



TC06750

Appeal number: TC/2018/03402

*INCOME TAX – penalty for failure to make returns – whether reasonable
excuse – no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN McALPINE

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 2 October 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 23 May 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 19 July 2018.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under
5 Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2016-17 tax year on time.

2. The penalty under appeal can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13
February 2018

10 **Appellant’s case**

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) He argued that he filed his tax return on January 30th and received a confirmation email saying it was successfully received;

15 (2) He had moved away from the UK in March 2017 and had only received the letter of penalty in May 2018.

4. The appellant’s appeal was notified to the Tribunal late. However, since HMRC have not objected to the late notification, I give permission under s49G(3) or s49H(3) of the Taxes Management Act 1970 for the appeal to be notified late.

20 5. In addition, the appellant’s appeal was notified directly to the Tribunal without an appeal to HMRC. Under s49D Taxes Management Act 1970, the Tribunal has no jurisdiction over such appeals. In this case, HMRC have stated that they have accepted the Tribunal appeal as an appeal to HMRC at the same time in order to seek a timely resolution to the issues such that the Tribunal has jurisdiction to deal with this matter.

25 **HMRC’s case**

6. HMRC stated that the appellant’s tax return for the 2016-17 tax year had still not been filed by 10 July 2018, the date of the Statement of Case. The confirmation email provided by the appellant related to his submission of his 2015-16 tax year.

30 7. HMRC stated that their self-assessment notes show that the appellant contacted HMRC on 22 January 2018 by telephone to ask whether he was required to submit a tax return for the 2016-17 tax year, as his self-employment had ceased in August 2016. The notes show that he was advised that he did need to complete the return for the 2016-17 tax year.

35 8. HMRC submitted that a notice to file was issued to the appellant on 13 February 2018, as evidenced by HMRC’s records. An email alert was also sent to the appellant on 15 February 2018.

Findings of fact

9. The appellant's annual self-assessment return for the 2016-17 tax year was not submitted on time and, at the date of HMRC's Statement of Case (10 July 2018) had not been submitted.

5 10. The "Successful Receipt of Online Submission" provided by the appellant is dated 30 January 2017 and so cannot be a receipt evidencing submission of a tax return for the 2016-17 tax year as such tax year had not yet ended at 30 January 2017.

11. The appellant contacted HMRC by telephone on 22 January 2018, before the deadline for filing the 2016-17 tax return, and was advised that he needed to complete that tax return.
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12. No change of address was notified by the appellant to HMRC. The appellant was advised by email that the penalties had been issued. The email address used by HMRC was the same as that notified by the appellant in his appeal to the Tribunal.

Discussion

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

14. I have concluded that the appellant's tax return for the 2016-17 tax year was not submitted by the statutory filing deadline (31 October 2017 for paper returns; 31 January 2018 for online returns). Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.
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15. The appellant's submission that he filed his tax return on time is not supported by the online filing confirmation email provided, as that is dated 31 January 2017 and so cannot have been a receipt for the 2016-17 tax return as that tax year had not ended at that time. As the appellant has provided no evidence supporting his contention that he filed his tax return on time, and HMRC records show that no tax return has been filed, I conclude that the tax return to which this penalty relates (the 2016-17 tax year) has not been filed.
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16. The appellant's statement that he had moved to the United States does not amount to a reasonable excuse for the late filing of his return because he telephone HMRC on 22 January 2018 to ask whether he needed to complete a tax return and was advised that he did need to do file the return. The appellant was therefore aware that he needed to complete a return, before the online filing deadline for that return, and has given no further reason why he did not complete the return. I find, therefore, that the appellant has no reasonable excuse for the delay in filing his tax return.
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17. Finally I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a
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special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC's decision.

Conclusion

5 18. The appeal is dismissed and the penalties are confirmed.

Application for permission to appeal

19. 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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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 8 OCTOBER 2018

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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).

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

- 5 (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—

- 10 (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—

- 15 (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—

- 20 (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—

- 25 (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:

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(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

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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—

(a) ability to pay, or

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(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

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(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

(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.

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

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