



TC06346

Appeal number: TC/2015/00426

***INCOME TAX – penalties for failure to make returns – whether reasonable
excuse - No***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAUL DANIEL GARCIA

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

MEMBER JOHN CHERRY

Sitting in public at Taylor House, London on 15 December 2017

Mr McNally for the Appellant

Gemma Adams, presenting officer of HMRC, for the Respondents

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns for the tax years 2010-11, 2011-12 and 2012-13 on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) Three £100 late filing penalties under paragraph 3 of Schedule 55 imposed on:
 - (a) 14 February 2012 in relation to tax year 2010-11;
 - (b) 12 February 2013 in relation to tax year 2011-12;
 - (c) 18 February 2014 in relation to tax year 2012-13;
 - (2) Three £300 “six month” penalties under paragraph 5 of Schedule 55 imposed on:
 - (a) 7 August 2012 in relation to tax year 2010-11;
 - (b) 14 August 2013 in relation to tax year 2011-12;
 - (c) 18 August 2014 in relation to tax year 2012-13
 - (3) Two £300 “twelve month” penalties under paragraph 6 of Schedule 55 imposed on:
 - (a) 19 February 2013 in relation to tax year 2010-11;
 - (b) 25 February 2014 in relation to tax year 2011-12;
 - (4) “Daily” penalties under paragraph 4 of Schedule 55 as follows:
 - (a) £900 in relation to tax year 2010-11 imposed on 7 August 2012;
 - (b) £900 in relation to tax year 2011-12 imposed on 14 August 2013;
 - (c) £900 in relation to tax year 2012-13 imposed on 18 August 2014;

Parties arguments

3. Mr Garcia appeals against the penalties on the basis that he had a reasonable excuse for the failure to submit the returns on time and to make the payments on time, in particular:
 - (1) He had been homeless for a number of years, staying in temporary accommodation or with friends due to being made redundant and then being unable to find further work;
 - (2) As a result of the lack of permanent accommodation, his life had been in turmoil and he had been unable to organise himself to submit his tax returns;
 - (3) As he was a construction industry scheme worker, the submission of tax returns always generated a tax refund, so it would have been in his interests to

submit them as soon as possible, but he was not able to do it himself due to his lack of competence with computers and knowledge of figures and he could not afford an accountant to do it for him;

5 (4) By 2013 he was starting to get more regular work and was able to pay off some of his debts and bills, so that in 2014 he was in a position to appoint an accountant and submit the returns;

(5) The imposition of total penalties in excess of £4500 is unfair, particularly on a taxpayer who does not owe any tax for the relevant years.

4. HMRC submits that the penalties were all validly issued.

10 5. HMRC submits that being made redundant and subsequently homeless can be a reasonable excuse for failing to file a tax return and that if Mr Garcia was indeed made homeless towards the end of 2012, it may be that he did have a reasonable excuse for not filing the 2011-12 return that was due by 31 January 2013.

15 6. However, HMRC submit that he did not have a reasonable excuse for the continued late filing of that return or the late filing of the other returns because:

(1) his behaviour was not that of a reasonable and prudent taxpayer in the circumstances of Mr Garcia;

20 (2) Mr Garcia was aware of his obligations to submit a return and made telephone calls to HMRC regarding his self-assessment position on 14 March and 12 September 2012, but still failed to submit the 2010-11 return;

(3) The 2011-12 return was due by 31 January 2013 and Mr Garcia returned to settled accommodation, according to HMRC's address records to the same address he included when submitting his appeal in 2015, in February 2013;

25 (4) The 2012-13 return was due by 31 January 2014 and by that time he had been in settled accommodation, according to HMRC's address records, for over a year.

30 7. Some of the appellant's appeals to HMRC under s 31A TMA 1970 were made outside the statutory deadline. HMRC initially refused consent under s 49(2)(a) of TMA 1970 to those late appeals. However, since HMRC have prepared and presented a full defence of the appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC), we therefore consider that HMRC have now given consent under s49(2)(a).

Findings of fact

35 8. It was agreed between the parties that all three tax returns were submitted late on 12 September 2014. Mr McNally stated that Mr Garcia was not disputing the validity of the penalties.

9. Given the importance to Mr Garcia's case of the fact of his homelessness, in particular when it occurred and its extent, it was unfortunate that Mr Garcia chose not to attend the tribunal hearing to give evidence and that no documentary evidence of his

difficulties in accommodation or financial position were submitted to the Tribunal. We were therefore left only with:

- (1) The submissions of Mr McNally on behalf of Mr Garcia;
- (2) The statements made by Mr Garcia in letters to HMRC; and
- 5 (3) The evidence of HMRC's computer systems.

10. Mr McNally submitted that Mr Garcia started to sofa surf (meaning that he had no fixed accommodation but was relying on friends and colleagues for temporary places to stay) in 2010. The basis for this submission appeared to be HMRC's record of a change of address in January 2010.

- 10 11. Mr Garcia made two statements:

- (1) In his initial appeal to HMRC (dated 12 September 2014) in relation to the penalties for the 2010-11 return, he states that lost his home in early 2012 and had very little income in 2011-12; whereas
- 15 (2) In his notice of appeal (dated 16 January 2015), in relation to the submission of the 2012-13 return, he states that he was made redundant in November 2012 and was subsequently made homeless;

12. HMRC's submissions were that:

- (1) They had records from Mr Garcia's employer of employment until November 2012 (set out in a letter from HMRC to Mr Garcia dated 23 December 2014); and
- 20 (2) The taxpayer self-assessment notes and address records in HMRC's systems showed two changes of address in February 2013, with the second change being to the address in Gunton Mews, which remained his address on the HMRC system until April 2017.

- 25 13. We put very little weight on the factual submissions made by Mr McNally because the evidence was hearsay and because he was not consistent in his responses to questions.

14. Based on the limited information we had available, we find that Mr Garcia was made redundant in November 2012 and at some point shortly after that he lost his home, 30 but that by the end of February 2013 he had returned to permanent accommodation in Gunton Mews.

Discussion

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

16. As agreed between the parties, the tax returns for the 2010-11, 2011-12 and 2012-35 13 tax years were due by 31 January 2012, 31 January 2013 and 31 January 2014 respectively and were submitted on or around 12 September 2014. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

17. The appellant has argued that the penalties charged are disproportionate. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC), we do not consider we have jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal.

5 18. The essential question, therefore, is whether Mr Garcia had a reasonable excuse for his failures to submit tax returns. As accepted by HMRC, being made redundant and subsequently homeless can constitute a reasonable excuse. We do not underestimate the impact that such upheaval can have on a person, nor do we consider that the excuse necessarily ends as soon as fixed accommodation is restored.

10 19. Given the finding of fact above that the period of homelessness or sofa-surfing continued between November 2012 and March 2013, we need to consider a number of different periods.

15 20. The period between 31 January 2012 and November 2012 when Mr Garcia was in employment and had a fixed place to live. During this period, the late filing penalty of £100, 3 month penalty of £300 and £900 of daily penalties arose in relation to the 2010-11 tax return. Given Mr Garcia was in employment and had somewhere to live, and that he made several telephone calls to HMRC regarding his tax returns during the period, we do not find that Mr Garcia has satisfied the burden of showing that he had a reasonable excuse for failing to submit the 2010-11 return during this period.

20 21. The period between November 2012 and March 2013 when Mr Garcia was homeless or sofa surfing. During this period, the £300 12 month filing penalty for the 2010-11 tax return and the £100 late filing penalty for the 2011-12 tax return arose. We find that Mr Garcia did have a reasonable excuse for these failures as a result of his redundancy and homelessness.

25 22. The period after March 2013 up until the returns were submitted on or around 12 September 2014. While we have sympathy with Mr Garcia and agree that a person would need some time after having re-established fixed accommodation to get back into the swing of day to day responsibilities such as the submission of tax returns, the burden of showing that he continued to have a reasonable excuse during this period was on Mr Garcia. The first penalties that arose after February 2013 were issued in August 2013. Mr McNally did not submit any evidence to support the assertion that Mr Garcia remained in difficult financial circumstances until well into 2014 and could not afford an accountant to submit his returns for him. Given that Mr Garcia was apparently in a repayment position for all three tax years and that penalties were mounting up, it would have been reasonable for Mr Garcia to turn his attention to re-establishing compliance with his tax affairs earlier than he did, which was 18 months after he had returned to fixed accommodation. We find that Mr Garcia has not met the burden of showing he had a reasonable excuse during this period.

35 23. Mr McNally did not raise an argument relating to “special circumstances”.
40 Nonetheless, we must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16 of Schedule 55. A special circumstance is generally taken to mean something exceptional, abnormal or unusual.

5 The Tribunal's jurisdiction in this context is limited by paragraph 22 to circumstances
35 where it considers HMRC's decision in respect of the application of paragraph 16
was flawed when considered in the light of the principles applicable in judicial review
proceedings. It is not apparent from the letters sent or the submissions made that HMRC
made any decision at all on special circumstances, which failure is, in itself, a flawed
decision. Where there is such a flawed decision, the Tribunal is able to substitute for
HMRC's decision another decision that HMRC had power to make. We do not consider that
any of the information presented to us represents a special circumstance different from the
reasonable excuse that we have already found. Therefore the decision we substitute is that there
10 are no special circumstances that would give rise to a penalty reduction.

Conclusion

24. We allow Mr Garcia's appeal in respect of the £300 12 month filing penalty for
the 2010-11 tax return and the £100 late filing penalty for the 2011-12 tax return and
these penalties are therefore cancelled.
15 25. We reject Mr Garcia's appeal in respect of all the remaining penalties under
appeal, which therefore stand.

Application for permission to appeal

26. 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)
20 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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**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

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RELEASE DATE: 16 FEBRUARY 2018

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).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- 5 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (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%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

- 15 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (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%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

- 25 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

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

23—

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)—

- (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

5 (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:

10 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

15 (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

20 (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:

25 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—

30 (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—

35 (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.

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

