



TC05880

Appeal number: TC/2017/01915

INCOME TAX – penalties for late submission of return for period 2013-2014 whether reasonable excuse for late submission. In respect of initial penalty- No- in respect of subsequent delay-yes
INCOME TAX – assessment of balancing payment in respect of the year 2014-2015. Inadequate explanation of what the balancing payment was for or how it had been calculated – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

XAVIER ERIC EL GUEDJ

Appellant

- and -

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

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

Sitting in public at Fox Court, 30 Brooke Street, London on 9 May 2017

Edwin El Guedj, son of, and agent for the Appellant.

Amy Biney, HMRC Officer, assisted by Bisi Sanu for the Respondents.

DECISION

5 1. The appellant is appealing against assessments penalties, tax, and interest totalling
£2,119. HMRC have imposed penalties totalling £1,600 under Schedule 55 of the
Finance Act 2009 (“Schedule 55”) for a failure by the appellant to submit his self-
assessment return for the period 2013/14 on time. In relation to the period ended 5
April 2015 HMRC have assessed what is described as a balancing charge of £479.80
of tax. The remainder represents interest on the unpaid penalties and balancing
10 charge.

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 14 August 2015

15 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed
on 23 February 2016

(3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55
imposed on 12 August 2016

(4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55
imposed on 23 February 2016

20 3. The appellant’s grounds for appeal can be summarised as follows:

(1) He argues that he did not receive a self-assessment tax return before
penalties were imposed.

(2) He argues that he is not self-employed and should not have to do a tax
return, he had never done one previously.

25 (3) He argues that he was told that he owes £479.80 tax from a work
health insurance, his employer paid for this insurance and he never used it.

(4) He argues that he cannot pay the fine nor the £479.80 as he was sacked
from his job and has no income.

30 (5) He argues that there was a “reasonable excuse” for his continued
failure to submit the return on time.

(6) He says that he tried on several occasions to login to his “gateway
account on line but without success and also tried on several occasions to
get a paper tax return sent to him without success until September 2016

35 4. The appellant’s appeal was notified to the Tribunal late. For the following reasons,
we have decided to give permission for the appeal to be notified late:

(a) The Tribunal wrote to HMRC on 10 March 2017 saying if
you object you must address it at the hearing. That letter included “If
you do not object the Tribunal will consider you have consented. No
objection was received by the Tribunal.

(b) The appellant's appeal to HMRC was rejected on the grounds it was made late. If the appeal to the Tribunal was now to be rejected the appellant's grounds for appeal would not have been considered by either HMRC or the Tribunal.

5 **5. Findings of fact**

10 (1) HMRC say they sent a notice to file a return for the tax year ended 5 April 2014 to the appellant at his last known address on 23 April 2015. In view of the lateness of the issue of this notice HMRC required the return to be submitted by 31 July 2015. This date applied whether the return was supplied electronically or non-electronically.

15 (2) The appellant denies receiving a self-assessment tax return for 2013/14 to complete at that time. The Tribunal asked HMRC for some form of evidence that the return was sent. HMRC had no copy of the return and no certificate of posting. In addition they were unable to confirm the address to which the return was sent except to say "it would have been the last known address". Because the timing was non-standard HMRC were unclear as to whether a return for completion was sent or some other form of notification given.

20 (3) In the course of the hearing the appellant's agent said
i) his father received an e-mail from HMRC saying that he needed to complete a return
ii) that he remembered that when his father received the notice of the late filing penalty of £100 his father had said it was his own fault and that he should have done something about it earlier.

25 (4) The Tribunal therefore finds that whether or not the appellant had received a self-assessment tax return for completion he had in some way been made aware that he was required to complete a tax return for the period 2013-2014.

30 (5) On 11 August 2016 the appellant telephoned HMRC saying he could not file on line after 20 odd attempts. HMRC's notes of the call say that a paper return was issued with an employment page.

35 (6) On 30 September 2016 the appellant telephoned HMRC in response to HMRC's telephone message left on 27 September 2016. The appellant advised that he had not received the paper return. HMRC therefore reissued it that day.

(7) HMRC say their records show that they received a non-electronic return from the appellant on 28 October 2016 and this was not disputed by the appellant's agent.

40 (8) The appellant was employed as a Butler by Canaccord Genuity Hawkpoint Limited, a financial services company, from 24 May 2012 until he was sacked in March 2014. The employment particulars include:-

“You, your spouse, dependent children (under 21 years) will be eligible for cover in the Company’s Health Care Scheme (currently managed by BUPA). The subscription will be paid by the Company.”

6. In respect of reasonable excuse the appellant wrote

5 “I have lost several months exchanging letters and phone calls to try:
to get my password to login online
to exchange letters and copies of my contract with HMRC
spent money on calls to HMRC (hours)
to wait for HMRC to reply, which most of the time takes 3 weeks.”

10 7. The appellant’s son explained that his father lost his job in the city in March 2014. It was not until over a year later in April 2015 that HMRC say a return was sent for completion. In November 2015 his father went to Cambodia where he now spends most of his time. The appellant has visited the UK on a few occasions since then as finance permits but he has only visited for a few days at a time.

15 8. The appellant retained an address in London. At the time the appellant’s son was studying chemical engineering at Bath University. When his father left for Cambodia arrangements were made for post to be forwarded to the appellant’s son. The son then scanned the post and sent it electronically to his father in Cambodia.

20 9. The Tribunal questioned whether the suggestion of 20 odd attempts to file online was an exaggeration. The appellant’s son said he was not with his father when some of the attempts were made so he could not verify the figure. However he said he was with his father on at least ten occasions when he had tried to submit online.

25 10. The appellant’s son confirmed that as his father’s post was forwarded to him he was also able to confirm that his father had obtained replacement passwords but produced no evidence to support that contention.

11. The appellant’s son also said that he thought communication difficulties with Cambodia was part of the problem. Some of his father’s e-mails to HMRC had been unanswered and it was difficult to know whether or not HMRC had received them.

30 12. The Tribunal asked HMRC whether they had consulted their Gateway team to see if this suggestion of many attempts could be verified. HMRC said they had not done this. They also said they could neither confirm nor deny that attempts were made. Neither could they confirm or deny whether fresh passwords had been issued.

35 13. HMRC said that in considering whether there was a reasonable excuse it was important to consider the case of *The Clean Car company Ltd v The Commissioners of Customs and Excise* [1991] VATTR 234 where Judge Medd said “Parliament must have intended that the question whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his

duties as a taxpayer but who, in other respects, shared such attributes of the particular appellant as the Tribunal considered relevant to the situation being considered;”

5 14. HMRC said that the appellant’s belief that he did not have to file a return is not a reasonable excuse. They also said that inability to pay a penalty is also not a reasonable excuse.

15. HMRC confirmed that they considered special reduction under paragraph 16 Schedule 55 of the Finance Act 2009. HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

10 16. In respect of the 6 and 12 month penalties The Tribunal referred HMRC to paragraph 24 (2) of Schedule 55 which states:-

“In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates-

- 15 (a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC’s information and belief, and
- (b)

The Tribunal asked how the determination had been carried out and was there any evidence of how the amount had been determined. HMRC confirmed that the amount had been determined automatically.

Discussion

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

18. The Tribunal has concluded that the tax return for the 2013-2014 tax year was submitted on or around 28 October 2016. It should have been submitted by 31 July 2015. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

25 19. In respect of the assessment to tax of £479.80 in the appellant’s Notice of appeal to HMRC he said “I am told that I owe £479.80 from a work health insurance- my employer paid for this insurance that I never used.”

30 20. HMRC appear to have applied this amount to the appellant’s account in relation to the period ended 5 April 2015 stating “Balancing payment due for year 14/15” in the sum of £479.80 HMRC produced no other evidence to explain how the amount had been calculated or more precisely what it represented. HMRC were unable to explain to the Tribunal exactly what this balancing charge was intended to balance. As the appellant had been sacked in March 2014 he had no income in the tax year 2014-2015 so it was difficult to understand why a balancing charge was necessary for that year.
35 HMRC suggested that it might have related to the previous year. Following receipt of the appellant’s tax return HMRC had issued a self-assessment tax calculation dated 2 December 2016 showing that the appellant had overpaid tax by £7 in respect of the year 2013-2014. It does appear to the Tribunal that the value of the health insurance

was not included in the return nor was it included in HMRC's tax calculation. The appellant accepts that he did not have the figure for the value of the health insurance as he expected this to be attended to by his former employer as they had done this in previous years. However there was no evidence produced by HMRC to show how the balancing payment had been calculated, no evidence that the details had been notified to the appellant, and no evidence as to why this was regarded as a balancing payment for 2014/2015.

Conclusion

21. It is clear to the Tribunal that the return was submitted late and it appears to have been accepted by the appellant that the late filing penalty of £100 is justified. Thus the appeal against this penalty and any subsequent interest thereon is dismissed.

22. In respect of whether the appellant had reasonable excuse for the further delay in submission of his return the Tribunal has been hampered by the dearth of supporting evidence from both parties. HMRC were unable to confirm or deny that numerous log in attempts had been made and they were unable to confirm or deny that they had issued additional login passwords. In the circumstances the Tribunal accepts the appellant's son's statements that his father made numerous attempts to access the gateway but with no success. The tribunal also accepts that further passwords were obtained.

23. At the time he left for Cambodia in November 2015 the appellant's tax return had not been submitted. It is also apparent that once the appellant was in Cambodia communication was more difficult and slower. The Tribunal considers that the appellant did make reasonable attempts to resolve the problem.

24. HMRC notes show that they issued a 30 day daily penalty reminder and a 60 day daily penalty reminder to the appellant but copies of those documents were not presented to the Tribunal.

25. In August 2016 and September 2016 HMRC's records show that the appellant was still trying to submit a return. In a telephone call on 11 August 2016 HMRC said that they would send a paper return. The appellant telephoned again on 30 September and reported that the return had not been received.

26. It is apparent that once the appellant received the paper return form sent to him by HMRC on 30 September 2016 he completed it and returned it within a reasonable period of time as it was received by HMRC on 28 October 2016.

27. The Tribunal considers that the matter is finely balanced but the actions that the appellant took were reasonable and indicated that the appellant was aware of his responsibility to submit a return even though he considered the matter of the outstanding tax should have been dealt with by his former employer. Therefore the Tribunal finds that the appellant experienced real difficulty in submitting his return electronically. On his notice of appeal dated 4 February 2017 the appellant stated that he was still unable to login. In respect of the tax year 2013/2014 the Tribunal finds

that this constituted a reasonable excuse until the appellant received a paper return at the beginning of October 2016. As the appellant submitted a return which reached HMRC on 28 October 2016 he has but the matter right within a reasonable period of time from when the excuse ceased. Thus the Tribunal finds that the appellant has
5 established a reasonable excuse for his continued failure to submit a return and the appeal against the daily penalties of £900, the 6 month penalty of £300 and the 12 month penalty of £300 and the interest on all three are all allowed.

28. HMRC have considered whether Special Circumstances existed and found there were none. In respect of the first late filing penalty the Tribunal agrees. As the
10 Tribunal has allowed the appeal against the other penalties it did not need to consider whether special circumstances existed.

29. The Tribunal was dissatisfied with the explanations from HMRC in respect of what was described in a statement of the appellant's account as "Balancing payment due for year 14/15" in the sum of £479.80. The appellant had been sacked in March
15 2014, he had no income in the tax year 2014-2015 so without explanation from HMRC it was difficult for the Tribunal to understand why a balancing charge was necessary for that year. As HMRC could not provide a satisfactory explanation of what this balancing payment represented and how it had been calculated the Tribunal has allowed the taxpayers appeal in respect of this sum plus any interest added
20 thereto.

30. **Application for permission to appeal**

31. 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
25 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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PETER R. SHEPPARD

TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 18 May 2017

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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 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.