



TC06580

Appeal number: TC/2013/04226

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment returns on time - Appellant attempted to set up online account via Government Gateway but asserts he did not receive activation code - Appellant also asserts he did not receive paper return - defaults occurring over a period of two years - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOHN OLD

Appellant

- and -

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

**TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: DEREK SPELLER**

**Sitting in public at Tax Appeals Tribunal, Taylor House, Rosebery Avenue
London on 23 January 2018**

The Appellant did not attend and was not represented

Ms Olivia Donovan, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr John Old ('the Appellant') against penalties totalling
5 £2,900 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 of
Schedule 55 Finance Act ('FA') 2009, for his failure to file self-assessment tax returns
on time, for the tax years ending 5 April 2011 and 5 April 2012.

2. 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
10 that it was in the interests of justice to proceed.

3. The appeal was dismissed. The Tribunal's findings of fact and reasons for its
decision are set out below.

Background

4. The Appellant has been within the Self-Assessment ('SA') regime since the
15 1996-97 tax year. His SA record shows that he is a Furniture Restorer and French
Polisher and a director of 'Old Times Limited'.

5. The Appellant had filed his electronic returns for 2008-09 and 2009-10 on time,
through his agent.

6. The Appellant's 2010-11 SA return was issued on 6 April 2011. If filed in paper
20 form, the return was due by 31 October in that tax year. If filed electronically, the
return was due no later than 31 January in the year following.

7. The Appellant's 2011-12 return was issued on 6 April 2012. If filed in paper
form, the return was due by 31 October in that tax year. If filed electronically, the
return was due no later than 31 January in the year following.

8. The Appellant failed to file returns on time for each of the two years under
25 appeal.

9. A late filing penalty is chargeable where a taxpayer is late in filing their
Individual Tax return. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA
2009 and is the date after the filing date.

10. The penalties for late filing of a return can be summarised as follows:
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- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 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
35 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.

11. In summary, 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 under (i) (ii) and (iii) above for the year 2011-12.

12. The Appellant was issued with a £100 late filing notice on 21 March 2012, in respect of the late 2010-11 return. This would have also advised the Appellant that if the delay continued, and 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.

13. The Appellant says that he then applied to set up his Government Gateway On-line account on 24 April 2012 in order to file his 2010-11 return, but never received an activation code.

14. As the Appellant's 2010-11 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 on 7 August 2012 and a notice of penalties totalling £900 was issued to the Appellant. A 6 month late filing penalty of £300 was also imposed on the same date.

15. On 21 August 2012 the Appellant telephoned HMRC to say that he was a director of Old Times Limited a furniture restoration company and a person in his company who normally dealt with his tax returns had died in April 2012. He had tried to register on-line but had not received an activation code. He said that he would be appealing. He was informed that any appeal had to be made within 30 days of the penalty notice and that his return must be filed before an appeal could be considered.

16. On 23 September 2012, the Appellant wrote to HMRC appeal the penalties that had been issued and explained the difficulties he had encountered in setting up his on-line Gateway account. He said that it had been impossible for him to submit his return on-line. He asked for a new activation code to be sent to him and in the meantime for the penalties to be waived.

17. On 21 November 2012, having not received a response, the Appellant wrote to HMRC again request an activation code, adding that the penalties imposed had “spiralled to unaffordable levels and this in itself is very concerning and worrying”.

18. On 10 December 2012 HMRC replied saying that they would treat his request that the penalties be waived as an appeal, but could not consider an appeal until his 2010-11 return had been filed. HMRC asked that the return be filed no later than 18 January 2013 and in the meantime would postpone collection of the penalties imposed. HMRC also enclosed a paper return for 2010-11 for completion, and said

that if the Appellant would rather submit his return online he could ring their helpline telephone number 0845 605 5999.

19. On 15 February 2013, as the Appellant had still not filed his 2010-11 return, HMRC wrote to him saying that having considered the reasons he had given for not filing his return, he had not shown a reasonable excuse for the failure. It was explained that he could ask for a review of the decision on appeal to H M Courts and Tribunals Service, but that he must do so within 30 days of the date of HMRC's letter.

20. As the Appellant's 2010-11 return had not been filed after a period of 12 months beginning with the penalty date, a fixed penalty of £300 was imposed on 19 February 2013.

21. 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 on 12 February 2013.

22. On 4 March 2013 the Appellant wrote to HMRC requesting a review and saying that he had still not received the ID and activation codes in order to file his returns. He added that he had been advised by his accountant that as his income for the year 2010-11 was less than £7,000 he was "not duty bound to file a tax return anyway". He asked for the ID and activation codes to be sent to him and for the penalties that had been imposed to be waived.

23. On 24 April 2013, HMRC issued their review conclusion, upholding the previous decision. The Appellant was advised that as he was a self-employed director of his company he was required to file a tax return regardless of the amount of his income. He was further advised that if he did not accept HMRC's conclusion, he could appeal to an independent Tribunal but that he must do so within 30 days of HMRC's letter.

24. The Appellant's Notice of Appeal to the Tribunal dated 2 June 2013 was received by the Tribunal out of time on 19 June 2013.

25. A 60 day daily penalty reminder to file his 2011/12 return was issued to the Appellant in July 2013.

26. 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 on 14 August 2013 a notice of penalties totalling £900 was issued to the Appellant. A 6 month late filing penalty of £300 was issued on the same date.

27. The Appellant's outstanding returns were finally received by HMRC on 23 January 2014 with his 2012-13 return.

28. Daily penalties had 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 and at the date of the Appellant's Notice of Appeal, *Donaldson* was due to be heard by the Upper Tribunal.

29. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed on 17 September 2013 that the appeal should be stood over until the *Donaldson* appeal was determined.

30. The Upper Tribunal's decision was further appealed to the Court of Appeal. The Court's decision was that HMRC had satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission in the notice of assessment of the correct period for which daily penalties had been assessed, the omission did not affect the validity of the notice.

31. On 19 December 2017, the Appellant was advised that the Court of Appeal's decision in the *Donaldson* case had been released and that accordingly the Appellant's case was to be listed. A notice of hearing at 10.30am, Taylor House Rosebery Avenue, London was issued to the Appellant on 15 January 2018.

15 *Relevant statutory provisions*

Taxes Management Act 1970

32. 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-

- 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.

(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]

(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

(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.]

5 (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.

10 (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-

15 (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.

(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-

20 (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

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

25 (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-

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

(b) may make different provision for different cases or circumstances.

30 (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.

(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.

35 (4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(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).

5 (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.

(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:

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

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

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

15 36. 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).

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

35 (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.

38. 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.
- (2) For the purposes of sub-paragraph (1)-
- 10 (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.

15 39. 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.
- 20 (2) In sub-paragraph (1) "special circumstances" does not include-
- (a) ability to pay, or
- 25 (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.

30 40. 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:

- 35 (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
- 40 (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
- 45 (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

41. The Appellant's grounds of appeal are set out in his Notice of Appeal, which reiterate what he had said in correspondence to HMRC.

5 HMRC's Case

42. HMRC accepts that the onus rests with it to demonstrate that the 2010-11 and 2011-12 tax returns were issued to the Appellant and that the Appellant had failed to submit the returns on time.

10 43. Individual tax returns for the years 2010-11 and 2011-12 were correctly issued to the Appellant and as such he was legally bound to complete and file the returns by the legislative deadline for each year.

44. The evidential burden then shifts to the Appellant to show that he has a reasonable excuse for any such failure and that that reasonable excuse lasted for the entire period of the failure.

15 *Reasonable excuse*

45. 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.

20 46. 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.

25 47. 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).\

30 48. Reasonable excuse was considered in the case *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by the Tribunal Chairman Judge Medd:

35 "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 reasonable thing to do?" [Page 128 3rd line et seq.].

49. A reasonable excuse has 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 circumstances and
5 decide if the actions of that person met that standard. If there is a reasonable excuse it must exist throughout the failure period.

50. The Appellant's return for 2010-11 was submitted two years late and his return for 2011-12 was submitted one year late. Although the Appellant says that he did not receive an activation code to file his return on-line, he did not make any efforts to
10 resolve this by either telephoning HMRC's helpline or appointing an agent or accountant to assist him.

51. HMRC contend that the Appellant has not provided a reasonable excuse for his failure to file his individual tax returns for the years under appeal and that the penalties have been correctly charged in accordance with the legislation.

15 *Special Reduction*

52. 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
20 another.

53. "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
25 apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

54. 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
30 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".

55. 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
35 penalties.

56. 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

57. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. Whether there was a reasonable excuse, which lasted for the entire period of default, is a matter to be considered in the light of all the circumstances of the particular case.
- 5 58. 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.
59. In this matter, SA returns for two years were filed late. The 2010-11 return was two years late and the 2011-12 was one year late.
- 10 60. HMRC first sent a late filing penalty to the Appellant in respect of his late 2010-11 return on 21 March 2012 for £100. 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.
- 15 61. This should have acted as a prompt to him that a return was due and had not been submitted. If he had any difficulties filing his return he could have raised these with HMRC who would have advised him accordingly.
62. The Appellant did not contact HMRC until 21 August 2012, almost eight months after his 2010-11 return should have been filed. This was shortly after he had
20 received two further penalties of £300 and £900. He was provided with HMRC's helpline telephone number.
63. The Appellant then wrote to HMRC on 23 September 2012 and 21 November 2012, saying that he had not received the activation code he needed, but there is no
25 indication that he utilised the help that would have been available from HMRC's on-line filing helpline, or took any other steps to resolve matters by for example enlisting the assistance of an accountant or agent.
64. HMRC wrote to the Appellant again on 10 December 2012 reminding him that his return was still outstanding. He was provided with a paper return for 2010-11 for completion.
- 30 65. A late filing £100 penalty was imposed in respect of the Appellant's late 2011-12 return on 12 February 2013, followed shortly afterwards by a further reminder from HMRC on 15 February 2013, reminding him that he had to file his returns before any appeal could be considered. The 12 month late filing penalty followed on 19 February 2013.
- 35 66. In early March 2013 it appears that the Appellant had instructed his accountant, Garners, who misinformed him that because his income was below £7,000 he was not duty bound to file a return.
67. In the meantime the Appellant would have received a notice to file his SA return for 2011-12, on or around 6 April 2013.

68. The Appellant was therefore aware that his returns were overdue and that penalties had been issued. He was also aware that penalties would continue to be imposed until his returns were filed. The Appellant did not file his 2010-11 and 2011-12 returns until February 2014.

5 69. In his Notice of Appeal the Appellant maintains that he attempted to file his tax return on-line in late April 2012, and enclosed copies, together with copy acceptance emails following Gateway registration, advising that he would be sent an activation code, which he maintains he has never received, despite enquiries and requests. There is no reason to doubt what the Appellant says, although he also says that he did not receive the duplicate paper return which HMRC say they sent to him in December 10 2012. He received all of HMRC's other correspondence.

70. Clearly the Appellant should have enlisted the assistance of his accountant or spoken to HMRC's helpline soon after he did not receive the activation code. He should have also telephoned HMRC when he did not receive the paper return in 15 December 2012, so that another one could be sent to him.

71. The Appellant accepts that he was late filing his 2010-11 return, and a £100 late filing penalty was accordingly due, but following that, whatever reasonable excuse the Appellant initially had for the delay in filing his return, it did not continue throughout the entire period of default. The delays continued throughout 2012 and 20 2013 and his 2011-12 return was not filed until February 2014, a year after he had consulted his accountants.

72. The Appellant has not shown a reasonable excuse and the late filing penalties have therefore been charged in accordance with legislation.

73. The Tribunal also concurs with HMRC's conclusions and finds that there are no special circumstances which would allow the penalties to be reduced under the Special Reduction regulations. 25

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

75. 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 30

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: 5 JULY 2018

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