



TC06158

Appeal number: TC/2014/00197

INCOME TAX – penalty for failure to make return timeously –HMRC’s burden of proof when daily penalties charged-appeal against daily penalties allowed-appeal against £100 and £300 penalties dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARTIN XAVIER SANKEY

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 18 August 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 3 January 2013 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 29 March 2017 and the Appellant’s Reply dated 18 April 2017.

DECISION

Introduction

1. The appellant is appealing against penalties that HMRC has imposed under
5 Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an
annual self-assessment return for 2011/2012 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
12 February 2013;

10 (2) A “six months” penalty under paragraph 5 of Schedule 55 imposed on
9 July 2013; and

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed
on 9 July 2013.

3. The detail of the appellant’s grounds for appealing against the penalties has varied
15 in the different letters sent to HMRC and the Notice of Appeal. At the heart of his
various arguments are the core arguments that:

(a) He thought that he had filed the return on time but due to human error had
failed to do so.

(b) He had no motive not to file on time.

20 (c) His business was near collapse at the time and he had no taxable profit.

(d) He has no money to pay the penalties.

(e) He had medical investigations in the autumn of 2013.

(f) He had changed address a number of times in the period.

4. Both the appeals of the penalties to HMRC and the Notice of Appeal to the
25 Tribunal were submitted after the relevant 30 day deadlines. HMRC do not oppose
the application to appeal out-of-time although HMRC had initially refused consent
under section 49(2)(a) of Taxes Management Act 1970 (“TMA”). HMRC have
prepared a full Statement of Case which deals with the substantive appeal and I
therefore consider that HMRC have now given consent under Section 49(2)(a) TMA.
30 As far as the appeal to the Tribunal is concerned, I give permission under
Section 49G(3) TMA.

Findings of Fact

- 5 5. It is not in dispute that HMRC issued a tax return to the appellant requiring him to submit a tax return for 2011/12 on 6 April 2012. That being the case the return was due by 31 October 2012 (if submitted in paper form) or by 31 January 2013 (if submitted electronically).
6. It is also not in dispute that the return in paper form was ultimately received by HMRC on 3 June 2013. It was processed on 16 August 2013.
- 10 7. In the interim, in a letter received by HMRC on 28 January 2013, the appellant advised that he had ceased self-employment and he provided his new address. HMRC issued a Notice of Penalty Assessment on or around 12 February 2013 in the sum of £100 and replied to the appellant's letter on 18 February 2013 advising that the 2011/12 return was outstanding.
- 15 8. The appellant responded on 23 March 2013 stating that he thought that the letter might have sufficed but asking for a duplicate return. That was issued on 16 April 2013 but the appellant did not complete it correctly so it was returned to him on 21 May 2013.
9. The other two penalties were issued on 9 July 2013.

Legislation

- 20 10. The late filing penalty was imposed under paragraph 3 of Schedule 55 Finance Act (FA) 2009, the daily penalties under paragraph 4 and the six month late filing penalty under paragraph 5.
11. In summary, paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return.
- 25 12. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.
13. Paragraph 5 provides that if after a period of six months beginning with the penalty date, the return remains outstanding, then a penalty is payable which is the greater of 5% of any liability to tax or £300.
- 30 14. 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, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.
- 35 15. That paragraph specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control and where the taxpayer relies on any other person to do anything then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

Discussion

Was the return late?

16. There is no doubt that the return was late. The £100 and £300 penalties are therefore due unless the appellant had a reasonable excuse for the late submission or special circumstances applied. I discuss special circumstances at paragraphs 30-32 below. In his Reply to the Statement of Case, the appellant stated that he accepted the £100 late filing charge. He disputed the £300 penalty partly on the basis that £1,000 was a very heavy penalty for late filing for a small loss making business.

17. He stated that he accepted the £900 daily penalties “in the light of the Donaldson case”. That case is *Donaldson v HMRC*¹. I do not think that the appellant could reasonably be expected to be aware of the finer detail of *Donaldson*. In their submission HMRC refer extensively to that decision stating in particular that:-

“HMRC submit that following the Court of Appeal decision the Tribunal should find that in the present appeal HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which daily penalties had been assessed in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice”.

18. That is a submission. It is not evidence. The Statement of Case does not focus in any way on how the requirements of those paragraphs have been met in the appellant’s case. Crucially in *Donaldson*, Mr Donaldson had received an “SA Reminder” (after the deadline for submitting a paper return had expired) that informed him that daily penalties would be charged if his return was not filed by 31 January 2012. He also received a SA 326D Notice informing him of the first £100 fixed penalty and warning that if the return was more than three months late, daily penalties would be charged. Those documents were sufficient to constitute notices to Mr Donaldson that complied with paragraph 4(1)(c) of Schedule 55. It is with that with which I am concerned.

19. In this instance, whilst I can see that the appellant was notified of the £100 penalty, HMRC have not asserted that the appellant received an “SA Reminder” in similar terms to that considered in *Donaldson*. They have not asserted that he received a “SA 326D Notice” in a form similar to that in *Donaldson* and nor have they included in the Statement of Case the actual text of the Notice notifying the appellant of the £100 penalty (or a document that is expressed to be a standard form of such a penalty notice at the relevant time).

20. HMRC have the burden of proving that daily penalties are chargeable and although the appellant has not taken the point, it is clear from *Burgess and Brimheath Limited v HMRC*² that HMRC must prove their case, even if the appellant has not taken the point. I find that they have not established that there has been compliance with paragraph 4(1)(c) of Schedule 55. Accordingly the daily penalties are not chargeable.

¹ 2016 EWCA Civ 761

² 2015 UKUT 0578 (TCC)

21. Was there any reasonable excuse? *Rowland v HMRC*³ at paragraph 18 makes it clear that a reasonable excuse "... is a matter to be considered in the light of all the circumstances of the particular case".

5 22. There is no statutory definition of reasonable excuse but in my view the test articulated by Judge Medd in *The Clean Car Company Limited v CEE*⁴ should be applied. Judge Medd said:-

10 "...the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?"

The same principle applies to all taxpayers, whether traders or not. It would have been prudent to have submitted the return timeously in compliance with the provisions of Section 8 TMA.

15 23. Applying this test to the facts, the question is whether the appellant had acted reasonably.

24. I have looked at the various arguments deployed by the appellant and find that he has not established a "reasonable excuse" for the late filing of the tax return. The appellant knew or should have known that he had received a tax return. The face of that return made it clear that he was required to lodge it and within the specified time limits otherwise penalties would be applied. The same applied to the duplicate return and there was a further delay in filing that.

25 25. If he did hold a belief that no return was required, then he was mistaken. In that context, firstly, it is a well-established principle that ignorance of the law cannot be an excuse.

30 26. Secondly, perhaps the appellant did get muddled about what he did and when but the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*⁵ where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

"What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...".

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³ 2006 STC (SCD) 536

⁴ 1991 VTTR 234

⁵ 2012 UKFTT 315 (TC)

27. I agree and therefore his motives are not relevant.

28. As I indicate at paragraph 15 above, the law provides that lack of money is not a reasonable excuse for failure to lodge a return on time.

5 29. It is for the appellant to prove that he had a reasonable excuse and he has not done so.

30. Paragraph 16 of Schedule 55 FA 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁶ said “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

31. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances.

15 32. I did consider whether HMRC had acted in a way that no reasonable body could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. I think not. I have also considered whether HMRC have erred on a point of law. They have not. I find no reason to disagree with their conclusion. HMRC’s decisions in that regard are not
20 flawed when considered in light of the principles applicable in proceedings for judicial review.

33. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In
25 this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Boshier*⁷ makes it clear that I do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

34. The decision of the Upper Tribunal in *HMRC v Hok*⁸ is binding on me and that
30 makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

35. The appeal is therefore dismissed in part and the late filing penalties of £100 and £300 are confirmed. The daily penalties of £900 are not confirmed.

⁶ 1971 3 All ER 967

⁷ 2013 UKUT 579 (TCC)

⁸ 2012 UKUT 363

36. 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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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 10 OCTOBER 2017

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