



TC06822

Appeal number: TC/2018/03317

INCOME TAX – late filing penalties – individual return – whether service effected – yes – whether penalties disproportionate – no – whether reasonable excuse – no – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALAN FREDERICK BIRD

Appellant

- and -

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

TRIBUNAL: JUDGE JENNIFER TRIGGER

The Tribunal determined the appeal on 24 September 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 18 May 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 25 July 2018 and the Reply dated 25 July 2018 (with enclosures).

DECISION

Introduction

1. Alan Frederick Bird, (the “appellant”), is appealing against penalties 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 2015/16 on time.

2. The penalties that have been charged can be summarised as follows:

(a) daily penalties for late filing of the individual tax return, (the “Return”), of the appellant, for the tax year ending 5 April 2016, in the sum of £900.00, being 90 days at £10.00 per day imposed under paragraph 4 of Schedule 55.

(b) a 6 month late filing penalty of £300.00 for the late filing of the Return imposed under paragraph 5 of Schedule 55.

3. Summary judgment was given by the Tribunal. The Decision was released on 11 October 2018. On 11 October 2018 the appellant made a request for full statement of reasons.

Background facts.

4. I have taken the facts from the bundle prepared by the respondents, (“HMRC”), which includes the appellant’s notice of appeal to HMRC dated 12 March 2018; his notice of appeal to the Tribunal dated 18 May 2018; the statement of case from HMRC dated 11 July 2018 and the appellant’s reply dated 25 July 2018.

5. The Return was issued to the appellant on 6 April 2016. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return.

6. On 25 January 2017 the appellant telephoned HMRC to question whether a return was required. HMRC confirmed that it was and at the same time extended the deadline for filing to 01 May 2017 for either an electronic or non-electronic return.

7. The appellant’s non-electronic Return was received by HMRC on 13 March 2018. It was returned to the appellant because although the non-resident supplementary page had indicated that it had been included it was not submitted with the Return.

8. As the Return had not been received by HMRC by the filing date, HMRC issued a notice of penalty assessment on or around 02 May 2017 in the amount of £100.00.

9. As the Return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 31 October 2017 in the amount of £900.00 calculated at £10.00 per day for 90 days.

10. As the Return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on or around 07 November 2017 in the amount of £300.00.

Appellant's case

11. The appellant explained that since February 2013 his personal and professional life had been “turned upside down by a series of events outside his control”. The listed events started in February 2013 and continued for a number of years. In February 2013 his niece was missing and she was found dead on 25 March 2013.

12. In March 2016 he was “forced to move house” a house that he had lived in for 16 years. In that move personal papers including tax papers were mislaid.

13. In August 2016 the brother of his partner died after eight weeks in intensive care.

14. In June 2017 the partner of his niece died leaving a young son and the appellant was involved in issues arising from guardianship proceedings. During the summer of 2017 the island of St Martin was struck by a number of hurricanes which flooded the guardian's home and resulted in the young boy being relocated to Canada to live there temporarily with relatives.

15. In 2016 a change in the managing agent of property held by the appellant may have caused the appellant to pay tax on rental income which should not have been levied.

16. The appellant moved to Switzerland from the UK in 1999. Switzerland has a double taxation agreement with the UK. The appellant maintained that he made an annual tax return in Switzerland and declared all of his income save for some pensions taxed at source in the UK. He had half ownership of property and had done so since 1983. The property had been let and he received 50% of the income.

17. The appellant had not received any tax papers for the tax year 2015/16.

18. In 2016 he moved home in Switzerland following a dispute with the owner and a subsequent tribunal hearing which proved very stressful.

19. The 50% shared income from the rental property was less than the threshold of £2,500.00.

20. The penalties of £1,200.00 are disproportionate.

21. Part of the delay in filing was caused by the complexity of the HMRC website and the appellant's unfamiliarity with HMRC's processes for filing.

HMRC's case

22. HMRC submitted that the appeal was not concerned with specialist or obscure areas of law. It concerned the ordinary ever day responsibilities of the appellant to ensure his 2015/16 tax return was filed by the legislative due date and payment made on time.

23. Self-assessment places a responsibilities on a taxpayer for their own tax affairs. To assist taxpayers HMRC publicises information and advice about their obligations and how they can comply. All the information is within the public domain and widely available via the internet including HMRC's website.
24. The appellant is required to complete an annual self-assessment tax return due to receiving rental income as a non-resident landlord.
25. The appellant's net profit from his rental property was over £2,500.00.
26. Although the appellant has been resident in Switzerland since 1999, no claim has been made by him for double taxation relief.
27. Under the terms of a double taxation agreement income from property from the UK remains taxable in the UK and even if a valid application for double taxation relief was made the appellant would still be required to complete a UK self-assessment tax return.
27. The appellant did complete returns for the tax years 2013/14 and 2014/15. The appellant did contact HMRC on 25 January 2017 to ask if he needed to declare his income from property as the amount received was not large. He was advised that he must complete a return and the papers were sent to him on 6 April 2016. The appellant advised HMRC on the same occasion that he had moved house in Switzerland and probably had not received the Return and, accordingly, HMRC extended the deadline for filing to 01 May 2017.
28. HMRC issued a penalty notice to the appellant's current address on 02 May 2017 in the sum of £100.00. The appellant paid the late filing penalty on 21 July 2017. HMRC contend that the fact that the appellant paid the late filing penalty meant that the appellant was in all probability aware that the Return was outstanding.
29. HMRC do not consider that the appellant had a reasonable excuse for the late filing of the Return. Although the appellant had experienced a number of stressful events since February 2013 the period of failure to file is from May 2017. Furthermore the appellant did not submit a complete Return until 13 March 2018.
30. HMRC relied on the decision of the Court of appeal in the case of *Donaldson v Commissioners of HMRC*, (the "Donaldson case").
31. HMRC further contend that the warnings on the £100.00 notice, referred to as SA326D, issued to the appellant on 02 May 2017 were the same warnings as those that were considered in the *Donaldson* case.
32. The penalties are not disproportionate. HMRC assert that the amount of each penalty is laid down in legislation. Furthermore, a Tribunal does not have the power to discharge or adjust a penalty which is properly due because the Tribunal considers that the penalty is unfair.
33. In the event that the Tribunal find that the appellant had a reasonable excuse HMRC assert that the reasonable excuse had not existed throughout the default period.

34. HMRC considered whether there were special circumstances that would support a special reduction of the penalties imposed. HMRC declined to make a special reduction because there were in the opinion HMRC no exceptional, abnormal or unusual factors or anything out of the ordinary which would justify making a special reduction. In reaching that decision HMRC considered all the factors raised by the appellant in his notice of appeal to HMRC dated 12 March 2018 together with those matters pleaded in the appellant's notice of appeal to the Tribunal dated 18 May 2018.

Findings of fact

35. The Return was correctly issued.

36. The penalties had been correctly calculated.

37. The Return was received late.

38. The penalties were correctly levied.

39. The appellant had failed to demonstrate that he had a reasonable excuse which existed throughout the default period.

40. That HMRC's decision not to make a special reduction was not flawed.

Reasons for the decision

41. HMRC had issued the Return to the last known place of residence of the appellant as notified to them by the appellant. HMRC by custom and practice issue annual returns which are sent, served and delivered to taxpayers by post unless a contrary form of delivery is indicated. There were no contrary indications in the appellant's case. The Return was not returned to HMRC as "undelivered" by the Royal Mail. On the balance of probabilities the Tribunal concluded that the Return had been served on the appellant.

42. The Return was not received by HMRC until 13 March 2018. The Penalty date was 02 May 2017. As the return had not been filed by the penalty date HMRC had correctly issued the late filing penalty, the daily penalties and the 6 month penalty.

43. The Donaldson case was relevant to this appeal. In accordance with that decision the Tribunal found that although the period for which daily penalties were assessed was not specified in the notice of assessment, sent to the appellant on or around 31 October 2017, this omission fell within the scope of section 114(1) of the Taxes Management Act 1970 and therefore did not affect the validity of the notice.

44. The penalties are laid down in Schedule 55. The penalties as they relate to the appellant have been calculated in accordance with paragraph's 4 and 5 of Schedule 55.

45. The penalties are neither unfair nor disproportionate. They apply to all taxpayers in circumstances where a tax return is filed late and the amount of those penalties is enshrined in law.

46. The appellant was told that the amount of tax outstanding was in excess of the £2,500.00 and therefore he was aware that the Return must be filed.

47. The appellant claimed that he had a reasonable excuse for the delay in filing the Return. The Tribunal considered the circumstances in which a reasonable can be relevant. A penalty does not arise in relation to a failure to file a return if the person concerned satisfies the Tribunal that he had a reasonable excuse for the failure and that the failure was put right without unreasonable delay after the excuse had ended. Any such reasonable excuse must exist throughout the failure period. Once HMRC have shown that the penalties have been correctly calculated the burden shifts to the appellant to demonstrate such a reasonable excuse. The standard of proof is the ordinary civil standard namely on the balance of probabilities.

48. There is no statutory definition of reasonable excuse but it is a matter to be considered in the light of all the circumstances of the particular case.

49. The Return was issued to the appellant on 6 April 2016. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. On 25 January 2017 the appellant telephoned HMRC to question whether a return was needed in his case. HMRC confirmed it was and also extended the deadline to file to 01 May 2017 for either an electronic or a non-electronic return. The Tribunal concluded that at that date the appellant would be aware that he had to file the Return and the date by which that Return must be filed.

50. HMRC issued the appellant with a penalty notice to his current address on 02 May 2017 and on 21 July 2017 the £100.00 late filing penalty was paid. That late filing penalty is not the subject of this appeal. Furthermore, HMRC issued to the appellant at his current address letters on 05 September 2017 and 03 October 2017 from which it was clear that daily penalties were accruing and that the Return should be returned as soon as possible. The Return was not submitted to HMRC until 13 March 2018. The Tribunal concluded that the appellant had been made aware by HMRC that daily penalties were accruing and that the Return had still not been filed as at the date of the letters referred to above. Furthermore, the appellant appears, on the balance of probabilities, to have received the penalty notice issued on 02 May 2017, at the address notified by the appellant to HMRC, because he paid the penalty of £100.00 on 21 July 2017 which was the subject of the penalty notice of 02 May 2017.

51. In his notice of appeal to HMRC the appellant states that since February 2013 his life has been “turned upside down by a series of events outside my control”. The listed events start in February 2013 and continue for a number of years. In that appeal notice he further states that a change in the agent managing the UK property which he owns jointly might have been a contributory factor. He stated also that income arising from the letting of the property is fully declared in his annual tax return to the Swiss authorities as he has been ordinarily resident there for tax purposes for at least 15 years.

52. In his notice of appeal to the Tribunal he asserts that he makes an annual tax return in Switzerland and that Switzerland has a double taxation agreement with the UK. Furthermore, he states that he moved house in Switzerland in 2016 leading to a time consuming and stressful time and that part of the delay in filing the Return has involved a complexity of using HMRC website whilst dealing with complex, time consuming and stressful other events. He asserts that his half share of the UK property income for the relevant financial is less than the stipulated threshold of £2,500.00 and therefore there was no necessity on him to file the Return. The Tribunal found that the

threshold of £2,500.00 had been exceeded and therefore the appellant was required to file the Return.

53. The appellant did complete UK self-assessment tax returns for both 2013-2014 and 2014-2015 and therefore, in the opinion of the Tribunal, he must have received a return issued in each of those tax years to the address notified by him to HMRC.

54. On 25 January 2017 he asked an employee of HMRC by telephone whether he still needed to declare income from UK property and was advised that he did. On that occasion HMRC further advised that he had been sent the Return on 6 April 2016. The appellant indicated that he had not received the Return for 2015/16. It was for that reason that his filing deadline was extended by 3 months to 01 May 2017. From these facts the Tribunal concluded that the appellant was aware that he may be required again to file a return and it was for the reason he had telephoned HMRC on 25 January 2016 to seek clarification. On 25 January 2016 he was made aware by HMRC that he did have to file the Return for the tax year 2015/16. Whilst the Tribunal sympathises with the life events that the appellant encountered, the last documented account occurred in June 2017, the appellant has provided no credible explanation for his failure to file the completed Return until 13 March 2018. From this fact the tribunal concluded that the appellant had failed to demonstrate that there was a reasonable excuse which continued throughout the default period to the requisite civil standard, namely on the balance of probabilities.

55. The self-assessment criteria tool on HMRC website would indicate that a person, in the position of the appellant, receiving net profit of over £2,500.00 from UK property rental would need to file in a self-assessment tax return. The Return eventually filed by the appellant shows a net profit from UK property rental of over £2,500.00. Furthermore, the appellant had been able to file on line the returns for 2013/14 and 2014/15. The Tribunal therefore concluded that he was able to use the on line filing system and could have used this facility to file the Return by the extended filing date.

56. No claim had been made by the appellant at that time for double taxation relief but even if a valid application for double taxation relief has been made the appellant would still be required in these circumstances to complete a UK self-assessment tax return.

57. The Tribunal can only substitute its decision in relation special circumstances if it concludes that the original decision of HMRC was flawed when considered in the light of the principles applicable in proceedings for judicial review. Having considered all the facts in this case the Tribunal cannot so conclude.

58. A taxpayer becomes liable to penalties of this sort for no reason other than his continuing failure to file a return; no proof of qualitative misconduct if required. The daily penalties and the 6 month penalty were simply a means of securing the production of timely returns.

59. Accordingly, the appeal is unsuccessful and the appellant remains liable for the penalties totalling £1,200.00.

60. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after the 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.

**JENNIFER TRIGGER
TRIBUNAL JUDGE**

RELEASE DATE: 15 November 2018

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