



TC06387

Appeal number: TC/2017/06817

INCOME TAX – penalty for failure to make return – have HMRC complied with the requirements of paragraph 18(1)(c) of schedule 55 to Finance Act 2009 – yes – did the appellant have a reasonable excuse for the failure – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VIVEEN CUMBERBATCH

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ROBIN VOS
JANE SHILLAKER**

Sitting in public at Taylor House, London on 5 March 2018

The appellant did not appear and was not represented.

Mr D Gander and Mrs A Biney, Officers of HM Revenue and Customs, for the Respondents

DECISION

Background

- 5 1. The appellant, Ms Viveen Cumberbatch, has had problems filing her self-assessment tax return for the tax year ended 5 April 2016.
2. As a result of this, HMRC have charged penalties under schedule 55 to Finance Act 2009 (“schedule 55”) in respect of the late filing of the tax return.
3. As at the date of Ms Cumberbatch’s appeal to the Tribunal, the penalties totalled £1,300.
- 10 4. In her notice of appeal to the Tribunal, Ms Cumberbatch appeals against penalties totalling £1,200. However, HMRC have treated the appeal as also being an appeal against the initial £100 late filing penalty and so do we.
5. Ms Cumberbatch’s appeal is on the basis that she has a reasonable excuse for the failure to file her tax return.

15 Non-attendance of Ms Cumberbatch

6. Ms Cumberbatch had received notice of the hearing. On 1 March 2018, she emailed the Tribunal to say that, due to pressing work commitments, she would be unable to attend the hearing. However she expressed a wish that the hearing should go ahead in her absence and was content that her case was adequately set out in the document/letters she had provided.
- 20 7. Having had an opportunity to review the papers prior to the hearing, the Tribunal concluded that it had sufficient information on which to base its decision and that, bearing all of these factors in mind, it would be in the interest of justice to proceed with the hearing in accordance with Rule 33 of the Tribunal Rules.

25 The evidence and the facts

8. The evidence consisted of a bundle of documents and correspondence produced by HMRC and which included Ms Cumberbatch’s notice of appeal to the Tribunal together with the attachments to that notice of appeal.
9. The bundle also included a witness statement from Martin Delnon who works in HMRC’s live services team which is responsible for the computerised systems which deal with the automatic assessment of late filing penalties and the issuing of notices and reminders to taxpayers.
- 30 10. On the basis of this evidence, we find the following facts:
11. During the tax year ended 5 April 2014, Ms Cumberbatch started working for a company, JS Bennett Limited and, as a result of becoming a director of this company, was registered for self-assessment.
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12. Ms Cumberbatch engaged Umbrella Accountants LLP (“Umbrella”) to deal with the tax compliance for both herself and her company.
13. In March/April 2015 Umbrella registered JS Benett Limited for an online service which enabled changes to the company’s VAT registration details to be made online.
5 As part of this, the company opened a Government Gateway Account and Ms Cumberbatch was sent the activation code which she passed on to Umbrella who in turn activated the online service on 10 April 2015.
14. Umbrella filed Ms Cumberbatch’s self-assessment tax return for the tax year ended 5 April 2014 online using their own agent’s online filing service on 22 April
10 2015.
15. Umbrella also filed Ms Cumberbatch’s self-assessment tax return for the tax year ended 5 April 2015 using their agent’s online filing service, this time on 28 January 2016.
16. JS Benett Limited ceased trading on 22 December 2015.
- 15 17. HMRC issued Ms Cumberbatch with a notice on 6 April 2016 requiring her to submit a tax return for the tax year ended 5 April 2016.
18. On 6 January 2017, Umbrella emailed Ms Cumberbatch to remind her that she needed to submit a self-assessment tax return for the tax year ended 5 April 2016 by 31 January 2017. Umbrella offered to do this for her for a fee of £200 plus VAT.
- 20 19. Ms Cumberbatch however elected to file the tax return herself and asked Umbrella to send her all the information she needed.
20. On 16 January 2017, Umbrella provided all the figures relating to JS Benett Limited which Ms Cumberbatch needed for her tax return together with a warning that if Ms Cumberbatch had received any other income, this would also need to be
25 included on the self-assessment tax return.
21. On 27 January 2017, Ms Cumberbatch contacted Umbrella as she was having difficulty completing and filing her tax return. She referred to activating the Government Gateway Account in 2015 and asked Umbrella whether she was able to complete her self-assessment tax return online via this service and, if so, whether she
30 needed a user ID and password to do so.
22. Both Ms Cumberbatch and her husband, Stephen Cumberbatch attempted to contact Umbrella both by email and by telephone on a number of occasions between 27 January 2017 and 31 January 2017 but were unable to do so. Ms Cumberbatch’s hope and expectation was that, as Umbrella had filed Ms Cumberbatch’s self-
35 assessment tax return for previous years, they would be able to provide the necessary user ID and password to enable her to submit her self-assessment tax return for the tax year ended 5 April 2016.

23. In the early hours of 1 February 2017, Ms Cumberbatch emailed HMRC in order to try and obtain a new user ID and password for the existing Government Gateway Account which, as mentioned above, was an account for JS Bennett Limited and not for Ms Cumberbatch. Ms Cumberbatch received an acknowledgement from HMRC's VAT online office promising that Ms Cumberbatch would receive details of her "Effective Date of Registration" within 15 working days.

24. As Ms Cumberbatch's self-assessment tax return for the tax year ended 5 April 2016 had not been filed by 31 January 2017, HMRC charged an initial late filing penalty of £100 on 7 February 2017. Ms Cumberbatch appealed against this penalty on 7 March 2017.

25. HMRC responded to Ms Cumberbatch's appeal on 5 April 2017. This letter mistakenly referred to the self-assessment tax return for the tax year ended 5 April 2015. The letter stated that HMRC could not consider the appeal as they had not received the tax return.

26. Ms Cumberbatch wrote back to HMRC on 10 April 2017 reiterating that she was still expecting to hear from HMRC about the user ID and password following their exchange of emails on 1 February 2017 and again requesting HMRC to send her a user ID and password.

27. HMRC provided a further response on 23 May 2017. This letter contained specific information about how to obtain a user ID and password and advised Ms Cumberbatch to telephone HMRC if she continued to have problems. This letter also referred to the daily penalty which would be charged if the tax return was more than three months late (which by then it already was) saying:

"If your return is more than three months late, we will charge you a penalty of £10 a day for up to 30 days."

28. Ms Cumberbatch wrote again to HMRC on 29 May 2017 saying that she could not file her tax return online as she did not have the user ID/password which she had requested. She repeated her request for a new user ID and password.

29. On 6 June 2017, HMRC sent Ms Cumberbatch a 30 day daily penalty reminder letter. This letter informed Ms Cumberbatch that the daily penalty of £10 per day for a maximum of 90 days had started clocking up and that, by the date of reminder, the penalty was at least £300.

30. On 4 July 2017, HMRC wrote to Ms Cumberbatch advising her that she had not registered for online filing. HMRC could not therefore send her a user ID. They advised Ms Cumberbatch on how to register for online filing and to set up an online account.

31. Also on 4 July 2017, HMRC sent Ms Cumberbatch a 60 day daily penalty reminder letter. This explained that the daily penalty was now at least £600 as the return was more than 60 days late.

5 32. Ms Cumberbatch wrote a further letter to HMRC on 5 July 2017 repeating what she had said in her previous letters and asking once more for HMRC to send her a new user ID and password. This letter was not in response to HMRC's letter of 4 July 2017 but was in response to an earlier letter dated 8 June 2017 which we have not seen.

33. HMRC responded to Ms Cumberbatch's letter of 5 July 2017 on 7 August 2017. They told Ms Cumberbatch again that she had not registered to submit her tax return online and again explained what she needed to do in order to register.

10 34. On 11 August 2017, HMRC assessed late filing penalties totalling £1,200 being a daily penalty of £900 (£10 per day for 90 days) and a further penalty of £300 as a result of the tax return being more than six months late.

35. It appears that Ms Cumberbatch appealed direct to the Tribunal against these penalties rather than appealing to HMRC. HMRC have however treated this as a valid appeal to HMRC, thus entitling Ms Cumberbatch to appeal to the Tribunal.

15 36. As at the date of hearing, Ms Cumberbatch had still not filed her self-assessment tax return for the year ended 5 April 2016.

Self-assessment returns and late filing penalties

20 37. HMRC is entitled to require a taxpayer to file a self-assessment tax return by sending a notice to the taxpayer. Where a notice is sent, the tax return is due by 31 October after the end of the tax year if the tax return is filed in paper form or by 31 January in the year after the end of the tax year in question if the return is filed online (s 8 Taxes Management Act 1970). In this case, the return is likely to have been due by 31 January 2017 as it is clear that Ms Cumberbatch intends to file the tax return online.

25 38. Schedule 55 provides a system of penalties where a self-assessment tax return is filed late. There is an initial penalty of £100 if the tax return is not filed by the deadline. HMRC may charge a daily penalty of up to 90 days if the tax return is more than three months late. If the tax return is more than six months late, there is a further penalty of a minimum of £300. There is an additional penalty, again of a minimum of
30 £300, if the tax return is more than 12 months late.

39. A taxpayer is not liable to a penalty if they have a reasonable excuse for the failure to make the return.

40. Reliance on another person to do anything is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

35 41. If the taxpayer had a reasonable excuse but that excuse has ceased, the taxpayer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

42. HMRC have discretion to reduce penalties if there are special circumstances justifying a reduction.

Were the penalties properly charged

5 43. HMRC has the burden of proving that the penalties have been charged in accordance with the legislation.

44. The records produced by HMRC show that all the relevant notices were sent to Ms Cumberbatch. Her address has not changed throughout the relevant period and there is no suggestion that she did not receive any of those notices.

10 45. There is also no dispute that Ms Cumberbatch has failed to file her tax return so that, on the face of it, late filing penalties are due.

15 46. There is however one technical issue which was discussed at the hearing and which relates to whether or not HMRC have complied with the requirements of paragraph 18(1)(c) of schedule 55. This requires HMRC to send a notice to the taxpayer of the assessment of the penalty and to state in the notice the period in respect of which the penalty is assessed.

47. We have a copy of the notice which was sent by HMRC to Ms Cumberbatch assessing the daily penalty of £900 and the six month late filing penalty of £300. This notice does not state the period in respect of which the daily penalty is assessed.

20 48. This issue was considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 [at 23-29].

49. The Court of Appeal accepted in *Donaldson* that HMRC could rely on s 114(1) TMA and that, as a result, the notice of assessment was valid. It is convenient to set out the Court of Appeal's reasoning on this point [at 27-29] in full:

25 "27 It is therefore, necessary to consider Mr Vallat's alternative argument that the failure to state the period over which the penalty was incurred does not of itself invalidate the assessment because, despite the defect, the notice was in substance and effect in conformity with para 18 or accorded to its intent and meaning within section 114(1) of the Taxes Management Act 1970 ('TMA') Section 114(1) of TMA provides:

30 'An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or
35 voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to

be charged or affected thereby is designated therein according to common intent and understanding.’

5 28 Ms Murray submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. In my view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice ‘affected by reason of a mistake, defect or *omission* therein’ (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is ‘in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts’. In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions.

20 29. In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice.”

40 50. There is no doubt that Ms Cumberbatch was sent (and received) a number of documents explaining the way in which the daily penalties worked and when they would be charged (including the initial £100 penalty notice which is one of the documents relied on in *Donaldson*).

51. There is however one difference in this case which is that, as mentioned above, on 23 May 2017, HMRC sent Ms Cumberbatch a letter in which they stated that:

“If your return is more than three months late, we will charge you a penalty of £10 a day for up to 30 days.”

52. The Court of Appeal in *Donaldson* accepts that some mistakes may be too fundamental or gross to fall within the scope of s 114(1) TMA [at 28]. However, in their view, the fact that the penalty assessment notice did not specify the period for which the daily penalty was assessed was not too fundamental to be saved by s 114(1) TMA. The Court of Appeal was satisfied that Mr Donaldson was not misled or confused by the omission [at 29].

53. The question in this case is whether a taxpayer might have been misled or confused as a result of the letter from HMRC dated 23 May 2017 which stated that the daily penalty would be charged for 30 days rather than for a maximum of 90 days.

54. Mr Gander, on behalf of HMRC submits that, although a mistake was made, this would not have caused confusion or would have misled the taxpayer. He points out that there were numerous references to a daily penalty being charged for a maximum of 90 days. This includes the initial notice of assessment of the £100 late filing penalty, the 30 day penalty reminder letter, the 60 day penalty reminder letter and the notice of assessment itself.

55. On balance, we agree with HMRC. Even if a taxpayer noticed the discrepancy, the fact that there were communications both before and after the letter of 23 May 2017 which made it clear that the daily penalty could be charged for a maximum of 90 days (and not 30 days) and that the notice of assessment made it clear that the penalty was being charged for 90 days would have made it clear to the taxpayer that the letter of 23 May was a mistake.

56. Although the test as to whether a mistake is likely to confuse or mislead a taxpayer is an objective test (and that the question is whether a hypothetical taxpayer would have been confused or misled) we do note that there was no evidence in this case that Ms Cumberbatch was in fact confused or misled in this particular case as there is no complaint about the amount/calculation of the penalty as opposed to the fact that one has been imposed at all.

57. In our view, HMRC have therefore complied with the requirements of schedule 55 in charging the penalties. We therefore go on to consider whether Ms Cumberbatch has a reasonable excuse for her failure.

Does Ms Cumberbatch have a reasonable excuse

58. Ms Cumberbatch's case is that she has a reasonable excuse in that:

- (1) She relied on her accountant who failed to give her the information she needed.
- (2) Despite repeated requests, HMRC failed to provide her with a user ID and password to enable her to file her tax return online.

59. Mr Gander on behalf of HMRC says that this is not a case where Ms Cumberbatch relied on somebody else to do something. Indeed, she specifically decided that she was going to file her tax return for year ended 5 April 2016 herself.

60. Mr Gander was prepared to accept that Ms Cumberbatch might initially have had a reasonable excuse for the failure to file her tax return by 31 January 2017 given the problems she encountered in trying to file her tax return online. However, he submits that, in the light of HMRC's letters dated 4 July 2017 and 7 August 2017, any
5 excuse she had must, at that stage, have come to an end as HMRC made it clear in those letters that Ms Cumberbatch was not registered for online filing of her self-assessment tax returns and explained what she needed to do in order to open an account and get a user ID and password.

61. If Ms Cumberbatch continued to have difficulties, Mr Gander suggested that he
10 would have expected her to call HMRC and to ask for help. Mr Gander drew attention to the fact that HMRC's self-assessment notes (which record details of any communications with a taxpayer) do not contain any evidence that Ms Cumberbatch attempted to contact HMRC by telephone. He does however accept that the self-assessment notes may not capture any call which Ms Cumberbatch might have made
15 to HMRC's online self-assessment helpline but points out that there is no evidence that Ms Cumberbatch did try and contact HMRC by telephone and, in particular, that there is no suggestion in any of the evidence put forward by Ms Cumberbatch that she did so.

62. In Mr Gander's view, a prudent taxpayer in Ms Cumberbatch's circumstances
20 would have called HMRC for help given the problems she was having and the letters which HMRC had sent telling her that they could not provide her with a user ID and password unless she followed the appropriate online procedure.

63. Mr Gander also reminded the Tribunal that Ms Cumberbatch has still not filed
25 her self-assessment tax return for the year ended 5 April 2016. He submits that, in order to avoid any liability for penalties, an excuse must continue throughout the period of default and that it is clear that, if there ever was an excuse, it is no longer continuing.

64. It is unfortunately clear to us that Ms Cumberbatch does not have a reasonable excuse for her failure to file the tax return.

30 65. Ms Cumberbatch appears to have got into a muddle as a result of the Government Gateway Account created by her company, JS Benett Limited in 2015. She did not realise firstly that this related to VAT and not the filing of self-assessment returns and second that it was a Government Gateway Account for her company and not for herself.

35 66. It would of course have been helpful if Umbrella had explained this to her in January 2017 although it is perhaps understandable that they failed to do so given that they were no doubt snowed under with filing tax returns for other clients and that Ms Cumberbatch had specifically said that she did not want Umbrella to file her tax return for the year ended 5 April 2016.

40 67. We also accept that Ms Cumberbatch would not necessarily have known that a firm of accountants is able to file tax returns online for clients using their own agent's

online self-assessment service and that they do not therefore need to create a specific Government Gateway Account for each individual client and could not therefore provide a user ID and password to Ms Cumberbatch. Again, it would have been helpful if Umbrella had explained this to Ms Cumberbatch in January 2017.

5 68. It also would have been helpful if HMRC had explained to Ms Cumberbatch earlier on (i.e. in April when they responded to Ms Cumberbatch's initial appeal against the £100 late filing penalty) that she was not registered for online filing and that she would need to set up her own account.

10 69. Having said this, HMRC did make it very clear in July and August 2017 that this is where the problem lay and, indeed, told Ms Cumberbatch what needed to be done in order to set up an online filing account for self-assessment.

70. HMRC correctly say that the test as to whether a taxpayer has a reasonable excuse is an objective test. The question is what a reasonable taxpayer, intending to comply with their obligations, would have done in all the circumstances.

15 71. There is no evidence that Ms Cumberbatch has taken any action in response to HMRC's letters given that she has still not filed her self-assessment tax return for the year ended 5 April 2016. At the very least, we would have expected a reasonable taxpayer in these circumstances to call HMRC to ask for help (as Mr Gander has suggested) or to consult an adviser such as Umbrella who would have been able to
20 sort things out for her.

72. We are not sure we necessarily agree with HMRC that Ms Cumberbatch had a reasonable excuse for her failure to file the tax return by 31 January 2017 as, even then, it was fairly clear that the previous Government Gateway Account related to the company and not to Ms Cumberbatch personally and also related to VAT and not self-
25 assessment online filing.

73. However, even if this were accepted, there is no doubt that Ms Cumberbatch ceased to have a reasonable excuse in July/August 2017 and that, as she did not file her tax return within a reasonable period after that time, she remains liable to the penalties which have been charged.

30 **Special circumstances**

74. HMRC have considered whether there are any special circumstances which would justify a reduction in the amount of the penalties. They have taken into account the fact that Ms Cumberbatch did not get the help which she was hoping for from her accountants and they have also taken account of the fact that she has not received a
35 user ID and password for online filing. Despite this, they have concluded that there are no special circumstances which would justify a reduction in the amount of the penalties.

75. The Tribunal is only able to take the existence of special circumstances into account if HMRC's decision in relation to this is "flawed" in a judicial review sense.

76. It is however clear that HMRC have taken into account all of the relevant circumstances and that the conclusion which they have reached is not one which is unreasonable in the circumstances. The Tribunal therefore has no jurisdiction to take a separate decision on this point although, even if it did, we would agree with HMRC that there are no special circumstances in this case which would justify a reduction in the amount of the penalties.

Conclusion

77. The penalties have been calculated/assessed in accordance with the relevant legislation.

78. Ms Cumberbatch does not have a reasonable excuse for her failure to file her self-assessment tax return for the tax year ended 5 April 2016.

79. The Tribunal cannot interfere with HMRC's decision that there are no special circumstances justifying a reduction in the amount of the penalties.

80. This appeal is therefore dismissed and the penalties upheld.

81. We would note in passing that it appears that Ms Cumberbatch has not filed her tax return for the year ended 5 April 2017. She should register for online filing as soon as possible and submit her tax return for the year ended 5 April 2017 as she is otherwise likely to incur the same penalties as have been charged for the tax year ended 5 April 2016.

82. 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.

83.

**ROBIN VOS
TRIBUNAL JUDGE**

RELEASE DATE: 12 MARCH 2018