to complete the submission, exiting the page after printing off the summary page only.

20 We would be grateful in this instance if the fines could be reduced to £100 as a result of this clerical error. We have included a print out of the tax return page showing the date the submission was completed but not filed.

Unfortunately the clerks employment with the company will be in jeopardy unless the fine is reduced.

25 9. On 1 October 2012 the appellant's accountant wrote to HMRC requesting an independent review, the letter included: "Following further interrogation of the new clerical staff member, he has confirmed that the submissions were taking several minutes to successfully submit with some stalling during the upload process. We understand that in April the HMRC servers are put under heavy strain as many users
30 simultaneously access their information and submit their self-assessments. The staff member is adamant that he submitted the return and that it must have failed during this procedure (most likely timed out)."

HMRC's submissions

35 10. HMRC wrote to the appellant on 13 November 2012 advising the result of the review which was that the decision to charge penalties was correct. Their reasons were that failures by an agent are not regarded as reasonable excuse, and that when a return is completed successfully online on-screen confirmation that the submission process is 100% complete and that the transmission of the return was successful should be received. A separate e-mail; confirming that HMRC has safely received the
40 return should also be received.

11. In respect of reasonable excuse HMRC say that they consider the actions of a 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. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

10 HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

12. In respect of this case HMRC say a prudent business, having employed a new clerk, would have taken steps to ensure that they were able to complete the tasks allocated to them in a satisfactory manner.

15 13. HMRC say that reliance on a third party e.g. an accountant, to submit the return is precluded from providing a reasonable excuse under paragraph 23(2) of schedule 55 of The Finance Act 2009. They say their view is supported by the judgements made in *G & A Jeffers* [2010] UKFTT 22 (TC); *Giles Bushell* [2010] UKFTT 577 (TC); and *Siobhan Helena Heaney-Irving* [2011] UKFTT 785 (TC)

20 14. In the case of *Jeffers* former First-tier Tribunal president Sir Stephen Oliver observes

25 *“The Code (i.e. Part X of TMA) does not qualify the expression “reasonable excuse” by, for example, ruling out reliance on another to perform a task such as making a tax return. The obligation to make the tax return on time is nonetheless the taxpayer’s. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer’s failure, through his agent, to comply with, e.g. the obligation to make the return on time can amount to a “reasonable excuse”. To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could*
30 *not reasonably have been foreseen. It must be something exceptional.”*

15. In the *Heaney-Irving* case Judge Brooks says at paragraphs 12 and 13

“12. Jeffers was followed by the Tribunal (Judge Charles Hellier and Mr Peter Laing) in Bushell v HMRC [2010] UKFTT 577 (TC) where it was said, at [56 – 57]:

35 *[56] “It seems to us that reliance on an agent may be an excuse or a reason for non compliance, but such reliance is normal and customary, and the statute cannot have intended such reliance to constitute a reasonable excuse in every case. It seems to us that it cannot be the intention of legislation to permit the reliance on a competent person who fails unreasonably to fulfil the task with which he is entrusted to absolve the principal in all cases.*
40

5 [57] We concur with the President when he said that to be a reasonable excuse the excuse must be something exceptional. In our view, in determining whether or not that is the case it may be necessary to consider why the agent failed (and thereby to regard the agent as an arm of the taxpayer). To give a simple example, if a return was given to someone to post, and that person failed to do so, the reasons for that failure will illuminate whether or not there is a reasonable excuse: if the messenger was run over by a bus the position will be different from the case where the messenger merely forgot.”

10 13. Although the failure to file the Return in the present case may have been outside the control of Mrs Heaney-Irving I am unable to find any evidence that it was beyond the control of her accountant who, if the information regarding the trust income was necessary for the completion of the Return could, and should, have requested it before the filing deadline. Even if this was outside of the accountant’s control as it is, in my
15 judgment, clearly a matter that was reasonably foreseeable and certainly not something that could be described as “exceptional” I am unable to find that there was a reasonable excuse for the failure to submit the Return”.

16 HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be “exceptional, abnormal or
20 unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC say the special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

25 Discussion

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

18. In respect of the letter of 20 August 2012 the Tribunal notes that it is accepted that the return was late and that a £100 late filing penalty was due. This explains why that penalty was not included in the Notice of Appeal.

30 19. I therefore conclude that the tax return for the 2010-2011 tax year which should have been submitted by 31 January 2012 was submitted late on or around 17 August 2012 and that a late filing penalty of £100 is due. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the subsequent penalties imposed are due and have been calculated correctly.

35 20. The print out accompanying the appellant’s agent’s letter of 20 August 2012 shows that at 16 August 2012 the return for the period ending 5 April 2011 due by 31 January 2012 but not submitted was part completed on 25 April 2012.

The Tribunal is surprised that the appellant’s agent states “Unfortunately the clerk’s employment with the company will be in jeopardy unless the fine is reduced.” The
40 Tribunal notes that this was a new clerical staff member and agrees with HMRC that a prudent business, having employed a new clerk, would have taken steps to ensure that

they were able to complete the tasks allocated to them in a satisfactory manner. The Tribunal also considers a prudent employer would have checked or supervised the work a new member of staff had done.

5 The fact that a new member of staff made a mistake cannot be taken as providing a reasonable excuse.

21. In the case of Garnmoss Ltd trading as Parham Builders [2012] UKFTT 315 (TC) the Tribunal observed at paragraph 12

10 *“What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”*

15 22. In this case the Tribunal finds that the appellant’s agent input the figures for the appellant’s 2010/2011 tax return on-line on 25 April 2012 but unfortunately made the simple mistake of failing to finally submit them. It is that simple omission that led the appellant’s agent to believe that he had submitted a return online for 2010-2011 when in fact he had not. It was a most unfortunate slip but one which does not provide a reasonable excuse for the appellant’s failure to submit her return on-time.

20 23. The Tribunal has considered the case of Leachman. In that case there was a genuine belief by both their client and an employee that the other had submitted the return. That is different to this case where the client had instructed the accountants to submit her return and believed they would act on those instructions. There was no belief by the accountants that their client would submit the return.

25 The Tribunal has considered the judgements made in Jeffers, Bushell, and Heaney-Irving and found them of assistance. The Tribunal considers that what happened in this case was a simple mistake which would have been avoided if the accountants had supervised the actions of their new employee. It was not something exceptional. Therefore the Tribunal is unable to find that there was a reasonable excuse for the failure to submit the Return”.

30 The Tribunal has considered the parties comments on the European Court of Justice in Jusilla v Finland and agrees with HMRC that the penalties are not “criminal charges” They are penalties levied under a provision of the Finance Act 2009.

The Tribunal considers that it is beyond reasonable doubt that the appellant failed to submit her tax return until 17 August 2012 and therefore penalties are due..

24. **Conclusion**

35 On 6 April 2011 a self-assessment tax return for the year ending 5 April 2011 was sent to the appellant. The filing date for the return was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. HMRC did not receive the completed appellant’s electronic return until 17 August 2012.

40 25. The appellant accepts that she failed to submit her self-assessment return for the period 2010-2011 by the due date of 31 January 2012 and has not appealed the late

filing penalty of £100. In respect of the penalties for the further delay in submission the appellant has not established that she had a reasonable excuse for that delay. HMRC has decided there are no special circumstances that would allow them to reduce the penalty and the Tribunal does not consider that their decision is flawed.
5 Therefore the appeal against the penalties totalling £1,200 is dismissed.

Application for permission to appeal

26. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and
10 reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

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RELEASE DATE: 28 APRIL 2017

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.

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

4—

(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:

5—

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

23—

35 (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.

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

- (a) an insufficiency of funds is not a reasonable excuse, unless 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
- (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.

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

- 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—
 - (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.

6. 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:

- 22—
- (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—
 - (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—
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(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.

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