



TC06658

Appeal number: TC/2016/02883

*INCOME TAX – penalties for late filing of tax returns – evidence of fact
that document sent to Appellant by HMRC and of date of receipt of return*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PATRICIA WORTHINGTON

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The Tribunal determined the appeal on 15 February 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 received by the Tribunal on 25 May 2016 (with enclosures), HMRC's Statement of Case (with enclosures) dated 25 August 2016, and the other papers in the case.

DECISION

Late application for full reasons for decision

5 1. The Tribunal originally gave summary reasons for decision in this appeal which
were released to the parties on 31 March 2015. An out of time application was
subsequently made by the Appellant for full reasons for the decision. HMRC
indicated that they had no objection to extending the time limit for the making of the
request. The Tribunal is satisfied that it is appropriate in all the circumstance to grant
10 the extension, and full reasons are now provided.

Permission to bring a late appeal

2. The Appellant applies for permission to bring a late appeal. HMRC have not
addressed this application, but have addressed in detail the substance of the appeal.
To the extent required, the Tribunal grants permission for a late appeal.

The decisions under appeal

15 3. The Appellant appeals against:

(1) a £100 late filing penalty for the late filing of her 2011-12 self-assessment
tax return; and

(2) penalties totalling £1,300 (late filing penalty, daily penalties and 6 month
20 penalty) for the late filing of her 2012-13 self-assessment tax return.

The positions of the parties

4. The HMRC statement of case sets out background facts concerning events in
2008-2013, which are said to explain why HMRC opened a self-assessment tax record
for the Appellant and issued the two tax returns to which this appeal relates. The
25 Appellant did not file a reply to dispute any of these facts. Nevertheless, as the
Appellant has not disputed that she was required to submit the two tax returns, these
background facts are not directly relevant to this appeal.

5. In the case of the 2011-12 return, HMRC contend as follows. A tax return was
issued to the Appellant on 7 July 2014. The deadline for filing the return was 14
30 October 2014, for either an electronic or a non-electronic return. A non-electronic
return was received by HMRC on 18 November 2014. HMRC have no record of
having received any 2011-12 return from the Appellant any earlier than this.

6. In the case of the 2012-13 return, HMRC contend as follows. A tax return was
issued to the Appellant on 7 July 2014. The deadline for filing the return was 14
35 October 2014, for either an electronic or a non-electronic return. A return was
received by HMRC on 3 September 2015 but was unsigned. The return was therefore
sent back to the Appellant with an employment supplementary page on 18 January
2016. HMRC then received a completed non-electronic return on 18 February 2016.

Because of the delay on the part of HMRC between 3 September 2015 and 18 January 2016 in sending the incomplete return back to the Appellant, HMRC cancelled the 12 month late filing penalty for 2012-13.

5 7. The Appellant's case, as the Tribunal understands it from her communications to HMRC dated 29 January 2016, 8 March 2016, and 14 March 2016, and from her grounds of appeal, is that she sent completed returns for both years to HMRC prior to receiving the penalty charges; and that on receiving the penalty charges she contacted HMRC about this and HMRC sent the returns again.

10 8. However, it is possible that the Appellant's grounds of appeal to the Tribunal are contending instead, in relation to the 2011-12 return, that she never received the tax return from HMRC at all prior to receiving the penalty notice (her grounds of appeal state that "I explained to [HMRC] that I did not receive a self-assessment so rang them up and they sent me another one which I filled in and sent back").

15 9. HMRC submit that they have no record of the Appellant otherwise having submitted any return to HMRC prior to 18 November 2014 and 18 February 2016. The 25 April 2016 HMRC review letter in respect of 2011-12 notes that the Appellant does not specify the date on which she claims to have sent the earlier returns, and that she has not provided any evidence of an attempt to submit by the due date.

20 10. The Appellant's grounds of appeal also state that she is struggling financially, and therefore cannot afford the penalties. She says that for this reason she would have returned any forms to HMRC promptly because she had an incentive to do so (namely to avoid the penalties).

The applicable legislation

11. Section 8(1) of the Taxes Management Act 1970 relevantly provides:

25 (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—

30 (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice ...

12. Paragraph 1(1) of Schedule 55 to the Finance Act 2009 provides:

35 (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

13. Paragraph 2 of Schedule 55 to the Finance Act 2009, read together with the Table in paragraph 1, has the effect that paragraphs 3-6 of Schedule 55 apply in the case of a self-assessment tax return.

14. Paragraph 3 of Schedule 55 to the Finance Act 2009 provides that “P is liable to a penalty under this paragraph of £100”.

15. Paragraph 4 of Schedule 55 to the Finance Act 2009 relevantly provides that:

- (1) P is liable to a penalty under this paragraph if (and only if)—
 - 5 (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.
- 10 (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).

16. Paragraph 5 of Schedule 55 to the Finance Act 2009 relevantly provides that:

- 15 (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
 - 20 (b) £300.

17. Paragraph 16 of Schedule 55 to the Finance Act 2009 relevantly provides that:

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- 25 (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—
 - 30 (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

18. Paragraph 22 of Schedule 55 to the Finance Act 2009 relevantly provides that:

- 35 (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.

5 (4) In sub-paragraph (3)(b) “*flawed*” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

19. Paragraph 23 of Schedule 55 to the Finance Act 2009 relevantly provides that:

10 (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)—

15 (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

20 (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.

The Tribunal’s findings

20. Having considered the evidence before it, the Tribunal finds as follows.

25 21. HMRC have relied on printouts from the HMRC database, bearing the title “Return Summary”, as evidence of the fact that the two tax returns were issued on 7 July 2014.

30 22. In *Jacks v Revenue and Customs* [2017] UKFTT 613 (TC), this Tribunal (Judge Geraint Jones QC and John Robinson) found that a “Return Summary” was not sufficient evidence by itself to discharge HMRC’s burden of proving on a balance of probability that a return was in fact sent to the taxpayer on a particular date, or that the address to which it was sent was the correct address.

35 23. However, I am satisfied, at least in the context of a default paper case where facts are not proved by witness evidence, that a “Return Summary”, in the absence of any countervailing evidence, is sufficient to show that a tax return was issued to a taxpayer on the date stated in the document, and that the return was sent to the address then held on record by HMRC for the taxpayer.

40 24. I accept that a “Return Summary” does not itself indicate what specific address was held on record by HMRC for the taxpayer on the date that the return was issued, and therefore it cannot be ascertained from the “Return Summary” to what specific address the return was sent. Thus, for instance, in a case in which there is a live issue as to whether a return was sent to one specific address rather than another specific

address, other evidence may be needed to establish the particular address to which the return was sent. In the absence of such evidence, it is possible that HMRC might be found to have failed to discharge the burden of establishing that the return was sent to the taxpayer.

5 25. In this case, however, although the Appellant may be contending that she did not receive a return (see paragraph 8 above), she does not make any positive assertion, for instance, to the effect that she had at the time when the returns were issued recently moved address, or that she had encountered difficulties receiving mail from HMRC more generally. The evidence is that the returns were issued on 7 July 2014.
10 There are in the bundle copies of letters from HMRC to the Appellant dated April and October 2013, which give as the Appellant's address the same address as that stated by her in her notice of appeal. While that does not prove conclusively that the Appellant lived at that address continuously from at least April 2013 until the date of filing of her notice of appeal, or that HMRC held that address on record for the
15 Appellant continuously during that period, in the absence of any suggestion to the contrary from the Appellant, the Tribunal is satisfied that it is at least more likely than not that she did live at that same address throughout and that HMRC continuously had that address on record for her.

26. Thus, on the the material before it, the Tribunal is satisfied on a balance of
20 probability that the returns were sent to the Appellant to her home address on 7 July 2014. On the basis of the material before it, the Tribunal is satisfied on a balance of probability that the Appellant received them. Ultimately she did submit the returns. There is no evidence that she contacted HMRC to obtain replacement returns, so the evidence suggests that the returns she submitted were those that had originally been
25 sent to her by HMRC on 7 July 2014.

27. The tax returns in this case were for the years 2011-12 and 2012-13. The 2011-12 tax return was issued after 31 October 2012, and therefore by virtue of s 8(1G) of the Taxes Management Act 1970 ("TMA"), the due date for the return was 3 months from the date of the notice. The 2012-13 tax return was issued after 31 October 2013,
30 and therefore by virtue of s 8(1G) TMA also had a due date 3 months from the date of the notice. The Appellant has not disputed that if the returns were sent on 7 July 2014, the deadline for submitting the completed returns was 14 October 2014.

28. HMRC have provided evidence, in the form of the two documents entitled "Return Summary" printed out from the HMRC database, that the completed returns
35 were received from the Appellant on 18 November 2014 and 18 February 2016 respectively. Again, I am satisfied, in the context of a default paper case at least, that a "Return Summary", in the absence of any countervailing evidence, is generally sufficient to show that a completed tax return was, on a balance of probability, received by HMRC from the Appellant on the date stated in that document.

40 29. The HMRC records do not, on the basis of the material before the Tribunal, indicate that any earlier returns for these years were received from the Appellant.

30. The Appellant has not provided evidence or details of the earlier returns that she says she sent. She has not said when or how those returns were sent, or provided any evidence that they were sent. Furthermore, in respect of the 2012-13 return, the Appellant was first sent a £100 penalty notice on 21 October 2014, before being sent
5 the second penalty notice six months later on 21 April 2015. The first penalty notice should have alerted the Appellant to the fact that there was a problem, and no adequate explanation has been provided as to why it took her so many months thereafter before submitting the return on 3 September 2015 (an explanation has been given by HMRC for the subsequent delay to 18 February 2016). The Tribunal accepts
10 that the threat of penalties gave her an incentive to submit returns on time and that there may have been no reason why she would not have done so. The Tribunal takes this into account, but this is not of itself sufficient to establish that the returns must have been sent earlier.

31. The Tribunal is satisfied on a balance of probability that the Appellant did not
15 send any completed tax return for 2011-12 prior to 18 November 2014, and that she did not send a return for 2012-13 until 3 September 2015 (although HMRC claim that this was incomplete and that the complete return was not sent until 18 February 2016).

32. Even if the Appellant's 2012-13 tax return is treated as having been received on
20 3 September 2015, it was still nearly 11 months late.

33. The Appellant is accordingly liable to the £100 late filing penalties for both returns, and to the six month penalty for the 2012-13 return. The Tribunal is similarly satisfied that the Appellant is liable to the daily penalties in respect of the 2012-13 return. For reasons similar to those given in paragraphs 23-24 and 28-30 above, the
25 Tribunal is satisfied that the Appellant was sent a SA326D notice on 21 April 2015, as HMRC have provided a printout from its database showing that this occurred, and the Appellant has not contended the contrary. The Tribunal finds that the requirements for issuing daily penalties were satisfied, for the reasons given in *Donaldson v HM Revenue and Customs* [2016] EWCA Civ 761.

30 34. The Appellant states that she is in difficult financial circumstances. Unfortunately it is well established that inability to pay penalties is not a reasonable excuse for the late filing of tax returns.

35. The Tribunal finds that the Appellant has not established a reasonable excuse for the late filing. Nor is the Tribunal persuaded that there are special circumstances
35 that have not adequately been considered by HMRC.

36. The appeal is accordingly dismissed.

37. 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
40 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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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 15 AUGUST 2018

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