



TC06432

Appeal number: TC/2017/03325

Income tax - Schedule 55 Finance Act 2009 - fixed penalties for failure to file self-assessment returns - assessment related to incapacity benefit claimed fraudulently - Appellant ordered to repay benefits - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID FOX

Appellant

- and -

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

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

Sitting in public at Leeds ET, Albion Street, Leeds on 19 January 2018

The Appellant did not attend and was not represented

Paul Hunter, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr David Fox ('the Appellant') against penalties totalling £3,200 imposed by the Respondents ('HMRC') under Paragraphs 3,4, 5 and 6 of Schedule 55 Finance Act 2009 for his failure to file self-assessment ('SA') tax returns for the tax years ending 5 April 2011 and 5 April 2012.
2. The Appellant also appeals an assessment of £624 based on his 2009-10 return.
3. The Appellant's returns for 2010-11 and 2011-12 were due no later than 27 February 2013. Neither of the returns have been filed.
4. 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.
5. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above for each of years 2010-11 and 2011-12.
6. The Appellant's appeal is against all the penalties and the assessment for 2009-10.
7. The Appellant did not attend the hearing. The Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Filing date and Penalty date

8. 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. 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 served on 20 November 2012, requiring him to file his returns by 27 February 2013.

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

5 *Reasonable excuse*

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.

10 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

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

15 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).

20 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
25 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.

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

The background facts

30 15. Information came to light that in addition to income from employment of £8,499 the Appellant had been in receipt of undeclared taxable income from welfare benefits of £5,840 in tax years 2010-11 and 2011-12. HMRC attempted but were unsuccessful in reclaiming the tax due through the Appellant's PAYE tax code. HMRC calculated that the Appellant had a total tax underpayment liability of
35 £1,759.68 as at 5 April 2012.

16. On 9 May 2012 and 16 September 2012, HMRC issued P800 Letters (underpayment letter) to the Appellant for the years 2010-11 and 2011-12 respectively. The Appellant failed to respond to the letters.

5 17. The notice to file for the years ending 5 April 2009, 2010 and 2011 were issued to the Appellant on 20 November 2012 in order to ascertain any additional tax liability. The Appellant was advised that he had three months and seven days to submit the returns. They were therefore due by 27 February 2013.

18. The Appellant failed to file the issued tax returns by the due date

10 19. As the returns were not received HMRC issued notices of penalty assessments for each of years 2010-11 and 2011-12, of £100, £900, £300 and £300 as and when the defaults occurred.

15 20. The Appellant contacted HMRC on 14 March 2013 querying why he had been placed in the self-assessment system and saying that he had not received the returns. HMRC explained why the returns had to be filed. To assist the Appellant in completing his returns a letter detailing his employment history from 2009-10 to 2011-12 was issued to him on 15 March 2013.

21. As the Appellant's returns had not been filed three months after the due date daily penalties of £900 were issued on 27 August 2013.

20 22. The Appellant telephoned HMRC on 30 August 2013 appealing the penalties. On the same date tax returns for 2009-10, 2010-11 and 2011-12 were re-issued to the Appellant.

23. As the returns had not been filed six months after the due date a six month penalty of £300 was issued on 3 September 2013.

24. The Appellant appealed the penalties on 9 September 2013, on the grounds that:

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- He had never been self-employed and did not understand why a Self-assessment record had been created.
 - He has been in and out of work for years but always on PAYE.
 - He was currently unemployed and had no income.
 - He is paying back the benefit money he has been convicted of fraudulently claiming from the Department for Work and Pensions (DWP), so HMRC should seek any loss of tax liability from the DWP.
 - He has no tax records and has not received any returns to complete.
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25. On 12 November 2013 HMRC rejected the Appellant's appeal as his tax returns were still outstanding.

26. On 15 November 2013 the Appellant was advised that HMRC were postponing collection of the £900 penalties pending the outcome of *Morgan and Donaldson v Comms of HMRC* (TC/2012/8431 and TC/2012//9096), and that interest would be charged on the outstanding penalties.

5 27. The Appellant contacted HMRC on 19 June 2014 and was told again that he had to complete the outstanding tax returns. Further blank returns were issued to him on 20 June 2014 along with a second letter detailing his employment history.

28. The Appellant's tax return for 2009-10 was received on 20 July 2014.

10 29. HMRC say that they have no record of any correspondence issued to the Appellant being returned undelivered to HMRC.

30. On 1 March 2017 HMRC wrote to the Appellant to say that the *Donaldson* appeal had been determined and that HMRC were confirming the earlier decision to impose the late filing penalties. The Appellant was advised that he could request a review of the decision by a HMRC officer not previously involved in the matter.

15 31. Following a request for a review, HMRC upheld their decision on 21 April 2017.

32. The Appellant had in the meantime appealed to the tribunal on 13 March 2017.

Relevant statutory provisions

Taxes Management Act 1970

20 33. Section 8 - Personal return- provides as follows:

(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-

25 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.

30 (1A) The day referred to in subsection (1) above is-

(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]

35 (1AA) For the purposes of subsection (1) above-

(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

5 (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.]

10 (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.

15 (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.]

(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.

20 (1E) But subsection (1D) is subject to the following two exceptions.

(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

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

(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-

30 (a) shall prescribe what constitutes an electronic return, and

(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.

35 (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.

5 (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.

10 (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:

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

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

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

37. 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 the paragraph if (and only if)-

- 20 (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.

25 (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).

30 (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).

35 38. 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.

40 (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.

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

- 5 (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.
- 10 (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
 - 15 (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.

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

- 20 (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-
- 25 (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-
- 30 (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

41. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

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- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may-
- 40 (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-
- 45 (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

5 42. In his grounds of appeal to the Tribunal the Appellant says:

10 “...I was a registered alcoholic. I am happy for you to have access to my medical records from that time. I took a job while still in receipt of incapacity benefits for being alcoholic at that time. The tax office thought my incapacity benefit was a second income so sent me a bill for the underpayment of tax. At that time I did not understand that or why they put me on self-assessment. I was convicted of benefit fraud and ordered to pay the money back to the DWP. I pay this back at £30 a month and have been doing this for about 3 years now.

15 With regard to the self-assessment penalties for not sending the tax returns, I was recovering from alcohol addiction problems. As I had never been on any other tax than PAYE I was confused. I kept ringing HMRC asking what they wanted me to send in. I had no tax returns to send them. They kept giving me financial penalties for not submitting my returns but I didn't have any to send them. I was so confused but the letters kept coming with me owing more and more money. I was seeing a doctor then at Leeds addiction unit to help me with my problem. My wife and I had separated, I was in debt and to be honest after a time I just ignored the letters because I did not have the information they wanted nor the money to pay them.

20 After that I never heard anything for about 18 months, then it just started again. I'm not proud of my past. I did a bad thing with the fraud but thankfully my addiction is overcome now and I'm back with my family and we are paying debts from the past and trying to rebuild our lives.”

HMRC's Case

30 43. 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. Legislation has been changed and penalties are no longer linked to liability.

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

35 45. 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 self-assessment return.

40 46. 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).

47. 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.

48. HMRC informed the Appellant of the underpayment of tax on 9 May 2012 and again on 16 September 2012, by issuing him with a P800 Letter. The Appellant did not make any attempts to contact HMRC to clarify his position, nor did he make any attempts to pay the outstanding underpayment.

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

50. It is HMRC's contention that tax returns were sent to the Appellant on numerous occasions, that is on 20 November 2012, 29 November 2012, 30 August 2013 and 20 June 2014. HMRC submit that it is inherently unlikely that the Appellant never received the returns.

- There was no "undelivered mail" returned to HMRC.
- The Appellant telephoned HMRC on 14 March 2013, 30 August 2013 and 9 July 2014 to clarify why he had received the returns and why he had to fill them in.
- The Appellant actually submitted his 2009-10 return on 9 July 2014, thus showing that contrary to his own statements he was actually in possession of the returns.

51. The Appellant additionally contends that during the period for which tax returns were outstanding he has a reasonable excuse for his non-compliance, namely that he was an alcoholic.

52. Whilst HMRC empathises, it is noted that the Appellant managed to be employed and also perpetrated benefit fraud by claiming Incapacity Benefit when not entitled. It is clear therefore that the Appellant was able to manage other various financial aspects of his life.

53. HMRC submit that the Appellant does not have a reasonable excuse. He should have completed his tax returns even if they were nil returns.

54. The Appellant says he was found guilty of benefit fraud and is paying back the money to DWP and so should not be liable to any tax liability arising from these fraudulently obtained funds. It is not in dispute that the Appellant claimed these funds fraudulently and was receiving the benefit from them. The income the Appellant received was taxable under s 660 ITEPA 2003.

55. Irrespective of the fact that the Appellant is making restitution for his offence, he is not absolved of his obligation and liability to pay tax on taxable income.

56. The 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 his tax returns were filed by the legislative dates and payment made on time. He received numerous reminders and explanations as to why he had to file self-assessment tax returns.

57. 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.

58. 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.

59. The Notice to File the 2009-10 to 2011-12 self-assessment tax returns were issued to the Appellant on 20 November 2012. The penalty notice 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.

60. As he did not submit these by the due date of 27 February 2013, late filing penalty notifications and penalties of £100 for each of years 2010-11 and 2011-12 were issued on 12 March and 11 April 2013. The Appellant contacted HMRC on 14 March 2013 when it was explained to him why he had to file the returns. However, he did not file his 2009-10 return until 20 July 2014 and has still not filed the 2010-11 and 2011-12 returns.

Special Reduction

61. 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.

62. 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).

63. 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'.

5 64. 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

65. 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.

10 **Conclusion**

66. 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.

15 67. 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.

20 68. HMRC first sent a late filing penalty to the Appellant on or around 12 March 2013 for £100. This should have acted as a prompt to him that a return was due and had not been submitted. If he had any doubts about his obligation to file a return he could have raised these with HMRC who would have advised him accordingly. Numerous late filing notices were sent to the Appellant together with penalty notifications without any response. Returns were issued to the Appellant on no less than three or possibly four occasions and on each occasion when the Appellant telephoned to query why he had to complete the returns a full explanation was given to him.

30 69. The tribunal has some sympathy with the Appellant. He clearly thought that he did not need to file a return having never been self-employed. 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 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."

70. No reasonable excuse has been shown for the Appellant's failure to file his tax returns for 2009-10 to 2011-12 on time.

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

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

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

74. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

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RELEASE DATE: 9 APRIL 2018