



TC06197

Appeal number: TC/2017/01882

INCOME TAX – penalties for failure to make return – whether conditions for daily penalties satisfied – whether reasonable excuse or special circumstances – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW WOODS

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 6 September 2017

There was no appearance by the Appellant

Ms P Patel of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an appeal against penalties imposed for late submission by the appellant of his self-assessment tax return for 2014-15. When the appeal came on for hearing at 2pm there was no appearance by the appellant. The appeal had been lodged by his accountants, Pure Contractor Accountants. The Tribunal file shows that appellant and his accountants were notified of the date of the hearing by emails dated 29 July 2017. HMRC also sent a copy of the bundle of documents to the appellant on 23 August 2017 which was delivered and not returned.

2. In all the circumstances I was satisfied that reasonable steps had been taken to notify the appellant of the hearing and that it was in the interests of justice to proceed with the hearing pursuant to Tribunal Rule 33.

3. The appellant was required to submit a return by notice dated 6 April 2015. The filing date was 31 October 2015 for a paper return and 31 January 2016 for an electronic return. The return was not submitted until 17 November 2016.

4. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”). The penalties total £1,300 and can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or about 17 February 2016.

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or about 12 August 2016

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or about 12 August 2016.

5. The grounds on which the appellant seeks to appeal the penalties may be taken to be as follows:

(1) there was a “reasonable excuse” for his failure to submit the return on time.

(2) owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.

(3) the penalty is excessively harsh and disproportionate.

6. I set out the facts on which the appellant relies in more detail below. In part the appellant relies on the fact that he had instructed accountants to lodge the return on time and had provided them with his books and records so that they could do so. The appellant contends that those accountants, Aster Accountants of Runcorn, failed to lodge the return, ceased trading and left their premises. As a result he had been unable to retrieve his books and records and it was not until November 2016 when he instructed his present accountants that a return containing provisional figures could be lodged with HMRC.

7. This appeal was originally categorised as a “default paper” case. It came before Tribunal Judge Staker on paper and he released a decision on 5 July 2017. In that decision he rejected those grounds of appeal based on the appellant’s reliance on Aster Accountants to lodge the return. He held that such reliance could not amount to a reasonable excuse. Judge Staker did however consider that certain other factors relied on by the appellant might amount to a reasonable excuse or special circumstances. He re-categorised the appeal as a basic case so that there would be an oral hearing which would give the appellant an opportunity to set out in more detail and in evidence the precise circumstances that he was relying on.

8. As stated above, the appellant has not taken his opportunity to attend the oral hearing. I must therefore make findings of fact and determine the appeal on the basis of the documentary evidence before me. I shall not revisit the question of reliance by the appellant on his accountants which Judge Staker has already determined does not amount to a reasonable excuse.

9. When the appellant first submitted his appeal to HMRC, and subsequently asked for a review of their decision to uphold the penalties, the sole ground of appeal was the reliance he placed on Aster Accountants. The notice of appeal to the tribunal was submitted on 27 February 2017. The grounds of appeal went further. In particular the appellant relied on the following matters:

(1) Once he received the first late filing penalty letter in February 2016 he tried to contact Aster Accountants, but was unable to do so as they had ceased trading. At that stage he had effectively lost all his records.

(2) At some time in early 2016 he split up with his partner. As a result his business suffered, causing financial hardship. It was not until November 2016 that he felt able to “cope with things again”.

(3) In November 2016 he approached Pure Contractor Accountants and they filed the return using provisional figures.

10. HMRC do not accept that these matters amount to a reasonable excuse for the delay in filing the return, or to special circumstances by reference to which the penalties should be reduced.

Findings and Reasons

11. I set out in an Appendix to this decision the relevant statutory provisions.

12. I am satisfied that the appellant’s tax return for 2014-15 was not submitted until 17 November 2016. It should have been submitted by 31 January 2016. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the fixed penalties imposed are due and have been calculated correctly.

13. In relation to the daily penalties paragraph 4(1)(c) Schedule 55 provides that a taxpayer will only be liable to daily penalties if HMRC gave notice to the taxpayer specifying the date from which the daily penalties are payable. Paragraph 4(3) provides that the date specified in the notice may be earlier than the date of the notice,

but may not be earlier than 3 months after the “penalty date”, that is the date on which the first fixed penalty became payable pursuant to paragraph 3.

14. On the present facts, the penalty date was 1 February 2016. The notice under paragraph 4(1)(c) had to be given some time after 30 April 2016 and on or before the date when the daily penalties were imposed, namely 12 August 2016.

15. At the hearing there was no evidence before me as to whether or when a notice pursuant to paragraph 4(1)(c) had been given. I directed that HMRC should be permitted to file and serve further evidence on that point. HMRC sent further evidence to the tribunal and the appellant on 14 September 2017. The notice relied on by HMRC is headed “Daily Penalty Reminder”. It is a pro forma notice in the sense that it was not addressed to the appellant but HMRC say that it is in the form that would have been sent to taxpayers in the position of the appellant. It states:

“ Your tax return for the year ended 5 April 2011 is now more than three months late

After 30 April 2012, a daily penalty of £10 a day is payable for each day your online tax return is outstanding ...”

16. It can be seen that the notice relied on by HMRC relates to tax year 2010-11 rather than 2014-15. In the absence of any other evidence I am not satisfied that HMRC gave any valid notice to the appellant pursuant to paragraph 4(1)(c). On that basis I am not satisfied that the daily penalties have been properly imposed and I allow the appeal against those penalties.

17. Turning to the matters specifically relied on by the appellant, these are the loss of his business records with Aster Accountants, splitting up with his partner and being unable to cope. I must first consider whether these matters amount to a reasonable excuse for failing to submit his return on time. The meaning of the term “reasonable excuse” was considered in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, where Judge Medd QC said:

“ The test of whether or not 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 at the relevant time, a reasonable thing to do?”

18. The objective nature of the test was confirmed in *Nigel Barrett* [2015] UKFTT 0329 where Judge Berner said:

“ The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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.”

19. Applying that test to the appellant, I am not satisfied that the loss of business records amounts to a reasonable excuse for late submission of the return. Firstly, the

records were not lost at the penalty date. They were in the possession of Aster Accountants. It has already been found that reliance on Aster Accountants cannot provide a reasonable excuse. As far as the six month penalty is concerned, throughout the period of six months the appellant was in the same position as when the return was eventually filed. There was nothing to prevent him from submitting a return with provisional figures.

20. In relation to the other matters relied on by the appellant, there is so little detail provided that I cannot be satisfied that they amount to a reasonable excuse for late filing of the return.

21. In so far as the appellant relies on special circumstances to justify a special reduction in the amount of the penalty I must be satisfied that the decision of HMRC not to allow a special reduction was “flawed”. In other words, that HMRC’s decision failed to take into account all relevant factors, took into account irrelevant factors, was wrong in law or was outside the bounds of reasonableness. I am not satisfied on the evidence before me that HMRC’s decision was flawed in that sense.

22. The appellant has also argued that the penalties charged are disproportionate. The Tribunal’s powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. The tribunal has power to reduce a penalty where there is a reasonable excuse and also if HMRC’s decision on special circumstances is flawed. The jurisdiction of the tribunal in relation to proportionality was considered by the Upper Tribunal in *HMRC v Boshier*, [2013] UKUT 01479 (TCC). For reasons set out in that decision I do not consider that the tribunal has any separate jurisdiction to set aside or reduce penalties on the grounds of proportionality.

Conclusion

23. For the reasons given above I allow the appeal against the daily penalties and dismiss the appeal against the fixed penalties. The decision to impose daily penalties of £900 is therefore cancelled. The decision to impose fixed penalties of £400 is affirmed.

24. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 NOVEMBER 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:

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(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:

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(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:

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(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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(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.