



TC05956

Appeal number: TC/2017/01408

*INCOME TAX – penalties for late self assessment return – reasonable
excuse –special circumstances – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL WATSON

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MS ANN CHRISTIAN**

Sitting in public in Manchester on 11 April 2017

The Appellant appeared in person

Mr Tony O'Grady of HM Revenue & Customs appeared for the Respondents

DECISION

Background

5 1. This is an appeal against penalties imposed by HMRC pursuant to Schedule 55 Finance Act 2009 (“Schedule 55”) for failure to submit an annual self-assessment return on time. The Appellant is Mr Michael Watson (“Mr Watson”).

2. The penalties that have been charged relate to Mr Watson’s tax return for 2013-14. The penalties appear to total £1,600 and can be summarised as follows:

10 (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 March 2015.

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 15 September 2015.

15 (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 15 September 2015.

(4) A £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 15 March 2016.

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

20 4. The Appellant’s case is that his return for 2013-14 was not filed late. He also raises certain issues in relation to the tax which HMRC is seeking to recover for 2013-14 and 2014-15. We describe those issues below, although for the reasons given below and at the hearing we have no jurisdiction in relation to matters other than the penalties.

25 5. Schedule 55 makes provision for penalties where a self-assessment return is not delivered to HMRC by the filing date. However, paragraph 23 Schedule 55 provides that liability to a penalty will not arise if there is a reasonable excuse for the failure to submit a return. The burden of establishing a reasonable excuse lies on the Appellant.

30 6. HMRC may also reduce a penalty where there are special circumstances. HMRC have decided that there were no special circumstances. The Tribunal has only a limited jurisdiction in relation to that decision where it is satisfied that the decision was unreasonable or otherwise flawed.

Findings of Fact

35 7. The evidence before us comprised oral evidence and documentary evidence from Mr Watson and documentary evidence relied on by the Respondents. Based on the evidence before us we make the following findings of fact, in all cases on the balance of probabilities.

8. Mr Watson is employed by Kelburn Engineering Limited (“Kelburn”) as a general manager. He is required to travel for the purposes of his employment and he

charges expenses to a credit card which are reimbursed by Kelburn. Each year those expenses are included on Mr Watson's P11D prepared by Kelburn and sent to HMRC.

9. On 7 April 2014 Kelburn wrote to HMRC to say that all the expenses on his form P11D for 2013-14 were incurred wholly and exclusively for his employment and should not be treated and taxed as benefits in kind.

10. It is convenient to briefly record at this stage the tax treatment of reimbursed expenses. They must be included on the employee's form P11D. They will be taxable as earnings unless relief is available pursuant *section 336 Income Tax (Earnings and Pensions) Act 2003*. Section 336 provides for a deduction from earnings where the reimbursed expenditure was incurred wholly, exclusively and necessarily in performance of the employment.

11. As a matter of HMRC practice, in circumstances where the expenditure reimbursed is less than £2,500 a claim for deduction under section 336 can be made in correspondence. If the claim is accepted HMRC will not take any steps to tax the amount reimbursed. Where the expenditure is more than £2,500 HMRC require the employee to make a self-assessment return if the employee is not otherwise required to do so. The self-assessment return requires an employee to include details of expenses payments they have received from their employer, and separately to claim a deduction for allowable expenses.

12. On or about 27 August 2014 HMRC sent a tax calculation to Mr Watson claiming an underpayment of tax for 2013-14 of £3,203. This calculation was based on the expenses reimbursed to Mr Watson by his employer and appearing on his form P11D. Mr Watson telephoned HMRC on 5 September 2014 and he was advised to submit a claim for deduction pursuant to section 336.

13. On 4 November 2014 Mr Watson wrote to HMRC to submit a claim under section 336 for his expenses and stated that they were incurred wholly and exclusively for his employment and should not be treated and taxed as a benefit in kind.

14. HMRC's records show that on 4 December 2014 a return for 2013-14 was issued to Mr Watson. That return will have included a notice requiring it to be completed within 3 months. With the addition of one week, presumably to allow for posting to Mr Watson, the return was due to be made and delivered to HMRC by 11 March 2015.

15. Mr Watson did not challenge the evidence that the return had been sent to him, and that it was sent to him at the right address. However, Mr Watson's case is that he did not receive the return and that he did not receive any notice requiring him to make a return until July 2015.

16. On 17 March 2015 HMRC sent a late filing penalty of £100 to Mr Watson.

17. On 6 May 2015 Mr Watson wrote to HMRC stating that he had received a penalty notice for the 2013-14 return. He said that he had tried calling a number of

times but had been put on hold indefinitely. He further stated that he had not received a self-assessment return for 2013-14 and asked for a return to be forwarded to him.

18. Mr Watson's letter was received by HMRC on 12 May 2015 but for some reason a duplicate return was not issued until 14 July 2015.

5 19. Mr Watson maintains that he received the duplicate return in July 2015, completed it and returned it to HMRC the same month.

20. A reminder that daily penalties were accruing was sent to Mr Watson on 14 August 2015 and late filing penalty notices were sent on 15 September 2016. A statement of account showing penalties for 2013-14 was also sent to Mr Watson on 22
10 October 2015.

21. On 6 March 2016 Mr Watson wrote to HMRC to say that he was continuing to receive penalty notices for his 2013-14 return. He said that he had requested a return to be issued and that he had made the return in July 2015.

22. On 12 April 2016 HMRC wrote to Mr Watson to say that they had no record of
15 receiving his 2013-14 return and enclosed a duplicate return for completion by Mr Watson.

23. Mr Watson's return for 2013-14 was received by HMRC on 25 April 2016.

24. On 26 September 2016 Mr Watson appealed against the penalties to HMRC, outlining the sequence of events he relies upon in this appeal. Namely that he did not
20 receive a notice to complete a return until July 2015. He had completed it and sent it back to HMRC but he had continued to receive penalty notices. His appeal was refused in a letter dated 27 October 2016. The officer dealing with the appeal seems to have misunderstood the grounds of Mr Watson's appeal. She believed that Mr Watson was saying he didn't need to send a return because his tax affairs were straightforward
25 under PAYE. In fact what he was saying was that he had sent the return. In any event the officer went on to consider whether there was any reasonable excuse for not delivering the return on time and found that there was not.

25. Mr Watson asked for a review of that decision. He again explained the sequence of events which he relies on in this appeal. He disputed that his return was late. The
30 review letter dated 10 January 2017 upheld the decision to refuse his appeal.

26. We are unable to accept Mr Watson's evidence as to when he first received a 2013-14 return for completion. HMRC's self-assessment record for Mr Watson shows a note of a telephone conversation on 22 December 2014 as follows:

35 " TELI/MCR CC/T/P RE 13-14 – T/P confirmed paper rtn recvd. Issue Date 04-12-14. Advised due date 11-03-15. T/P understood. rak"

27. Mr Watson's evidence about this telephone call and his receipt of the return was equivocal. First, he said that he did not recall the telephone call. He also said that he did not recall receiving the return. Then he said that was not expecting the return and

that he did not receive it. In the light of all the evidence we are satisfied that there was a telephone call between Mr Watson and HMRC on 22 December 2014. We consider that it is clear that there was a conversation with Mr Watson in which he confirmed that he had received the paper return. Details of the date on which it was issued and the due date are consistent with the record of that return described above. We do not consider that there was any misunderstanding that would otherwise explain the note.

28. For whatever reason, Mr Watson did not send a completed return by March 2015. When he received the first penalty notice on or about 17 March 2015 he attempted to telephone HMRC and then wrote to HMRC on 6 May 2015 requesting a return form. A duplicate return was sent to Mr Watson on 14 July 2015 but there is no record that it was received back by HMRC. Mr Watson maintained that he did send it by first class post to HMRC within 4 or 5 days. However he was unable to produce any evidence of posting the return in July 2015.

29. We are satisfied that Mr Watson received reminders and penalty notices for non-submission of the return in August, September and October 2015. They were sent to the right address and they were not returned undelivered to HMRC. If Mr Watson had believed at that time that he had sent the return then we consider he would have challenged the penalties at that time. Mr Watson suggested that he had spoken to HMRC's debt recovery department about the reminders and penalty notices. However the earliest evidence of involvement by HMRC debt recovery was in 2016.

30. In light of the evidence before us we do not accept Mr Watson's case that he posted a 2013-14 return to HMRC in July 2015. More likely is that he simply overlooked the fact that he had not sent the return.

31. In his evidence Mr Watson said that he has kept a copy of the return which he had sent in July 2015 but he did not bring it to the hearing. He also said that he had sent a photocopy of that return when he was waiting to receive a duplicate in April 2016. However, HMRC have no record of receiving any return prior to 25 April 2016. We do not consider that Mr Watson has been untruthful in his evidence but in the light of his evidence in connection with the phone call in December 2014 we do not consider that Mr Watson's evidence based on his memory is reliable. In the absence of any reliable evidence to support his case that the return was sent any earlier than April 2016 we do not accept that the return was made any earlier than 25 April 2016.

Decision

32. As stated above, the penalties imposed on Mr Watson total £1,600. Mr Watson's notice of appeal to the Tribunal identifies an amount in dispute of £2,212. That appears to be an amount appearing in a statement of account. It may be that it includes interest. In any event it is the decision to impose penalties which is in dispute.

33. Mr Watson's correspondence and notice of appeal also makes reference to incorrectly charged tax liabilities for 2013-14 and 2014-15.

34. We understand that Mr Watson was reimbursed expenses of £7,767 in tax year 2013-14. Mr Watson submitted his return for 2013-14 in the circumstances set out above. The return included a claim for deduction of £7,767 but he did not include the equivalent receipt of expenses appearing on his P11D. The result was that the self-
5 assessment return was incorrect. The resulting tax calculation based on the incorrect return for 2013-14 showed income tax of £2,232 being overpaid.

35. Mr Watson submitted his return for 2014-15 on time. In that return he included the receipt of expenses amounting to £9,844 appearing on his P11D but he did not include a claim for deduction of those expenses. Again the result was that the self-
10 assessment return was incorrect. The resulting tax calculation based on the incorrect return for 2014-15 showed income tax of £3,945 being due.

36. Other things being equal, it appears therefore that Mr Watson was undercharged to tax of £2,232 in 2013-14 and overcharged to tax of £3,945 in 2014-15. These are amount calculated from Mr Watson's self-assessment returns. We agree with Mr
15 O'Grady that a taxpayer cannot appeal items appearing in a self-assessment return. There is no such right of appeal in *section 31 Taxes Management Act 1970* ("TMA 1970") which sets out matters against which appeals may be brought, for example amendments made by HMRC to a self-assessment, closure notices following an enquiry and assessments which are not self-assessments.

20 37. It is possible for a taxpayer to amend a self-assessment return but there are strict time limits which prevent any amendment in the present case. Mr Watson's remedy in the present case to correct any overpayment of tax in any tax year would be to make a claim under Schedule 1AB TMA 1970. Mr O'Grady kindly agreed to write to Mr
25 Watson following the hearing setting out how he should go about making such a claim.

38. In the light of these matters Mr Watson's appeal is confined to the penalties for late submission of his 2013-14 return.

39. We have found as a fact that the 2013-14 return including a notice requiring Mr
30 Watson to make a return was sent to Mr Watson on 4 December 2014 and received by him. Pursuant to section 8(1G) TMA 1970 the return was required to be delivered by him to HMRC by 11 March 2015. We have found as a fact that the return for 2013-14 was not made until 25 April 2016. It was therefore late. Pursuant to the provisions of Schedule 55, but subject to any reasonable excuse, the Appellant therefore became liable for the penalties charged by HMRC.

35 40. The likely explanation for why Mr Watson did not send his return until April 2016 is that he overlooked the need to do so. In those circumstances we are not satisfied that Mr Watson had any reasonable excuse for the late filing of his 2013-14 return.

40 41. We are also satisfied that HMRC were right to consider that there were no special circumstances by reference to which the penalties should be reduced.

Conclusion

42. For all the reasons given above we must dismiss the appeal.

43. 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.

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JOHNATHAN CANNAN
TRIBUNAL JUDGE

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RELEASE DATE: 16 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.

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)—

(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.

(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

(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—

(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

(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—

(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.

5 (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—

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

10 (b) £300.

(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

15 (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—

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

20 (b) £300.

(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

25 (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—

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

30 (b) £300.

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

5. 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.

6. 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.

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:

- 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.