

[2018] UKFTT 47 (TC)



TC06325

Appeal number: TC/2017/05655

Income tax - FA 2009 Schedules 55 and 56 - fixed penalties for late filing of self-assessment returns and late payment of taxes due - Appellant relied on agent to file returns - agent ill - returns not filed on time in each of three successive years - whether Appellant took reasonable care to avoid the failures - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTOINETE OSAHON

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID EARLE**

Sitting in public at Taylor House, Rosebery Avenue, London on 17 October 2017

Mr Isaac Addai of AJN & Co Limited, Chartered Accountants, for the Appellant

Ms Mary Donnelly, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Antoinette Osahon ('the Appellant') against penalties totalling £3,400 imposed by the Respondents ('HMRC') under Paragraphs 3,4,5 and 6 of Schedule 55 Finance Act ('FA') 2009 for the late filing by the Appellant of her self-assessment ('SA') tax returns for the tax years ending 5 April 2014, 2015, and 2016.

2. The Appellant's returns, if filed electronically, were due no later than 31 January in the year following the end of the financial years to which they related. They were all filed late, as set out below.

3. The Appellant also appeals late payment penalties totalling £2,468 for the late payment of tax in years 2014, 2015 and 2016, although she has not put forward any reasons or submissions for the late payments.

Filing date and Penalty date

4. Under s 8(1D) TMA 1970 for the year ended 5 April 2012 et seq. a non-electronic return must be filed by 31 October 2012 and an electronic return by 31 January 2013. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

5. Under Schedule 55 FA 2009, a late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return. The relevant legislation is set out in paragraph 24 below.

6. 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 ('FA') 2009 for the late filing of the Individual Tax Return.
- 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.
- 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 of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

7. Penalties are payable under Schedule 56 FA 2009 for the late payment of tax. The relevant legislation is set out in paragraph 24 below.

8. The Appellant's returns were due/ received as shown in the table below:

Tax Year	Date return issued to Appellant	Date return due by	Date of receipt
2013-14	6 April 2013	31 January 2014	8 February 2017
2014-15	6 April 2014	31 January 2015	28 March 2017
2015-16	6 April 2015	31 January 2016	28 March 2017

9. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above in respect of each of years 2014 and 2015 and penalties of £100 were imposed, under (i), in respect of year 2016.

10. Tax geared late payment penalties were imposed under Schedule 56 in respect of years 2014, 2015 and 2016.

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

Reasonable excuse

12. 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.

13. The law specifies two situations that are not 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.

14. 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. 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.

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

17. On 30 March 2017 the Appellant appealed the penalties through her agents AJN & Co. The agents said that the Appellant's previous accountant:

5 "...had been sick for some years (kidney disease) which rendered him unable to prepare and file their returns. After we took over the account we had to wait some time for the records to be passed on to us. We have now received the records and can confirm that we have filed all the outstanding returns."

18. On 18 May 2017 HMRC upheld the penalties on the basis that reliance on an agent is not a reasonable excuse, unless the taxpayer has taken reasonable care to avoid the failure, and in this case the failure had been ongoing for three years and the taxpayer had not taken reasonable care to avoid the failures.

19. The agent requested a review reiterating that the Appellant's previous accountant had been on a kidney transplant waiting list for a number of years had been incapacitated. As soon as the new agent had been able to obtain the Appellant's books and records they had submitted all outstanding accounts without delay.

20. On 12 July 2017 HMRC responded saying that it is the taxpayer's responsibility to meet any filing or tax payment deadlines and failure by the agent is not accepted as a reasonable excuse. Although HMRC empathised with the Appellant given her previous agent's illness, ignorance of what her agent did or did not do cannot amount to reasonable excuse for failing to comply with their obligations. The Appellant should have sought assistance from another agent much earlier or contacted HMRC for assistance. The self-assessment guidance which is provided to taxpayers states that customers can use provisional figures that can be amended at a later date. The Appellant could have estimated her tax liability and made an estimated payment by the deadline.

21. Numerous penalties had been issued to the Appellant over the three years period during which her tax returns were outstanding. HMRC had issued five self-assessment statements of account detailing penalties due and to become due. HMRC would have expected the penalty reminders and statements to have alerted the Appellant to the fact that her tax returns were overdue. However there was no record of the Appellant making contact with HMRC regarding the matter

22. The Appellant's tax liability for the first year default 2013-14 was due to be paid in full by 31 January 2015. No adequate reason had been offered by the Appellant as to why the liability had still not been discharged.

35 23. The Appellant lodged a Notice of Appeal with the Tribunal on 17 July 2017.

Relevant statutory provisions

24. The relevant statutory provisions are as follows:

Taxes Management Act 1970

Section 8 - Personal return - provides as follows:

- 5 (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 -
- 10 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 -
- 15 (a) the 31st January next following the year of assessment, or
- (b) where the notice under this 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 -
- 20 (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
- 25 income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]
- (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 this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any
- 30 income, [loss, tax, credit] or charge for the period in respect of which the statement is made.
- (1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.
- 35 (1D) A return under this 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.

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

5 (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
- (b) on or before 31st January (for an electronic return).

10 (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 -

- (a) shall prescribe what constitutes an electronic return, and
- 15 (b) may make different provision for different cases or circumstances.

(2) Every return under this 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.

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

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

25 (4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(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.

30 (5) In this section and sections 8A, 9 and 12AA of this 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

Penalties for late filing of returns

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.

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

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 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).

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

- 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.

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

- 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) -
 - 40 (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.

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

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

10 (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.

15 (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.

20 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:

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

25 (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.

30 (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.

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

Schedule 56 Finance Act 2009

40 *Penalty for failure to make payments on time*

Penalty for failure to pay tax

1 (1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out -

- 45 (a) the circumstances in which a penalty is payable, and
(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table). Income tax is payable on later than the date falling 30 days after the date specified.

(5)(1) This paragraph applies in the case of:

(a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table

(b) a payment of tax falling within item 2 or 4 which relates to a period of 6 months or more, and

(c) a payment of tax falling within item 2 which is payable under regulations under section 688A of ITEPA 2003 (recovery from other persons of amounts due from managed service companies)

(6) P is liable to a penalty of 5% of the unpaid tax.

(7) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(8) If any amount of tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

The Appellant's case

25. The Appellant's grounds of appeal as set out in her Notice of Appeal, reiterate those put to HMRC on 30 March 2017, (see paragraph 17 above).

26. At the hearing Mr Addai for the Appellant said that it had taken some time to procure the Appellant's books and records from her previous accountant, 'Chris Atkins Services Limited'. The Appellant had been telephoning the accountant, but had only ever been able to speak to a trainee, who simply said that he would pass on a message that the Appellant was becoming very concerned. The Appellant ran a small nursery and was extremely busy, not only with day-to-day duties but also regulatory paperwork. The Appellant said that having passed her books and records to the accountant she felt assured that he would deal with everything. OFSTED had classed her business as 'outstanding' for two years running. She had been working long hours and multitasking over an extended period, trusting her accountant to deal with her tax affairs. Whenever she called her accountant she was never told how serious his condition was. Had she known, she would have arranged for the retrieval of her books and records and appointed a new accountant. When she received the penalties she simply passed them to the accountant, expecting him to deal with them. The Appellant said at the hearing that she didn't really understand what was happening. It was only when the trainee told her that Mr Atkins had been admitted to hospital for a kidney transplant that she began to realise how serious the position was.

HMRC's Case

27. Late filing penalties for the years ended 5 April 2014, 2015 and 2016, are due in accordance with Schedules 55 and 56 FA 2009.

28. Where a return is filed or tax paid after the relevant deadline, a penalty is charged. The later a return is received or payment made, the more penalties are charged.
29. This 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 her tax returns were filed by the legislative dates and payment made on time.
30. 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.
31. 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.
32. 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.
33. Under para 23(1) Schedule 55 and para 23(1) FA 2009, liability to a penalty will not arise where there was a reasonable excuse for the failure, and the failure was remedied without unreasonable delay after the excuse ceased.
34. In *Clean Car Company v The Commissioners of Customs & Excise* [1991] VATTR 234, J Medd held that:
- “.. 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 test. 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? Put in another way which does not I think alter the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do..”
35. HMRC submit that the Appellant's grounds of appeal do not constitute a “reasonable excuse” for the purposes of Paragraph 23(1) Schedule 55 FA 2009.
36. Paragraph 23(2) of Schedule 55 states that where P [a taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and 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.

37. In all the circumstances, because the delay in filing returns and payment of tax had happened over a very extended period, the Appellant cannot suggest that she took reasonable care to avoid the failures. Once she started to receive penalty notices, the burden was clearly upon her to establish what the problem was and to ensure that her tax affairs were in order. It appears that she simply telephoned the accountants offices, spoke to a trainee and was content with the explanation that her messages would be passed on. That is not a reasonable excuse.

Special Reduction

38. 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.

39. 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).

40. HMRC have considered the Appellant's grounds of appeal but these are not special circumstances which would merit a reduction of the penalties below the statutory amount.

Conclusion

41. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. As HMRC say, 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.

42. 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.

43. Taking all the circumstances into account, no reasonable excuse has been shown for the Appellant's failure to file her tax returns or pay tax on time for the years 2014, 2015 and 2016.

44. The Appellant should have been more diligent and proactive in ensuring that her tax returns were filed and tax paid on time. Had the penalties only related to a limited period, certainly not more than a full year, then given her reliance on the accountant, it may have been possible to accept that having telephoned his office, and having to some extent been misled by his staff as to the seriousness of the accountant's condition she had done what she could to avoid the failures. However the penalties were notified to the Appellant and occurred over a period of three years. The Appellant cannot assert that she took reasonable care to avoid the failures occurring.

45. Where a person appeals against the amount of a penalty, Schedules 55 and 56
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 apply its
discretion, but only if there were special circumstances and it thinks HMRC's
5 decision was 'flawed when considered in the light of the principles applicable in
proceedings for judicial review'.

46. We have to conclude that HMRC's decision not to reduce the penalties was not
flawed. There are no special circumstances which would require the tribunal to reduce
the penalties.

10 47. The late filing and late payment penalties have therefore been charged in
accordance with legislation.

48. The appeal is therefore dismissed and the late filing penalties of £3,400 and late
payment penalties of £2,468 are confirmed.

15 49. 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)"
20 which accompanies and forms part of this decision notice.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 02 FEBRUARY 2018