



TC06422

Appeal number: TC/2017/06809

Income tax - Schedule 55 Finance Act 2009 - fixed penalties for failure to file self-assessment returns - Appellant never self-employed but held two part time jobs both taxed under PAYE - incorrect codes applied by employers - self-assessment returns issued to collect underpaid tax - delay by Appellant in filing returns - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOHAMMAD SHAKIL

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN LOUSADA**

**Sitting in public at the Tax Appeals Tribunal, Centre City Tower, Birmingham
on 19 October 2017**

The Appellant in person

Mr Gareth McKinley, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Mohammad Shakil ('the Appellant') against penalties totalling £2,600 imposed by the Respondents ('HMRC') under Paragraphs 3,4, and 5 of Schedule 55 Finance Act 2009 for his failure to file self-assessment ('SA') tax returns for the tax years ending 5 April 2013 and 5 April 2014 by the filing date.

2. The Appellant's returns for 2012-13 and 2013-14 were due no later than 26 June 2015. The 2012-13 return was filed on 12 February 2016 and the 2013-14 return on 23 May 2016.

3. 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 Finance Act ('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 £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

4. Penalties of £100, £900, and £300 were imposed, under (i), (ii), and (iii) above for each of years 2012-13 and 2013-14.

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

Filing date and Penalty date

6. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

7. The filing date is determined by s 8 (1G) Taxes Management Act 1970 which provides 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."

8. Because the Appellant was not in the self-assessment regime he had not received a notice to file as he would normally have done on 5 April in each year of assessment. The notice to file was issued to the Appellant on 19 March 2015, requiring him to file his returns by 26 June 2015.

5 9. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

10 10. 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.

11. 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

15 (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

20 12. 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).

25 13. 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.

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

The background facts

35 15. In 2012-13 and 2013-14 tax years the Appellant was simultaneously employed by two employers. During this period there was an underpayment of PAYE income tax. Voluntary Payment Letters (P800 Letters) were issued to the Appellant on 21 September 2014 and 14 December 2014 requesting that he pay the underpaid income tax for 2012-13 amounting to £539.80. As no response was received and as it was deemed impossible to recover the underpayment by amending the Appellant's tax

code the underpayment was passed to HMRC's Self-Assessment section to seek recovery.

16. The return/notice to file for the years ending 5 April 2013 and 2014 were issued on 19 March 2015.

5 17. The tax returns were due by 26 June 2015.

18. As the returns had not been filed by the due date a fixed penalty of £100 was issued in respect of each late return on 6 August 2015.

10 19. As there was no response from the Appellant and the returns had still not been filed the Appellant was issued with a SA326D form, on 10 September 2015. This advised the Appellant that if his return was more than three months late, that is filed after 26 September 2015, HMRC would charge him a penalty of £10.00 for each day it remained outstanding for a maximum of 90 days.

15 20. Further reminder letters were issued to the Appellant regarding his returns during the 90 day daily penalty period on 27 October 2015 and 1 December 2015 and it has to be assumed that he received these as he telephoned HMRC on 14 December 2015 to discuss his penalties. Following the call further blank returns for 2012-13 and 2013-14 were issued to the Appellant.

20 21. The Appellant's paper returns for both the year 2012-13 and 2013-14 were initially received on 31 December 2015. These were returned as they had not been signed.

22. On 4 February 2016 HMRC issued two £900 penalties because the signed completed returns had still not been filed.

23. The signed return for 2012-13 was received by HMRC on 12 February 2016 and processed on 1 March 2016.

25 24. The signed return for 2013-14 was also received by HMRC on 12 February 2016. Unfortunately further information was required and so the return was returned to the Appellant on 1 March 2016. An electronic return was received 23 May 2016.

30 25. The 'daily penalties' and '6 month penalties' fell due on 29 December 2015 and so even had the Appellant's return received 31 December 2015 been complete, both penalties would still have fallen due.

35 26. The Appellant made his initial appeal against all penalties on 10 March 2017. HMRC responded on 10 April 2017 advising that the deadline for making an appeal had passed. The Appellant wrote a further letter of appeal on 22 June 2017 setting out his reasons as to why his appeal was late; this letter also sets out the Appellant's grounds for appeal. HMRC issued a further letter to the Appellant on 20 July 2017 again confirming that the deadline for making an appeal had passed.

27. On 31 August 2017, the Appellant submitted an appeal to Tribunals Service.

Relevant statutory provisions

Taxes Management Act 1970

28. 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 the 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

25 (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 income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

30 (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 the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any 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 the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

35 (1D) A return under the 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 the 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 the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

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

25 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the 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 the section and sections 8A, 9 and 12AA of the 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:

29. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

30. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

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

32. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

- 5 (1) P is liable to a penalty under the 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
 - 10 (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (2) The penalty under the 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).
- 15 (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).
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33. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

- (1) P is liable to a penalty under the paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
- 25 (2) The penalty under the 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

34. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

- (1) Liability to a penalty under any paragraph of the 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 attributable to events outside P's control,
 - 40 (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.
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35. 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 the Schedule.

(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.

(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.

36. 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.

(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.

(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.

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

The Appellant's case

37. In his appeal to the Tribunal, the Appellant explained why his appeal was late saying:

"When I received penalty notices I called HMRC and was advised to complete the tax returns and then make an appeal against the penalties which would hopefully be waived because I was not self-employed in the period and the tax returns were issued because my employers had used wrong tax codes which resulted in an underpayment of tax. By the time I got all P 45/60 and submitted returns, time to appeal had ended."

In his grounds of appeal the Appellant says:

"... I was not self-employed during 2012-13 and 2013-14. I was doing two jobs and my employers used standard PAYE tax codes in both jobs which resulted in an underpayment of tax. I notified my previous employers about the letters and I was told to ignore them because I was getting less than the tax threshold amount from each job. However when the salary from both jobs were added together it resulted in an

underpayment of tax. I was issued with the tax returns in 2015 for the tax years 2012–13 and 2013–14. I had to collect all the necessary information (P 45 – 60) which took time to complete. I completed my tax returns and filed an appeal. I believe that it is extremely unfair to charge me penalties for a mistake of my employers as they had correct tax codes which they ignored. I have paid the underpaid tax and ask that the penalties are waived. This will help me financially. I’m under great difficulty due to a new born child because of which have had to take time off.”

HMRC’s Case

38. A late filing penalty is raised solely because a self-assessment tax return is filed late in accordance with Schedule 55 Finance Act 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Penalties are not linked to liability.

39. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

40. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his return.

41. It is HMRC’s contention that it is for the taxpayer to notify HMRC of any chargeability (s 7 of the Taxes Management Act (TMA 1970). The legislation requires every person who is chargeable to income tax or capital gains tax for any year of assessment, who has not received a notice to file a return for the year of assessment (s 8 TMA 1970) or received a notice to file but has been notified that the notice has been withdrawn, to give notice to an officer of the Board that they are chargeable (s 8 TMA1970).

42. There are two ways HMRC can deal with customers who notify chargeability - through the SA system or by collecting liability from other income that is subject to PAYE.

43. HMRC informed the Appellant of the underpayment of tax on 21 September 2014, and again on 14 December 2014 by issuing him with a voluntary payment P800 Letter. The Appellant did not respond or make any attempts to contact HMRC to clarify his position, nor did he make any attempts to pay the outstanding underpayment.

44. As HMRC were unable to collect the underpayment through PAYE, a Self-assessment record was created for the Appellant, so that HMRC could accurately ascertain any liabilities and also recover the underpayment.

45. Tax returns were sent to the Appellant on 19 March 2015. The due date for their return was 26 June 2015.

46. In his letter of 22 June 2017 the Appellant advised that he had discussed correspondence received from HMRC with his employer at the time and they advised him to ignore it. From this it can be assumed that he received the original notices to file.
- 5 47. On 6 August 2015 the Appellant was issued with two £100 late filing penalty notices.
48. On 10 September 2015 form SA326D, was issued to the Appellant advising him that if his returns were more than three months late HMRC would charge him a further penalty of £10 for each day they remained outstanding for a maximum of 90
10 days.
49. As the returns were still outstanding on 26 September 2015, penalties of £10 per day (for a maximum of 90 days) started to accrue in respect of each late return.
50. As the returns were still outstanding on 26 December 2015, £300 penalties fell due in respect of each late return.
- 15 51. Both the two £900 penalties and the two £300 penalties were issued to the Appellant on 4 February 2016.
52. The Appellant filed the outstanding returns shortly after these penalties were issued.
53. The appeal is not concerned with specialist or obscure areas of tax law. It is
20 concerned with the ordinary every day responsibilities of the Appellant to ensure his tax returns were filed by the legislative dates and payment made on time. He received reminders and penalties but did not file his return for 2012-13 until almost eight months after the due date and did not file his 2013-14 return until eleven months after the due date.
- 25 54. 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.
55. The amount of the penalties charged is set within the legislation. HMRC has no
30 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.
56. The Notice to File the 2012-13 and 2013-14 self-assessment tax returns were
35 issued to the Appellant on 26 June 2015. The £100 penalty notices issued on 6 August 2015 would have advised the Appellant that he should file his outstanding tax returns as soon as possible and that if he were to appeal against HMRC's decision to charge a penalty, he must do so within 30 days of the charge date. He was also told this in his telephone call to HMRC.

57. It can be seen that the Appellant filed the returns shortly after he received the three and six month penalties. No reason has been offered as to why he could not have filed the returns before then. Furthermore any reasonable excuse that he may have initially had did not continue throughout the default periods.

5 *Special Reduction*

58. 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 save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

59. 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).

60. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, 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 rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

61. HMRC have considered the Appellant’s grounds of appeal but his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

62. Accordingly, HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the tribunal to reduce the penalties.

Conclusion

63. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. 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.

64. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or his from complying with an obligation which otherwise they would have complied with.

65. HMRC first sent two late filing penalty notices to the Appellant on or around 6 August 2015 for £100. This should have acted as a prompt to him that returns were due and had not been submitted. When he contacted HMRC he was advised to

complete the returns and then appeal the penalties. He failed to do this. Further late filing notices were sent to the Appellant together with penalty notifications without any response.

5 66. The tribunal would have some sympathy with the Appellant insofar as he incurred £100 penalties when he clearly thought that he did not need to file a return having never been self-employed. He also regarded the problem as having been created by his employers. To that extent he made an honest mistake. However whilst the Appellant's misunderstanding regarding his obligation to file a return could be considered a genuine error, it does not amount to reasonable excuse. This is supported
10 in a judgement by Judge Hellier in the [VAT] case of *Garnmoss Ltd v HMRC – TC2001* where he said "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."

15 67. Beyond 6 August 2015 the Appellant's actions cannot be attributed to an honest mistake or misunderstanding. It was clearly explained to him by HMRC that he had to file self-assessment returns in order that HMRC could assess and collect the underpaid tax.

68. In September 2015 further warning letters were issued regarding the three month £10 per day penalties, but the Appellant still did not file his returns.

20 69. We have to conclude that no reasonable excuse has been shown for the Appellant's failure to file his tax returns for 2012-13 and 2013-14 on time.

70. The late filing penalties have therefore been charged in accordance with legislation.

25 71. The Tribunal finds that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations.

72. The appeal is therefore dismissed and the late filing penalties confirmed.

30 73. 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.

35 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 6 APRIL 2018

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