



TC06509

Appeal number: TC/2014/04593

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file on time self-assessment returns for two years - Appellant appointed an agent but had not notified agent or HMRC of his change of address - agent unable to file online - Appellant unaware of penalties initially - request for review out of time - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TAMAS HERCZKU

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SHAMEEM AKHTAR**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 30
November 2017**

The Appellant in person

Gareth McKinley, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Tamas Herczku ('the Appellant') against penalties totalling £2,900 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, on time.

Background

2. 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.

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

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 year 2010-11 and £100, £900 and £300 for the year 2011-12.

30 *Reasonable excuse*

6. 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.

7. 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.

5 8. 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).

10 9. 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
15 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. The Appellant has been within the SA regime since the 2009-10 tax year. In 2009-10 his SA return was filed on time.

20 11. The Appellant's 2010-11 return was issued on 21 April 2011 and so was due to be returned in paper form by 31 October 2011 or on line by 31 January 2012.

12. The Appellant failed to file his return by 31 January 2012.

13. He was issued with a £100 late filing notice in respect of the late 2010-11 return on 4 March 2012. This would have also advised the Appellant that if his return was
25 more than three months late HMRC would charge him a penalty of £10 for each day it remained outstanding for a maximum of 90 days.

14. The 2011-12 return was issued on 6 April 2012 and so was due to be returned in paper form by 31 October 2012 or on line by 31 January 2013.

15. On 29 January 2013, as the Appellant's 2010-11 return had not been filed after a
30 period of 3 months beginning with the penalty date, daily penalties of £10 per day were imposed under Paragraph 4 of Schedule 55 and a Notice of Penalties totalling £900 was issued to the Appellant. A 6 months penalty of £300 was imposed under Paragraph 5 of Schedule 55 on the same date.

16. As the Appellant's 2010-11 return had not been filed after a period of 12
35 months beginning with the penalty date a fixed penalty £300 was imposed under Paragraph 6 of Schedule 55 on 28 March 2013.

17. The Appellant instructed his agent, M Seitler & Co Chartered Accountants, to complete and file his returns for 2010-11 and 2011-12 tax years.

18. The Appellant's agent attempted to file the returns on line on 17 April 2013 but they were faced with an error message "Error 1046".
19. On 1 May 2013, the agent posted paper returns to HMRC.
20. As the Appellant's 2011-12 return had not been filed after a period of 30 days beginning with the penalty date, a fixed penalty of £100 was imposed under Paragraph 3 of Schedule 55 on 4 June 2013.
21. At this stage a total of £1,600 penalties had been imposed for the late filing of the Appellant's 2010-11 return and a £100 penalty in respect of the Appellant's 2011-12 return.
22. As the returns had not been not signed, they were returned to the agent on 27 June 2013.
23. A 60 day daily penalty reminder was issued to the Appellant on 2 July 2013.
24. On 14 August 2013, as the Appellant's 2011-12 return had not been filed after a period of 3 months beginning with the penalty date, daily penalties of £10 per day were imposed and a Notice of Penalties totalling £900 was issued to the Appellant. A six month late filing penalty of £300 was issued on the same date.
25. The Appellant contacted HMRC on 26 September 2013 to discuss the status of his account and was advised that his returns for 2010-11 and 2011-12 tax years were still outstanding.
26. On 7 October 2013 the Appellant's agent filed the Appellant's outstanding returns and submitted an appeal challenging the late filing penalties. This was returned to the Appellant as it was submitted by an unauthorised agent.
27. On 9 January 2014 the Appellant appealed the penalties saying that:
- On 10 November 2012 he suffered a broken ankle in a road traffic accident and was unable to move for two months, returning to work on 7 January 2013. He was in pain and only able to walk with crutches and also dizzy due to taking painkillers.
 - He was not aware that his agent had not resubmitted the appeal against the penalties after the initial rejection of the appeal in October 2013.
28. On 29 January 2014, HMRC responded to the Appellant's appeal advising that they did not consider that he had a reasonable excuse for the late filing of his 2010-11 and 2011-12 SA Tax Returns, but in any event the appeal was outside the 30 day time limit.
29. On 12 February 2014, the Appellant's agent submitted a further letter of appeal, setting out the difficulties that they had faced in submitting the Appellant's returns for 2010-11 and 2011-12 tax years.

5 30. HMRC treated this as a request for a review and responded on 21 March 2014 referring the Appellant to their letter of 29 January 2014, once again pointing out that the appeal had been made outside of the 30 day time limit and advising that if he wished to continue his appeal against the penalties he could make an appeal to the Tribunal.

31. On 2 April 2014, the Appellant's agent wrote again to HMRC arguing that HMRC did not appear to have taken into account the technical issues faced by his agent in filing his returns.

10 32. On 9 April 2014, HMRC wrote to the Appellant to say that a decision can only be reviewed once, and that any appeal would have to be submitted to the Tribunal Service.

33. The Appellant's agent submitted a Notice of Appeal to the Tribunal on 15 August 2014.

15 34. Daily penalties have been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "Donaldson" case). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties.

20 35. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed on 14 October 2014 that the appeal should be stood over until the *Donaldson* appeal was determined.

36. The Court of Appeal decision in *Donaldson* was that HMRC had satisfied the requirements of Paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment the omission did not affect the validity of the notice.

25 *Relevant statutory provisions*

Taxes Management Act 1970

37. Section 8 - Personal return- provides as follows:

30 (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-

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

35 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-

(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]

5 (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

10 (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.]

15 (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.

20 (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.

25 (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

30 (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-

35 (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.

5 (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.

10 (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.

15 (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:

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

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

20 40. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

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

25 (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

30 (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).

35 (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).

42. 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.

(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.

43. 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.

(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.

44. 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.

45. 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

46. In his request for a review on 12 February 2014, the Appellant's agent says:

15 "Our client rather belatedly advised us to submit his Tax Returns for the said years, but
not until after the deadline had passed in January 2013. We attempted to submit the
Returns online on 17 April 2013, but they were rejected by your online authentication
service. No details were given as to why you were unable to accept the Tax Returns
online. We enclose a copy of the rejection notice dated 17 April 2013 and it should be
20 borne in mind that had your online service been able to accept those Returns there
would be no question of penalties at that stage as it was prior to the 1st May when the
daily penalties commenced.

In the absence of being able to submit the Returns online, we then posted them to you
on 1 May 2013 and enclosed our client's online authorisation that he had approved the
25 Tax Returns, as the copy Tax Returns submitted were printouts of what was submitted
online and therefore contained no signature, as we were keen to submit them without
any further delay. We did not hear anything from you and so assumed everything was
in order. As you did not indicate that you were not accepting the Tax Returns in that
manner, we should be grateful if you would consider how we were to know that the
30 clock was ticking in terms of penalties.

The lack of communication was exacerbated by our client being a non-native English
speaker and therefore did not realize that he had not communicated his new address to
either yourselves or us.

You will see from our client's records that as soon as it became clear that tax was
35 owing this was paid and the penalty itself has also been paid, such is our client's co-
operation with HMRC."

47. At the hearing, the Appellant said that he had changed address but had omitted
to notify HMRC and his agent. He had therefore been unaware of the penalties and
penalty warning letters. He also thought that he had given his agent authority to act on
40 his behalf which turned out not to be the case, causing further delays.

HMRC's Case

48. A late filing penalty is raised solely because a SA return is filed late in
accordance with Schedule 55 FA 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.

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

5 50. 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 SA return.

10 51. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

52. ‘Reasonable excuse’ was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

15 “It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a
20 reasonable thing to do?” [Page 142 3rd line et seq.].

53. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same
25 circumstances and decide if the actions of that person met that standard.

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

55. The Appellant’s agent has stated that their problems in accessing HMRC’s online filing service prevented them from submitting the Appellant’s return on time.

30 56. HMRC submit that the error message “Error No 1046” would have been shown if the agent had entered their log on details incorrectly. Had the agent carried out a Google search for the error they would have found the cause for the error as demonstrated by screen prints taken from results of a Google search conducted using the search term “Authentication Failure. The supplied user credentials failed validation for the requested service.”

35 57. Alternatively the agent could have contacted HMRC in order to discover the reason for the error message.

58. Even had the agent successfully filed his return for the 2010-11 tax year as attempted on 17 April 2013, it would have already been more than 12 months late and so all penalties for that tax year would have already been due.

59. The Appellant has not provided a reasonable excuse for his failure to file his individual tax returns for the years 2010-11 and 2011-12 on time and that the penalties have been correctly charged in accordance with the legislation.

60. 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.

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'.

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.

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.

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

5 68. HMRC first sent a late filing penalty to the Appellant on or around 4 March 2012 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.

10 69. The £100 penalty notice would have also advised the Appellant that if his return was more than three months late HMRC would begin charging him a penalty of £10 for each day it remained outstanding for a maximum of 90 days.

70. In the event, HMRC did not issue the 90 day penalty notice nor the six-month late filing penalty until 29 January 2013. The 12 month late filing penalty followed shortly after that on 19 February 2013.

15 71. In the meantime however the Appellant would have received a notice to file his SA return for 2011-12, on or around 6 April 2012.

72. The Appellant did not appoint his agent until sometime after 31 January 2013 by which date his 2010-11 return was already 12 months late.

20 73. The Appellant had received the £100 late filing penalty in respect of the 2011-12 return on or around 12 February 2013, which again would have notified the Appellant that daily penalties of £10 per day would be imposed if his return was 3 months late.

74. Shortly after this the Appellant's agent attempted to file the Appellant's returns, without success. Delays continued until October 2013 when eventually the returns were filed.

25 75. It is clear that no reasonable excuse has been shown for the Appellant's failure to file his tax returns for 2010-11 to 2011-12 on time. Part of the delay was entirely his, and part it appears was the Appellant's agent. However the Appellant must bear responsibility for his agent's delay. Reliance on another person to do anything, unless the person took reasonable care to avoid the failure, is not a reasonable excuse. The
30 Appellant would have been aware that his agent had not filed his returns when he received notification of the £900 daily penalty notice for his late 2011-12 return in mid August 2013 but his returns were not filed until 7 October 2013.

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

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

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

79. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 25 MAY 2018

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