



TC05912

Appeal number:TC/2013/06826

INCOME TAX –penalty for failure to make returns- whether reasonable excuse for late filing – No. whether special circumstances –No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMES SMITH

Appellant

- and -

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

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

The Tribunal determined the appeal on 15 May 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 28 September 2013, and HMRC’s Statement of Case (with enclosures) prepared on 10 February 2017. The Tribunal wrote to the appellant on 16 February 2017 indicating that if he wished to reply to HMRC’s Statement of Case he should do so within 30 days. A hand written reply was received on 1 March 2017 and considered by the Tribunal.

DECISION

5 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 his annual self-assessment return for the year ending 5 April 2012 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 12 February 2013.

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 14 August 2013.

(3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on or around 25 February 2014

15 (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 14 August 2013.

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

(1) He argues that his ex-girlfriend did the returns for him and he was not aware the return had not been submitted until he started receiving penalty notices.

(2) He argues that he has not been self-employed since January 2013 and was hardly making anything. He says he has notified HMRC on a number of occasions.

(3) He argues that the level of penalties is almost as much as his income.

25 **Findings of fact**

4. During 2011 and 2012 and until January 2013 the appellant undertook self-employment as delivery driver. In his notice of Appeal he said he did this “to try to earn some extra money.”

30 5. A notice to file a self-assessment tax return for the period ending 5 April 2012 was issued to the appellant on 6 April 2012. The deadline for submission was 31 October 2012 if the return was made non-electronically or 31 January 2013 if made electronically.

6. HMRC’s records show they received the appellant’s non-electronic return on 21 May 2014.

35 7. It is clear from the appellant’s letters that he had not realised that his ex-girlfriend had not submitted the return until he started to receive penalty notices.

8. HMRC's records show that the first penalty notice was issued on 12 February 2013. The appellant appealed to HMRC against that penalty.

9. On 4 June 2013 HMRC wrote a Late tax return Daily Penalty reminder to the appellant saying that the return was now more than 3 months late and that daily penalties of £10 per day were accruing. The letter gave details of further penalties that would be imposed if the appellant delayed further in sending in his return.

10. On 8 July 2013 HMRC wrote to the appellant sending a similar Late tax return Daily Penalty reminder but which also advised that the daily penalties now exceeded £600.

11. A request for a review of the penalties was received from the appellant by HMRC on 27 June 2013. HMRC refused to carry out a review until the return for the 2011-2012 was submitted. At this point the appellant had submitted his 2012-2013 tax return which had been received by HMRC in June 2013.

12. HMRC submissions

13. HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the appellant to ensure his 2011-2012 tax return was filed by the legislative date.

14. 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. HMRC refer to the case of *Rowland v HMRC (2006) STC (SCD)* and say the matter is to be considered in the light of all the circumstances of the particular case.

15. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be "exceptional, abnormal or 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.

Discussion

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

17. The penalties concern the late filing of the appellant's self-assessment tax return for the year ended 5 April 2012 which if submitted electronically was due by 31

January 2013. The appellant states he has not been self-employed since January 2013. This confirms that a return for the year ended 5 April 2012 was issued appropriately. The cessation of self-employment in January 2013 has no effect on the appellant's income for the year ended 5 April 2012.

5 17. I have concluded that the appellant's non-electronic tax return for the 2011-2012 tax year was received by HMRC on 21 May 2014. As it was a non-electronic return it should have been submitted by 31 October 2012. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

10 18. The appellant has argued that the penalties charged are disproportionate. He said that the level of penalties is almost as much as his income. A self-assessment tax calculation issued by HMRC in respect of the year 2012-2013 shows total income from employment and self-employment of £3,130 and therefore no tax due. Whilst this might give some form of guide to the appellant's level of income in the previous
15 year unfortunately no figures have been provided to the Tribunal for that year (2011-2012). It is therefore inappropriate to make a judgement. In any event following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

20 19. In respect of reasonable excuse the appellant argues that he thought his ex-girlfriend had sent the return. The Tribunal has considered of Schedule 55 paragraph 23 (2)(b) which states:

"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,"

25 The appellant admits he relied on his ex-girlfriend to send the return so the Tribunal is left to consider whether the appellant took reasonable care to avoid the failure. The Tribunal notes that the appellant first received notice of the failure in the form of a penalty notice issued on or around 12 February 2013. The return was not submitted until 21 May 2014.

30 20. The Tribunal considers that having received that penalty notice the appellant should have then filed his return as soon as possible. He later received reminders of the daily penalty on or around 4 June 2013 and 8 July 2013 but still did not file his return until 21 May 2014. This cannot be considered as exercising reasonable care. The Tribunal therefore considers that the appellant has not established any reasonable excuse for the three later penalties totalling £1,500.

35 21. In respect of the first penalty of £100 the Tribunal notes that in the Notice of Appeal the appellant states "My ex-girlfriend told me it had all been done. I know it was stupid on my part but thought it had been done"

40 There is no evidence to suggest that the appellant made any checks to see if his return had been submitted. This cannot be regarded as exercising reasonable care and therefore does not establish a reasonable excuse.

22. In respect of the appellant's contention that he wrote to and telephoned HMRC on many occasions HMRC's records show no actions by the appellant in 2011 and 2012 His letters and telephone conversations occurred after the penalties were issued in 2013 but did not result in submission of the return until May 2014.

- 5 23. The appellant's comment that the level of the penalties is almost as much as his income could be taken to mean that he cannot afford to pay the penalties.

Schedule 55 paragraph 23 (2)(a) states:

"an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,"

- 10 The Tribunal has already indicated that it considers the level of the penalties was within the appellant's control. He has given no explanation of why having received notice of the failure in February 2013 it took until May 2014 to submit the return.

24. Paragraph 9 of Schedule 56 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances.

- 15 They have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded there are none. The Tribunal sees no reason to disagree.

Conclusion

25. HMRC has applied the late filing penalties in accordance with legislation. The Appellant has not established a reasonable excuse for the late submission of his tax return for the period 2011-12. There are no special circumstances to allow reduction of the penalty. Therefore HMRC's decision is affirmed and the appeal against the late filing penalties totalling £1,600 is dismissed.

Application for permission to appeal

- 25 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 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 30 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.

35 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE: 18 MAY 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)—

(a) may be earlier than the date on which the notice is given, but

20 (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—

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

30 (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:

6—

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—

(a) ability to pay, or

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(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

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(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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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—

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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.