



TC06507

Appeal number: TC/2017/08147

INCOME TAX – penalty for failure to make returns-whether “special circumstances” justifying a reduction in penalties

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM MCCULLOCH

Appellant

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 23 May 2018 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 dated 8 November 2017 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 20 February 2018 and the Appellant’s Reply dated 8 March 2018.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the tax year 2015-16 on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 7 February 2017.
 - (2) “Daily” penalties totalling £360 under paragraph 4 of Schedule 55 imposed on 6 June 2017
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:
 - (1) He argues that there was a “reasonable excuse” for any failure to submit the return on time.
 - (2) He argues that, owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.

Findings of fact

4. Mr McCulloch was issued with notice to file his 2015-16 tax return on 6 April 2016. The deadline for submitting a paper return was 31 October 2016 and for an electronic return, 31 January 2017. Mr McCulloch submitted his return online on 5 June 2017.
5. Mr McCulloch had been in the self-assessment system but was informed by HMRC by a letter dated February 2015 that he would not need to complete a tax return after 2013-14. The letter stated that he might need to fill in returns in the future if his financial circumstances changed. The letter also advised that he make a careful note of his Unique Taxpayer Reference as “You’ll need it if you need to register for self-assessment again.”
6. In 2015-16 Mr McCulloch contacted HMRC to ask for a paper return, which he completed in order to claim for business expenses. This caused HMRC to reopen his self-assessment record and HMRC submit that this illustrates the fact that he was aware that he needed to notify HMRC of a change in financial circumstances. Mr McCulloch submits that that this was not a change in his financial circumstances and expenses were then included in his notice of coding so that there was no need to submit further returns for this purpose. However, HMRC had issued Mr McCulloch with a notice to file a return and that meant Mr McCulloch had to file one whether he thought he needed to or not. He did not contact HMRC to ask that the return be cancelled, he just assumed the 2015 letter meant he did not have to file a return.

7. On 18 January 2016 Mr McCulloch received a reminder about completing his tax return. HMRC say they have no record of any correspondence, but something caused Mr McCulloch to realise that he did need to submit a tax return after all.
8. He registered online on 18 January and was awaiting what he referred to as his pin number which may have been an activation code or password.
9. On 7 February 2017 (before anything had arrived from HMRC) he was rushed into Aberdeen Royal Infirmary with what was clearly a serious condition as he remained in hospital until 17 May 2017 and he continued to receive treatment as an outpatient.
10. Immediately on leaving hospital he began to attend to his tax affairs and between 17 May and 2 June, he received five different “passwords” for his account from HMRC.
11. HMRC’s records show that the Appellant contacted them on several occasions. He telephoned on 22 May 2017 to appeal against the late filing penalty and was informed that he must first submit his tax return. He telephoned again on 26 May to inform HMRC that he had registered online on 18 January but had then been admitted to hospital and had only just come out. He was (wrongly) advised to re-register as any activation code issued would have expired. Mr McCulloch appears to have telephoned again on the same day and his password was reset and issued. He again contacted HMRC on 5 June 2017 to say he was having online access problems. He was informed he should not have been told to re-register as he already had an activated online account and that he should ignore the several activation codes he had been sent and login using his password and ID. On the same day, 5 June, Mr McCulloch submitted his tax return.
12. HMRC have not challenged the assertion that Mr McCulloch’s illness prevented the submission of the return. I have had no specific evidence about Mr McCulloch’s illness, but I infer that it was serious, given the time he spent in hospital and the ongoing treatment, and I find it prevented him filing his tax return during the period he was in hospital. Given the computer issues, I also find that the Appellant submitted his return as soon as he could after his release from hospital.

Discussion

13. Relevant statutory provisions are included as an Appendix to this decision.
14. I have concluded that the tax return for the 2015-16 tax year was submitted on or around 6 June 2017. It should have been submitted by 31 January 2017. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.
15. Mr McCulloch’s reason for not starting the return process until 18 January 2017 is, essentially, that he did not think he had to do so because of the 15 February 2015 letter.

16. The Notice to File a tax return makes it clear that it is a legal requirement to submit the return if asked and that a return can be required even if there is no tax to pay. It gives details of where help can be found, online or by telephone. Mr McCulloch did not query whether he needed to file following receipt of the notice.
17. When he received a reminder, a few weeks before the deadline, he realised he did have to submit a return and began the process by registering online. It is unclear from the contacts with HMRC referred to above, and in particular the telephone call of 26 May 2017, whether Mr McCulloch already had a live account before 18 January (so he could have filed before the deadline) or whether the account had been activated following his registration on 18 January 2017. In either case, Mr McCulloch should have been alerted by the Notice to File that he needed to submit a tax return and should have contacted HMRC earlier, to query it, if he did not think he needed to. The fact that he only took action when reminded, and at that point it was too late to complete the whole process for online filing (assuming he did not already have a live account) does not amount to a reasonable excuse. He should have taken more timely action.
18. A serious illness which prevents a person from submitting their return is the archetypical “reasonable excuse”. In this case, the excuse was not present at the time of the filing deadline, but occurred later, preventing the Appellant from submitting his return before daily penalties began to be charged. The question is whether a supervening excuse which is capable of being a reasonable excuse falls within paragraph 23 of schedule 55 so as to enable the tribunal to quash the penalties.
19. This point was considered in the case of *D R Sudall v HMRC* [2017] UKFTT 0404 (TC), where Judge Richards decided that the reasonable excuse must exist at the time of the submission deadline. His reasoning was as follows:

“21. Paragraph 23 applies where there is a reasonable excuse for “a failure to make a return”. That raises a question of interpretation, namely whether Mr Sudall must establish a reasonable excuse for the initial failure to file by 31 October 2013, or whether Mr Sudall could argue that, even though there was no reasonable excuse for the original failure to file (so the £100 penalty is still due), he nevertheless has a

20 reasonable excuse for filing more than six months late so that the six-month penalty is not due.

22. I consider that the scheme of the legislation makes it clear that, for the defence of reasonable excuse to be available, there must in all cases be a reasonable excuse for the initial failure to file on time. My reasons are as follows:

25 (1) Paragraph 1(1) and 1(2) of Schedule 55 make it clear that all penalties imposed by paragraphs 2 to 13 of Schedule 55 are imposed for a failure to submit a return by the filing date. The relevant “failure”, therefore, that triggers both a £100 penalty and a six-month penalty is, specifically, a failure to file by the filing date.

30 (2) Paragraph 5 of Schedule 55 imposes the penalty where the “failure” (namely the failure to file on time) continues more than six months after the penalty date. Paragraph 5 penalties do not, therefore, penalise a new “failure” (to file within six months of the penalty date), but rather the original “failure” to file on time, where that continues for more than six months.

35 (3) Therefore, the “failure” set out in paragraph 23 (which has to be the subject of a “reasonable excuse”) must be a reasonable excuse for the original failure to file on time. That is emphasised by paragraph 23(2)(c) of Schedule 55 which provides for an excuse to be treated as continuing in certain circumstances. If Parliament had not wanted to impose a requirement that a “reasonable excuse” must excuse the initial failure to file, paragraph 23(2)(c) would not have been drafted in the terms it is. The implication of paragraph 23(2)(c) is that, where there is a continuing failure to file a return, in order for the defence of “reasonable excuse” to be available, the excuse must both exist on the filing date and continue (within the terms of paragraph 23(2)(c)).

(4) If Parliament had wished to deal with the situation where there is no original “reasonable excuse” for late submission, but subsequently a reasonable excuse starts, it would have needed to explain when a reasonable excuse is treated as starting. However, Parliament has not done so, instead focusing its attention in paragraph 23(2)(c) on when a reasonable excuse ceases”

20. A similar approach was adopted in the case of *Buivydas v HMRC* [2017] UKFTT 0557 (TC).
21. I agree that the legislation requires that the excuse is present at the time of the original deadline. Once there has been a failure to file on time, penalties accrue by reference to the period during which the failure continues, but there is no new failure (to which a new reasonable excuse might apply) at the points where daily or six month or twelve month penalties become due.
22. Accordingly, I find that Mr McCulloch did not have a reasonable excuse for the late filing of his return.
23. Paragraph 16 of Schedule 55 allows HMRC to reduce a penalty if there are “special circumstances”. Paragraph 22 of Schedule 55 allows the tribunal to substitute its own decision for that of HMRC and provides that the tribunal can rely on special circumstances to the extent that HMRC could but the tribunal can only do so if it considers that HMRC’s decision was “flawed” in the judicial review sense. That is, the tribunal must conclude that HMRC took into account irrelevant matters, failed to take account of relevant matters or made a decision that no reasonable officer of HMRC could have made.
24. In HMRC’s review letter of 12 October 2017, which is the decision under appeal, the Review Officer stated, under the heading “Special Reduction”:

“A penalty may be reduced if there are special circumstances. Special circumstances mean circumstances that are uncommon or exceptional. I have carefully considered all the information I hold but I do not think there are any special circumstances which allow me to reduce the penalty.

In reaching my decision I considered the following:

- No account has been taken of HMRC’s letter dated February 2015 advising 5 April 2014 was the last time you needed to complete a tax return. [This is taken from Mr McCulloch’s grounds of appeal.] HMRC advised you in 2016 that a tax return was needed.
 - On 18 January you went online and then waited for your password but this had not arrived by 7 February 2017. Between 17 May 2017 and 2 June 2017 you received 5 different passwords. [Again, taken from the grounds of appeal.]
 - You were in hospital from 7 February 2017 until 17 May 2017. [From the grounds of appeal.]”
25. I have seen many other such review letters. They are in standard form and the “consideration” of special circumstances is automatic and formulaic, setting out the grounds of appeal, more or less verbatim from the notice of appeal, and concluding that they do not amount to special circumstances justifying a reduction in the penalty (I have not yet seen a case where a special reduction was allowed). In the vast majority of cases, there are no circumstances which could possibly amount to special circumstances which, by definition, are something out of the ordinary and “exceptional”.
26. The review letter in this case followed the usual pattern stating merely that the writer had “carefully considered” the information and concluded there were no special circumstances. There was no attempt to give any reasons for coming to that conclusion.
27. I would agree that the first two bullet points plainly do not disclose any special circumstances.
28. A sudden and prolonged illness, necessitating a three month hospital stay and occurring shortly after the filing deadline seems to me to be, at least potentially, a special circumstance which deserves further consideration. I am not satisfied that the Reviewing Officer gave proper consideration to this. Although she states that she considered the bald fact that Mr McCulloch was in hospital from February to May, she does not seem to have properly taken into account that immediately before his illness he was in the process of filing his return and that the illness prevented him from doing so before the daily penalties began to accrue. Nor did she take into account that within days of his release from hospital he addressed his tax affairs and pursued them diligently. He telephoned HMRC several times to resolve the problems he had accessing his account and was initially given the wrong advice which cause further problems. As soon as he received the right advice, on 5 June 2017, he immediately filed the return.
29. This demonstrates that Mr McCulloch was a conscientious taxpayer who, once he realised he had obligations, took all reasonable steps to meet them. I am satisfied that if Mr McCulloch had not been taken ill he would have chased up

the access code/password with HMRC and would have filed his return before daily penalties became due.

30. In my view, the Reviewing Officer did not fully consider all the relevant circumstances and came to a conclusion which was unreasonable in the judicial review sense. Her decision was accordingly “flawed” and I am able to rely on paragraph 16 of Schedule 55 to the same extent as HMRC.
31. Having taken into account all the circumstances including, in particular, those set out above I conclude that there are special circumstances which make it right to reduce the penalties.

Conclusion

32. I have concluded that Mr McCulloch filed his tax return for the tax year 2015-16 late and that he did not have a reasonable excuse for the late filing.
33. I therefore affirm HMRC’s decision to impose a late filing penalty of £100 under paragraph 3 of Schedule 55 and dismiss the appeal to that extent.
34. However, I have concluded that there were special circumstances which merit a reduction in the daily penalties. Accordingly, I cancel HMRC’s decision in relation to the daily penalties under paragraph 4 of Schedule 55 and substitute my decision that the daily penalties are to be reduced to nil. I allow the appeal to this extent.

Application for permission to appeal

35. 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.

**MARILYN MCKEEVER
TRIBUNAL JUDGE**

RELEASE DATE: 25 MAY 2018

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

(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.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

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

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

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

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

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

- (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

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

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

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

- (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

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

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

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

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

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
 - (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
- 6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

16—

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
 - (2) In sub-paragraph (1) “special circumstances” does not include—
 - (a) ability to pay, or
 - (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.
- 7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

22—

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