



TC06457

Appeal number: TC/2015/01876

INCOME TAX – penalties for late filing of income tax return – appellant believed that return had already been filed – held that it had not been filed – appellant not informed that return was late at a meeting with HMRC to discuss his return for another period – whether reasonable excuse – held not – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN CONROY

Appellant

- and -

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

TRIBUNAL: JUDGE PHILIP GILLET

The Tribunal determined the appeal on 26 September 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal received on 12 February 2015 and HMRC's Statement of Case, which was acknowledged by the Tribunal on 31 March 2017.

DECISION

1. This was an appeal against late filing penalties totalling £1,300 imposed on the appellant under paras 3, 4 and 5 Sch 55 Finance Act 2009 for the late filing of an individual tax return for the year 2012-13.

2. This appeal was stood over behind the case of *Keith Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 761 which concerned the underlying legality of HMRC's processes for raising daily penalties charged under Sch 55 Finance Act 2009. The Court of Appeal determined that such penalties were legally charged and permission to appeal to the Supreme Court was refused on 21 December 2016, so the decision of the Court of Appeal is now final.

3. In this case however, the appellant is not challenging the underlying legality of HMRC's processes per se and I will not therefore set out the detail of the Court of Appeal's findings and decision in the case of *Donaldson*.

4. The appellant's grounds of appeal are set out in correspondence to HMRC and his Notice of Appeal and can be summarised as follows:

(a) Mr Conroy maintains that his return was filed on time and that it has been lost in HMRC's system. He states that he has always filed his tax returns on time because he is aware of the risk of incurring penalties which he has no means to pay.

(b) Mr Conroy is profoundly dyslexic.

(c) He was called into the HMRC office on Oxford Road, Bournemouth for an audit of another year and no reference was made to the lateness of a return for 2012-13. Had he been made aware of the non-filing of this return at that time he would have taken remedial steps earlier.

(d) When eventually he did telephone in order to resolve the matter, insufficient paperwork was sent to him so his second attempt at filing his return was thwarted.

(e) The penalty notices sent to him were headed "Late Return", which implied to him that his return had indeed been submitted but that it had been submitted late, not that it had not been submitted at all.

Facts

5. The facts of the case according to HMRC, which have not been challenged by the appellant, are set out in their Statement of Case as follows:

(a) The notice to file a tax return for the year 2012-13 was issued to the appellant on 6 April 2013.

(b) The filing date was 31 October 2013 for a non-electronic return or 31 January 2014 for an electronic return.

(c) The appellant's non-electronic return for the year was received by HMRC on 17 September 2014.

5 (d) As the return was not received by HMRC by the filing date HMRC issued a notice of penalty assessment on or around 18 February 2014 in the amount of £100.

10 (e) As the return had still not been received by HMRC three months after the penalty date HMRC issued a notice of daily penalty assessment on or around 30 September 2014 in the amount of £900, calculated at £10 per day for 90 days.

(f) As the return had still not been received by HMRC six months after the penalty date HMRC issued a notice of penalty assessment on or around 30 September 2014 in the amount of £300.

15 (g) HMRC also state that Mr Conroy's tax returns for the years 1999-2000, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05, 2008-09, 2009-10 and 2011-12 were also filed late.

Legal framework

6. No penalty will be charged in respect of the late filing of a tax return if the appellant is considered to have a reasonable excuse for the late filing.

20 7. The expression "reasonable excuse" is not defined in the legislation but para 23(2) Sch 55 Finance Act 2009 does specify two situations that are not to be regarded as a reasonable excuse:

(a) an insufficiency of funds, unless attributable to events outside the appellant's control, and

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

8. In addition para 23(2)(c) Sch 55 provides that:

30 (c) where the person had a reasonable excuse for the failure but the excuse has ceased, he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

35 9. The question of what "reasonable excuse" means has also been addressed in a number of cases and can be summarised as follows. 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.

10. Importantly, the test is whether or not the taxpayer's behaviour is reasonable in his particular circumstances, and his knowledge and understanding of tax issues. No higher standard, and no lower standard, than that.

Discussion

5 11. Mr Conroy clearly believes that his return was filed on time and that it has been lost within HMRC's systems. Contrary to HMRC's assertions, this does happen and may have happened in Mr Conroy's case. However in order to evaluate Mr Conroy's contentions I must look at the other facts available to me.

10 12. Mr Conroy has stated that he always files his returns on time because he is aware of the penalties and cannot afford to pay them. HMRC records on the other hand show that Mr Conroy's returns have been filed late in most of the years since 1999, sometimes they have been late by nearly a year. This casts considerable doubt on the accuracy of his statement.

15 13. HMRC have said in their statement of case that they would expect Mr Conroy to have proof of posting of the tax return. I have to judge this statement by what might be regarded as the reasonable actions of someone in Mr Conroy's position, and I have to say that I would not regard it as normal behaviour for Mr Conroy to have retained a proof of posting. In his correspondence, Mr Conroy has stated that he always used to send the return by recorded delivery, but since he had not encountered
20 any problems in the past he had stopped doing this. I regard this as reasonable behaviour on Mr Conroy's part.

25 14. However, where I am surprised by Mr Conroy's behaviour is that he did not apparently retain a copy of his return, either for his own records, or to check any HMRC assessments, if for no other reason. If he had done so then, once he had discovered that his return had not been received, he would have been able to file his return again with no need to await further papers from HMRC. This did not happen and this absence of a copy of his return indicates to me that perhaps Mr Conroy is mistaken in his belief, and that he did not in fact file a return as he thought. I therefore find, on the balance of probabilities, that Mr Conroy had not filed his return
30 as he believed.

35 15. Mr Conroy also maintains that HMRC penalty notices were misleading, in that they referred to "Late Returns" and not to the fact that HMRC had not received the return. He had not therefore thought that his return might not have been received. I can accept that a very literal reading of the heading of these notices could lead someone to this interpretation. However I would expect a reasonable person, having received a late filing penalty notice, to have checked with HMRC as to precisely when his return had in fact been received, if only to verify the amount of the penalty. Mr Conroy does not seem to have written to appeal the penalty until June 2014 and did not telephone until 22 July 2014, which was five months after he had received the
40 initial notice of penalty assessment. I do not regard this as reasonable on his part.

16. Mr Conroy has referred to a meeting at Bournemouth Tax Office to discuss an audit of a previous tax return and has stated that if he had been made aware at that meeting that his return for 2012-13 had not been received he would have taken action sooner. Unfortunately I cannot see any reason why HMRC should have informed him of this fact at that meeting. They do send out reminders for returns which have not been filed but there is no legal obligation on them to do this and certainly there is no legal obligation on them to tell taxpayers that their returns are late if they happen to have a meeting with them on another topic.

17. In addition it would appear that Mr Conroy is effectively saying that he took comfort from the fact that he was not informed of the late return at that meeting and that he somehow took this absence of a reminder as reassurance that his return had in fact been received. Unless the return for 2012-13 was specifically discussed at that meeting I cannot see how a reasonable taxpayer can treat the fact that late filing was not mentioned at a meeting as reassurance that his return had indeed been received.

18. This absence of any comment from HMRC at the meeting cannot therefore in my view be regarded as a reasonable excuse for the late filing of the return.

19. Finally I must consider the question of whether or not HMRC should or could have reduced the penalties because of the existence of special circumstances in accordance with para 16 Sch 55 FA 2009. My powers in respect of this provision are limited to a review of the reasonableness of HMRC's decision not to reduce the penalties and I can only interfere with their decision if I consider it flawed or so unreasonable that no properly directed officer of HMRC could have arrived at that decision.

20. Special circumstances are not defined in para 16 but para 16(2) states that the expression 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.

21. In my view special circumstances are circumstances which are extremely unusual or totally outside the normal spectrum of events. I can find no such circumstances in this case and I do not therefore consider that I can interfere with HMRC's decision on this issue.

Decision

22. For the above reasons therefore, I have decided that the appellant's appeal against the penalties charged under paras 3, 4 and 5 Sch 55 FA 2009 should be DISMISSED.

23. 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.

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**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 19 APRIL 2018

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