



TC05922

Appeal number: TC/2013/05493

INCOME TAX – penalty for failure to make returns- whether return submitted on time- No. Whether reasonable excuse for the failure-No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

M. AHMED

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 17 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 4 August 2013, 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. No reply was received.

DECISION

1. In the Notice of Appeal the appellant states that he is appealing against penalties totalling £935.10. It is not clear whether the appellant intends to appeal against the £100 late filing penalty as he appears to say that he should be penalised £100 only. However HMRC have taken this as an appeal against all penalties, totalling £1,300, that they have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the year 2010-2011 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 or around 14 February 2012

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 29 May 2012

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 29 May 2012

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

(1) He argues that the relevant return was submitted on time.

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

4. The appellant’s appeal was notified to the Tribunal late. For the following reasons, I have decided to give permission for the appeal to be notified late: HMRC have raised no objection to the appeal being notified late in fact in refusing a second review they suggested the appellant appeal to the Tribunal and prepared a statement of case accordingly.

5. Findings of fact

The appellant is a self-employed mini cab driver.

HMRC issued a return for the tax year ending 5 April 2011 to the appellant on 6 April 2011. The deadline for filing was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. HMRC’s records show they received a non-electronic return on 1 May 2012.

6. Appellant’s submissions

The appellant says that his accountant did submit his return on time but it must have got lost in the post because HMRC did not receive it. The accountant then resubmitted it.

7. In a letter to HMRC dated 4 December 2012 the appellant's agent Qazi & Sons auditor and accountants, confirms they submitted the return on time and then when it became obvious it had not been received they resubmitted it. The latter was acknowledged by HMRC on 30 May 2012.

5 8. The appellant submits there was no tax to pay. He submits he is not working due to sickness and that as he is unemployed he is not in position to pay the penalties.

9. **HMRC's submissions**

10 10. 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 2010-2011 tax return was filed by the legislative date. They say the appellant is expected to arrange his affairs and finances to make sure his tax obligations are met.

11. HMRC contend that receipt of the late filing penalty issued on 14 February 2012 should have alerted the appellant to the fact that his first return had not been received.

15 12. HMRC say the appellant has offered no explanation as to why having received the penalty notice in mid-February it took until 1 May 2012 to submit the return.

13. HMRC observe that the appellant submitted his tax return online in respect of the years 2008-2009, 2009-2010 and 2011-2012. Had he submitted his return for 2010-2011 in the same way the daily penalties would have been significantly reduced and the 6 month penalty completely averted.

20 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
25 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".

30 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.

35 15. 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*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

16. HMRC say they have considered the appellant's inability to pay the penalties and his claim, without supporting evidence, of an earlier submission and consider they are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

Discussion

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

5 18. I have concluded that the appellant's non-electronic tax return for the 2010-2011 tax year was submitted on or around 1 May 2012. It should have been submitted by 31 October 2011. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

10 19. The appellant has argued that he is not in a position to pay the penalties. If by this he is suggesting that the penalties charged are disproportionate then 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. If inability to pay is being offered as a reasonable excuse then the Tribunal makes the following observations:

15 The penalty was imposed after the failure to submit the return on time so inability to pay it cannot provide a reasonable excuse for the failure. Had the return been submitted on time there would have been no penalty

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

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

The Tribunal observes that submission on time was in the appellant's control.

25 21. Sickness and an item lost in the post are each capable of establishing reasonable excuse. Unfortunately the appellant has provided no medical evidence to support his contention that he was sick. In addition he has not provided any proof of posting the first submission of his return.

22. The appellant has offered no explanation as to why he did not submit his return electronically on this occasion. Neither the appellant or his agent has explained why having received the penalty notice in mid-February it took until 1 May 2012 to submit the return.

30 23. In the circumstances the Tribunal considers that the appellant did not submit his 2010-2011 self-assessment tax return on time and has not established any reasonable excuse for that failure.

35 24. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there are any special circumstances in this case which would allow them to reduce the penalty and have concluded there

are none. The Tribunal considers that their conclusion is not flawed and sees no reason to disagree.

25. **Conclusion**

5 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 2010-11. 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 £1,300 is dismissed.

26. **Application for permission to appeal**

10 27. 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
15 "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**

RELEASE DATE: 3 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 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—

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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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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.