



TC06105

Appeal number: TC/2016/07068

Income tax - Schedule 55 Finance Act 2009 - fixed penalties for late filing of self-assessment return - Appellant asserts that paper return was filed on time but lost by HMRC - whether reasonable excuse - on the facts no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW BAKER

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 21 June 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 1 December 2016, and HMRC's Statement of Case received by the Tribunal on 8 March 2017. The Tribunal wrote to the Appellant on 10 March 2017 stating 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. This is an appeal by Mr Andrew Baker ('the Appellant') against penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 3,4, 5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2015.

2. The Appellant's return, if filed electronically, was due no later than 31 January in the year following the end of the financial year to which it related. The return was therefore due by 31 January 2016, but was not filed until the 10 August 2016.

3. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
- 15 ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- 20 iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

4. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii) (iii) and (iv) above.

5. The Appellant's appeal is against all the penalties.

Filing date and Penalty date

6. Under s 8(1D) TMA 1970 a non-electronic return must be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

7. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

8. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

5 9. The law specifies two situations that are not a reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

10 10. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

15 11. HMRC's view is that the actions of the 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 upon 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.

20 12. If there is a reasonable excuse it must exist throughout the failure period.

The background facts

25 13. The notice to file for the year ending 5 April 2015 was issued to the Appellant on 6 April 2015.

14. The filing date for the Appellant's return was 31 October 2015 for a non-electronic return and 31 January 2016 for an electronic return.

30 15. As the return was not received until over six months after the penalty date, HMRC issued, with covering letters, notices of penalty assessments of £100 on 17 February 2016, of £900 and £300 on 12 August 2016, and £300. Following receipt of the Appellant's return in November 2016.

35 16. The Appellant submitted an undated handwritten message on HMRC's letter of 12 August 2016 (which advised that he must submit his outstanding return before he could make an appeal). He stated that he wasn't appealing as he had already sent in his paper return in October 2015.

17. HMRC sent the Appellant a decision letter on 19 September 2016, rejecting his appeal because he had not yet submitted his outstanding return. HMRC offered a review.

18. The Appellant requested a review of HMRC's decision, saying that (he) had
5 'filed paper returns in previous years as the website will not accept his details to file online and nobody has told (him) the return has not been received'. He is having to repeat filing as HMRC has lost it.

19. HMRC carried out a review and issued their review conclusion on 9 November 2016. The outcome of the review was that HMRC's decision should be upheld.

10 20. The Appellant's return was received on 30 November 2016.

Relevant statutory provisions

Taxes Management Act 1970

21. Section 8 - Personal return- provides as follows:

15 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

20 a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

25 (a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

30 (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any

income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

5 (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

10 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

15 (1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

20 (b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners—

25 (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

30 (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

5 (4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

10 22. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

23. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

24. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

15 25. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(1) P is liable to a penalty under the paragraph if (and only if)-

20 (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.

25 (2) The penalty under the 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

30 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

26. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

35 (1) P is liable to a penalty under the 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 the paragraph is the greater of-

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

40 (b) £300.

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

5 (1) Liability to a penalty under any paragraph of the 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.

10 (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
15 remedied without unreasonable delay after the excuse ceased.

28. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

20 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include-
(a) ability to pay, or
25 (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.
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29. 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:

35 (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-

40 (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-

45 (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.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

5

The Appellant's case

30. On 1 December 2016 the Appellant notified his appeal to the Tribunal, giving his grounds as:

10 "I have been having trouble filing my tax return electronically since its introduction and whenever I have tried I have been sent from pillar to post from your helpdesk, gateway section and IT departments. Because I once submitted electronically successfully the system seems unable to let me start from scratch and rejects any attempt I make to file my return.

15 I have spent literally hours on this going between departments and waiting for codes to arrive etc. but as yet to no avail.

I submitted a paper return on October 15 2015 and have a record of this in my post-book in which I log all my postage including quotations and invoices.

20 In March of 2016 I received a letter saying I had not filed a return which I returned asking you to check with your Bradford office which is where I sent my return. I received a statement type letter which I also returned asking you to check with the Bradford office.

25 When it was established that this return had not been received into the correct department I filed a new return which was necessary as I do not have a photocopier so had to work from the headline figure that I had written down as my record. As my income is so low for this tax year I believe I do not owe any tax as I had already had tax deducted (by the pension co) from 2 payments from my pension which had subsidised my income."

HMRC's Case

30 31. Late filing penalties are raised solely because the self-assessment tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

32. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

35 33. The appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure his tax returns were filed by the legislative dates and payment made on time.

34. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

35. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

36. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

37. A Notice to File a 2014-15 self-assessment tax return was issued to the Appellant on 6 April 2015. As he did not submit his 2014-15 electronic tax return by 31 January 2016 a late filing penalty notification was issued on 17 February 2016. There is no statutory requirement for HMRC to issue reminders. This penalty notice should have acted as a prompt to the Appellant to take immediate and necessary corrective action.

38. The penalty notice would have advised the Appellant that he should file his outstanding tax return as soon as possible and that if he were to appeal against HMRC's decision to charge a penalty, he must do so within 30 days of the charge date.

39. HMRC did not receive Mr Baker's return until 30 November 2016. If he had obtained proof of postage in October 2015, HMRC would have accepted this as grounds for appeal if it was in good time before the deadline. It is entirely his own responsibility to ensure deadlines are met and provide evidence that he tried to do so.

40. The Appellant commenced self-employment on 11 June 1998, so HMRC considers him to be experienced in filing his tax returns and aware of his obligations. He has been filing returns for many years and has filed paper returns in previous years up to 2012-13, these being submitted prior to the filing deadline.

41. The Appellant was told by HMRC that his return had not been received in their letters of 12 August 2016, 19 September 2016 and 9 November 2016. His return was not received until 30 November 2016. If he had filed his return when he received these letters, he would have avoided the 12 month late filing penalty issued on 20 December 2016.

Special Reduction

42. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save

that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

43. In other contexts “special” has been held to mean ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

44. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

45. HMRC have considered the Appellant’s grounds of appeal. However these do not amount to special circumstances which would merit a reduction of the penalties.

46. Accordingly, HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

47. When a person appeals against a penalty they are required to have a reasonable excuse which existed throughout the whole period of default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

48. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

49. HMRC sent a late filing penalty to the Appellant on or around 17 February 2016 for £100. This should have acted as a prompt to him that his return had not been submitted/received and he could have filed his return. However his return was not received until 30 November 2016. The Appellant says that he wrote to HMRC in March 2016 to say that he had filed a paper return at their Bradford office. He says that he received “a statement type letter which I also returned asking you to check with the Bradford office”. This must have been a reference to HMRC’s letter of 12 August 2016. After that he received a further reminder on 19 September 2016.

50. A taxpayer is required to make and deliver to HMRC on or before the requisite date a return containing such information as may reasonably be required in pursuance of the notice to file a return.

51. Once the Appellant became aware that HMRC had not received his return he should have taken all reasonable steps to file the return as soon as possible. Because he did not do so, whatever reason he may have initially had, (for instance if the return had been lost by HMRC at their Bradford office), his reasonable excuse ceased, because he did not then remedy his failure to deliver a return without unreasonable delay.

52. Accordingly no reasonable excuse has been shown for the Appellant's failure to file his tax return for 2014-15 on time.

53. The late filing penalties have therefore been charged in accordance with legislation.

54. The Tribunal find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations.

55. The appeal is therefore dismissed and the late filing penalties confirmed.

56. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2017