



TC05918

Appeal number: TC/2014/00054

INCOME TAX – penalties for failure to make returns – whether reasonable excuse for late return- No -Late filing penalty confirmed - Daily penalties reduced to £770- Six month penalty removed by Respondents.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOHN PATRICK COLLINS

Appellant

- and -

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

TRIBUNAL: PRESIDING MEMBER

**PETER R. SHEPPARD FCIS FCIB
CTA AHT**

The Tribunal determined the appeal on 29 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 27 December 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 February 2017. The Tribunal wrote to the appellant on 24 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. An e-mail dated 27 March 2017 was received from the appellant's agent and was considered by the Tribunal.

DECISION

1. It is unclear precisely what the appellant has appealed against. In his Notice of Appeal against the question “The amount of tax or penalty or surcharge...” The appellant has answered “was £1,200 now £924.69”. In the notice of Appeal the appellant also says he is appealing against a decision of HMRC dated 28 November 2013. That decision concerns penalties totalling £1,300 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 ending 5 April 2012 on time.
2. The Tribunal has decided to consider this as an appeal against penalties totalling £1,300. The Tribunal considers that this will not prejudice HMRC as in their statement of case they have covered penalties totalling £1,300. In fact HMRC in their statement of case consider the appeal is against the late filing penalty of £100 and daily penalties of £770. This reduced amount is explained below.
3. The penalties totalling £1,300 that were charged by HMRC can be summarised as follows:
 - a. a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 12 February 2013
 - b. a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 14 August 2013
 - c. “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 14 August 2013. The 90 days was calculated from 1 May 2013 to 31 July 2013.
4. The appellant’s grounds for appealing against the penalties can be summarised as follows:
 - a. He argues that there was a “reasonable excuse” for any failure to submit the return on time.
 - b. He argues that, owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.

5. Findings of fact

The penalties were imposed by HMRC because they believed that the appellant had not submitted his self-assessment return for the tax year 2011-2012 by the due date which was 31 October 2012 for returns submitted by non-electronic means or 31 January 2013 for returns submitted electronically. They received the return electronically on 31 October 2013.

It later became evident that the appellant had in fact submitted his 2011-2012 return to HMRC electronically on 18 July 2013 but had incorrectly filed it as being the return for the tax year 2012-2013. When this error came to the attention of HMRC they amended the penalties to reflect that they had received the return on 18 July 2013. Therefore the six month penalty of £300 was withdrawn, and the

daily penalty was reduced to £770. HMRC had calculated this as £10 per day for the 77 days from 1 May 2013 to 18 July 2013.

The appellant corrected the position by posting the same figures electronically to the 2011-2012 tax year on 31 October 2013.

- 5 6. On 21 March 2013 the appellant telephoned HMRC to query the late filing penalty; to request a paper return; to advise a change of address since November 2012; and advised of his divorce. HMRC advised him that these would not be accepted by them as a reasonable excuse for the late return.
- 10 7. On 16 May 2013 the appellant telephoned HMRC to request confirmation of his Unique Taxpayer Reference (UTR).
8. On 16 May 2013 the appellant wrote to HMRC asking for the penalty to be dropped . HMRC treated this as an appeal against the penalties.
- 15 9. On 18 June 2013 HMRC wrote to the appellant acknowledging receipt of the appeal. The letter included “ We cannot consider your appeal until we receive your tax return. Please send your tax return by 18 July 2013 so that I can consider your appeal . In the meantime I am postponing collection of the penalty”.
- 20 10. On 21 June 2013 the appellant telephoned HMRC saying he was really late with his tax return and he needed his UTR so he could register online. In this call the appellant said that he had until 18 July 2013 to complete his return but in their statement of case HMRC have no record that this deadline date was ever agreed to.
11. On 3 July 2013 the appellant telephoned HMRC to request a password so that he could file online.
- 25 12. On 9 July 2013 the appellant successfully registered to submit his return electronically.
13. On 7 August 2013 HMRC wrote to the appellant about the appeal and saying they did not consider he had reasonable excuse for the late return and offered a review.
- 30 14. After further correspondence from both the appellant and his agent HMRC conducted a review. In that review they pointed out that the appellant had his UTR on correspondence and reminders sent to him. They also pointed out that HMRC had a helpline to assist Taxpayers who were having difficulty in completing online returns. They did not consider that the appellant had reasonable excuse for the late submission of his return.
- 35 15. On 30 October 2013 the appellant submitted a Self Assessment: Appeal against penalties for late filing and late payment form SA370 to HMRC. This appealed against the daily penalties of £900 and the six month penalty of £300 dated 14 August 2013.

16. Appellants submissions

- 40 The Appellant said that he had never completed a tax return before. His wife had always looked after financial affairs including tax related matters. The appellant suffered an acrimonious divorce and his wife failed to forward his post until it was too late to submit a paper return without incurring penalties.

17. The appellant said that he had genuine difficulty in accessing the HMRC site in order to submit his return electronically. He said it was not possible for him to access the site in the way described. An HMRC assistant explained another procedure which allowed the appellant to gain access. He said this difficulty caused considerable delay.
18. The appellant says that filing his 2011-2012 figures on his 2012-2013 return was a simple and genuine mistake.
19. The appellant says that he cannot afford the fine. He considers the level of the penalty is unfair considering the level of his income. He is in debt and has taken on two jobs in order to make ends meet.

20. HMRC submissions

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.

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.

21. 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.
22. HMRC say that they understand that due to the appellants circumstances and his acrimonious split from his wife he may not have had possession of some of the earlier correspondence issued to him showing his UTR. However they contend that at the time of his call on 21 June 2013 he would have received the late filing penalty notice for £100, a paper copy of the 2011-2012 tax return, the 2012-2013 tax return and a 30 day penalty reminder letter, all of these show the appellant's UTR.
23. HMRC say that the potential effect that the payment of the penalties might have on the appellant's finances would not be considered a reasonable excuse for removal of the penalties
24. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.
25. HMRC say the penalties are not disproportionate. They say that in order for a national measure to be considered disproportionate it must be "not merely harsh but plainly unfair." They refer to the decision in *International Transport Roth GmbH v SSHD*.

26. HMRC have 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*). They say the special
5 circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*)
27. HMRC say that in this case they have considered that the appellant had difficulty registering to file on line; that he struggled with completing the forms; and that the level of the penalty is 9.91% of the appellant’s gross earnings and
10 11.26% of his take home pay. They have concluded that these are not special circumstances which would merit a reduction of the penalties below the statutory limit and that the penalties are appropriate in the circumstances.

Discussion

28. Relevant statutory provisions are included as an Appendix to this decision.
- 15 29. From the papers before the Tribunal it is apparent that the appellant accepts that he was late filing his 2011-2012 self-assessment tax return. The appellant has argued that he submitted his return on 18 July 2013 but made a simple error of entering the details against the wrong year. His agent corrected the position on 31 October 2013.
- 20 30. HMRC have accepted that this was a simple error and they have removed the £300 six month penalty entirely and reduced the daily penalties from £900 to £770 as explained above.
31. In the light of this the Tribunal is left to consider whether the appellant has reasonable excuse for his failure to submit his 2011-12 return by 31 January 2013.
25 And whether HMRC have imposed the late filing penalty of £100 and the daily penalties of £770 correctly and accurately
32. I have concluded that the tax return for the 2011-2012 tax year was submitted on or around 18 July 2013. It was late, it should have been submitted by 31 January 2013. Subject to considerations of “reasonable excuse” and “special
30 circumstances” set out below, the penalties imposed are due and have been calculated correctly.
33. In considering whether the appellant had reasonable excuse for the late submission of his 2011-2012 self-assessment tax return the Tribunal has looked carefully at the chronology of events.
- 35 34. The appellant suffered an acrimonious divorce in 2011. The result of this was that the appellant did not have the necessary papers and information in time to submit a non-electronic return. He had never filed a tax return as in the past this had been done by his wife who was being obstructive.
- 40 35. In an e-mail dated 27 March 2017 the appellant’s agent confirmed that the appellant had received post forwarded by his wife too late to file a paper return

and almost too late to file the return on line. This leads the Tribunal to conclude that had the appellant acted promptly he would have been able to file his return electronically on time.

- 5 36. The notice of the £100 late filing penalty was sent to the appellant on 12 February 2013 but he did not telephone HMRC until 21 March 2013. In that call the appellant was advised that he would start accruing daily penalties as long as his return was outstanding. In the call the appellant requested a paper return which HMRC promised to send and advised it would probably take two weeks for it to reach him.
- 10 37. The Tribunal considers that it is surprising that the advice the appellant had been given did not prompt him to make immediate and urgent steps to submit his return.
- 15 38. After almost two months of waiting on 16 May 2013 the appellant telephoned HMRC asking for his UTR. HMRC have pointed out that he already had the UTR on various documents they had sent to him.
- 20 39. On 21 June the appellant telephoned HMRC and in that call he said “ I am really late with this...my tax form” and “ the letter I had says I have got until 18 July to complete my tax return.” This is clearly the letter of 18 June referred to above. The letter refers to a date of 18 July 2013 and could be taken to mean that a new deadline for submission of the return had been set. The original deadline had passed and the appellant had received a late filing penalty notice of £100. In their statement of case HMRC deny that a new date was agreed to. It is clear that the appellant already knew he was “really late” with submission of his tax form
- 25 40. Nevertheless the appellant did submit his return on 18 July 2013 albeit incorrectly as explained above.
- 30 41. In the Tribunal’s view there are unexplained delays by the appellant. Why did he not act promptly when he knew he had until 31 January 2013 to submit his return? Why did he delay seeking help after receiving the penalty notice? Why did he delay following up on his phone call of 21 March 2013 where he was advised that he would start to accrue daily penalties if his return remained outstanding? These unexplained delays lead the Tribunal to conclude that the appellant has not established that he had reasonable excuse for submitting his return late.
- 35 42. The appellant has argued that the penalties charged are disproportionate. 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.
- 40 43. It is clear that HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They consider that the appellant’s personal circumstances and difficulties and the level of the penalties do not represent special circumstances which would allow them to reduce the penalty. The Tribunal does not consider that HMRC’s decision is flawed.

Conclusion

44. The Tribunal considers that the appellant's return for the tax year ending 5 April 2012 was submitted late and as the appellant has failed to establish a reasonable excuse for the continued late submission a £100 late filing penalty and £770 daily penalties are due. Therefore the appeal is therefore dismissed in respect of those penalties. The six month penalty of £300 has already been removed by HMRC and they have reduced the daily penalties by £130. The appeal is allowed to that extent.

Application for permission to appeal

10 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.

PETER R. SHEPPARD
TRIBUNAL JUDGE

RELEASE DATE: 01 JUNE 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 45. 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).

46. 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.

47. 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).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

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

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (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%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

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

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (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%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

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

(6) Paragraph 6A explains the 3 categories of information.

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

30

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)—

40

- (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 49. 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.
- 10 (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
- 15 a reference to—
- (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

20 50. 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
- 25 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
- 30 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),
- 35 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.
- (4) In sub-paragraph (3)(b) “flawed” means flawed when considered
- 40 in the light of the principles applicable in proceedings for judicial review.