



**TC06533**

**Appeal number: TC/2017/06049**

*INCOME TAX – penalty for failure to make returns – confusion and poor health – no details or evidence – no reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**COLIN SMITH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 23 March 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 dated 26 June 2017 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 18 November 2017.**

## DECISION

1. The appellant (Mr Smith) 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 2011-12 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 12 February 2013
  - (2) “Daily” penalties totalling £850 under paragraph 4 of Schedule 55 imposed on 14 August 2013
3. The appellant’s representative set out the following grounds for appealing against the penalties:
  - (1) Mr Smith is a confused, elderly gentleman in poor health;
  - (2) He attempted to file his return online and was of the opinion that he had done so successfully, “but clearly hadn’t”;
  - (3) He has retired and has limited funds
4. Mr Smith’s representative submitted that it would be fair for the penalties to be reduced to £0.
5. HMRC contends that no evidence of Mr Smith’s state of health has been provided to HMRC at any time. If the illness was long-lasting, a taxpayer would be expected to make alternative arrangements for his returns to be submitted on time. Mr Smith has been self-employed since 1 March 2000 and so is aware of his obligations under self-assessment, particularly as he has a poor compliance record in that time and has previously had penalties imposed for late filing of returns.
6. HMRC also contends that there is no evidence of any online activity for Mr Smith between 6 April 2012 and 31 January 2013.
7. Further, HMRC contend that reminders, notices and penalties in relation to the late return were sent to Mr Smith in February, March and June 2013 but the return was not received until 24 July 2013. Mr Smith therefore took more than 5 months to file his return from the time at which it would have been clear to him that the return had not been filed.
8. HMRC contend that inability to pay penalties is not a reasonable excuse for late submission of the return.
9. Finally, HMRC contended that special circumstances were considered but decided that no such circumstances existed.

### **Findings of fact**

10. Mr Smith's electronic return for the 2011-12 year should have been filed on or before 31 January 2013. It is not in dispute that it was received by HMRC on 24 July 2013.

5 11. No detail or evidence was provided by the appellant or his representative as to the appellant's state of physical and mental health. HMRC stated in their review letter of 9 June 2017 that they would consider such evidence if provided, but no evidence was provided.

10 12. No details were provided by the appellant or his representative as when the appellant had tried to file his electronic return.

13. HMRC considered the following statements by the appellant to determine whether there were special circumstances meriting a reduction in the penalties:

(1) that he is a confused, elderly gentleman in poor health;

15 (2) that he attempted to file his return online and was of the opinion that he had done so successfully;

(3) that he is retired and has limited funds.

### **Discussion**

14. Relevant statutory provisions are included as an Appendix to this decision.

20 15. It is agreed have concluded that the tax return for the 2011-12 tax year was submitted on or around 24 July 2013. It should have been submitted by 31 January 2013. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

#### *Reasonable excuse*

25 16. The first contention put forward for the appellant is that Mr Smith is elderly, confused and in poor health. However, no evidence as to the health problems has been provided to support this statement although HMRC offered to consider such evidence in their review letter. Without such evidence I cannot agree that this contention can be a reasonable excuse as there is simply no information on which to base such as decision.

30 17. The second contention is that Mr Smith attempted to file his tax return online and believed he had done so successfully. Again, no evidence of attempts or detail as to when the attempt was made has been provided. HMRC have stated that they have no record of any online activity in respect of Mr Smith in the relevant period. In the absence of any evidence, such as a copy acknowledgement of successful submission  
35 from HMRC, this belief cannot amount to a reasonable excuse.

18. Further, even if Mr Smith had believed that he had successfully filed his tax return online, it will have been clear to him from the penalty for late filing issued on 12 February 2013 that the return had not been successfully filed. Even if the belief

amounted to a reasonable excuse, such reasonable excuse must exist throughout the entire period. Where the excuse has ceased, the taxpayer is treated as continuing to have the excuse if “the failure is remedied without unreasonable delay after the excuse has ceased”.

5 19. In this case, the return was not filed until 24 July 2013, more than five months after Mr Smith was notified that the return had not been filed. Even if the belief had been capable of being a reasonable excuse, there was a considerable delay between the reasonable excuse ceasing and the return being filed.

10 20. Finally, Mr Smith’s inability to pay the penalties cannot amount to a reasonable excuse for late filing of the return as a reasonable excuse must clearly be causative of the delay: an inability to pay late-filing penalties cannot be the cause of a delay in filing a return.

#### *Special circumstances*

15 21. Mr Smith’s representative submitted that it would be fair in the circumstances for the penalties to be reduced to £0. I have found that there was no reasonable excuse that would eliminate the penalty and so it would only be if special circumstances existed that the penalty could be reduced.

22. HMRC considered the circumstances of the case and concluded that there were no special circumstances.

20 23. To be “special circumstances”, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves, and must be something out of the ordinary, something uncommon or exceptional, abnormal or unusual, and normally something external to the person doing the action in question, in contrast to  
25 something within his control.

24. Looking at the circumstances in this case:

(1) No evidence has been provided as to Mr Smith’s state of health so it is not possible to conclude that it amounts to a special circumstance;

30 (2) Mr Smith’s belief that he had filed the return successfully cannot be special circumstances as, again, there is no evidence provided which would support the contention;

(3) Mr Smith’s financial position is not, unfortunately, uncommon or exceptional.

35 25. I therefore agree with HMRC’s conclusion that there are no special circumstances in this case which would merit the reduction of the penalties.

#### **Conclusion**

26. As there is no reasonable excuse for the late filing of the return, and no special circumstances apply to reduce the penalty, the appeal is dismissed and the penalties confirmed.

**Application for permission to appeal**

27. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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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**ANNE FAIRPO  
TRIBUNAL JUDGE**

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**RELEASE DATE: 11/06/2018**

## 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.

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

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

10 (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.

15 (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

20 (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—

25 (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

30 (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—

35 (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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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:

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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—

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(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—

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(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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.