



TC06876

Appeal number: TC/2018/01345

*INCOME TAX – penalty for failure to make returns – whether late appeal
should be allowed – yes – whether reasonable excuse – no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAY MCDONALD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR MARK BUFFERY**

Sitting in public at Reading on 31 May 2018

The Appellant did not attend and was not represented

Mr S Macleod, Officer of HMRC, for the Respondents

DECISION

1. The appellant (Mr McDonald) did not attend. At the request of the Tribunal the Clerk telephoned the mobile telephone number in the papers but there was no response.

5 2. It was clear from the file that the appellant had been notified of the hearing and had not objected to the listing on 31 Mary 2018.

3. The respondents (HMRC) argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and had made no objection to its proceeding, having been warned of the consequences of not appearing.

10 4. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since there was no explanation as to the non-appearance by or for the appellant. The appellant’s attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

Background

5. Mr McDonald is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns for the tax years 2014/15 and 2015/16 on time.

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

(1) Two £100 late filing penalties (one for each tax year) under paragraph 3 of Schedule 55 imposed on 25 April 2017;

25 (2) Two “six month” penalties (one for each tax year) under paragraph 5 of Schedule 55 imposed on 24 October 2017

7. HMRC originally imposed daily penalties totalling £1,800 (£900 for each tax year) under paragraph 4 of Schedule 55 but cancelled these on 21 March 2018 and so, although these were included in Mr McDonald’s appeal, this Tribunal did not need to consider those penalties further.

30 8. The appellant’s appeal to HMRC under s31A Taxes Management Act (TMA) 1970 was made outside the statutory deadline, on 30 January 2018. HMRC refused to allow a late appeal in a letter date 16 February 2018. Mr McDonald appealed to this tribunal on 19 February 2018.

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9. HMRC noted that the Tribunal has a wider discretion than HMRC to accept late appeals, under s49(2B) TMA 1970 but asked that this Tribunal refuse to allow a late appeal to be made and submitted that:

5 (1) the three stage analysis set out by the Court of Appeal in *Denton* [2014] EWCA Civ 906 applied, so that the seriousness of the delay should be established, the explanation for the delay considered and a decision made taking into account all the circumstances of the case;

10 (2) the appeal was 281 days late (in relation to the late filing penalties) and 99 days (in relation to the “six month” penalties); the case of *Romasave* [2015] UKUT 254 (TCC) found that a delay of three months must be regarded as serious and so the delays in this case should be considered serious.

(3) Mr McDonald had not provided any explanation for the delay in appealing the penalties;

15 (4) the time limits are imposed by statute and should not be taken lightly, and are there to ensure finality in litigation;

(5) although the consequences of not allowing the late appeal would be that Mr McDonald could not challenge the appeal, there would be prejudice to other taxpayers who do adhere to the time limits.

20 10. We noted that Mr McDonald’s appeal to this Tribunal did not include an application to make a late appeal and in fact stated that the appeal was not being made late. We considered that this was likely to have been because the letter from HMRC, refusing to accept the late appeal, stated that Mr McDonald would need to apply to the Tribunal by 18 March 2018 and he had met this deadline.

25 11. We considered HMRC’s submissions, and the relevant case law, the circumstances of the case so far as they were available to us and in particular took into account the fact that HMRC had attended the hearing prepared to deal with the substantive appeal. We considered that, considering all the circumstances, we would allow the appeal to be brought late.

Appellant’s case

30 12. Mr McDonald’s grounds for appealing against the penalties can be summarised as follows:

(1) He was a PAYE employee and his tax was deducted at source by his employer;

35 (2) He registered for self-assessment only in order to claim deductions for work-related mileage expenses;

(3) He was unaware that he would need to submit his work expenses immediately on registering;

(4) He had paid all of his tax commitments to date and did not owe any money to HMRC and was, instead, owed money by HMRC;

(5) On completing his tax returns for 2014/15, 2015/16 and 2016/17 in January 2018, he had noted that he had penalties for the first two of those years.

HMRC's case

13. HMRC submitted as follows:

5 (1) Mr McDonald chose to register for self-assessment on 6 January 2017 and chose to register himself effective from the 2014/15 tax year.

(2) HMRC therefore issued him with a notice to file for each of 2014/15 and 2015/16 on 12 January 2017.

10 (3) The filing date for each of these returns was set as 19 April 2017, as the notices to file were issued outside the normal cycle for these tax years and so the filing deadline was set at 3 months and 7 days from issue, in accordance with legislation. Notices to file were issued to the address provided by Mr McDonald when he registered for self-assessment.

15 (4) Mr McDonald filed his self-assessment tax returns for 2014/15 and 2015/16 on 29 January 2018. They were therefore filed late.

(5) The penalty notices were issued to the address provided by Mr McDonald when he registered for self-assessment on the dates set out in the background above. Penalty reminder letters were also sent to that address on 29 August 2017 and 19 September 2017.

20 (6) The notice to file for each year had set out the deadline for filing the return and so Mr McDonald's lack of awareness of his obligation to file the return could not amount to a reasonable excuse.

25 (7) As established in *Hok* [2012] UKUT 363 (TCC), this Tribunal has no power to reduce to discharge a penalty on the grounds of fairness, or proportionality, and so Mr McDonald submission that he had no tax liability for the relevant years is not a factor that can be taken into account by this Tribunal.

30 (8) HMRC had considered whether any special circumstances applied that would merit a reduction in the penalty but concluded that Mr McDonald's lack of awareness of his obligations and the lack of any tax liability did not amount to special circumstances.

Discussion

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

35 15. It was not disputed that Mr McDonald's tax returns for the 2014/15 and 2015/16 tax years was submitted on or around 29 January 2018. Both returns should have been submitted by 19 April 2017. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

16. We took Mr McDonald's submissions as to his lack of tax liability for the relevant years as a submission that the penalties were unfair and/or disproportionate. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. 5 Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, we have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Bosher*, [2013] UKUT 01479 (TCC), we do not consider that I have a separate power to consider 10 the proportionality or otherwise of the penalties.

17. The test of whether something is a "reasonable excuse" for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

15 "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

18. We noted Mr McDonald's explanation that he did not realise that the returns had to be submitted immediately, but we consider that it is clear on the notices to file issued to him that the returns had to be filed "within 3 months of the date on this letter". There is no indication that the notices to file were not received by Mr McDonald.

19. Applying the test in *Clean Car*, we consider that a taxpayer with a responsible attitude to his duties as a taxpayer in Mr McDonald's circumstances would have read the notices to file and would have noted the deadline for submission of the returns and would have complied with that deadline. 25

20. We therefore find that Mr McDonald did not have a reasonable excuse for the late filing of the two returns.

21. Finally, we 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 special reduction and have found nothing that is exceptional, abnormal or unusual to 35 justify such a reduction. Applying the judicial review standards, we see no reason to overturn HMRC's decision.

Conclusion

22. The appeal is dismissed. The late filing penalties and "six month" penalties are confirmed. As already indicated, the daily filing penalties which were also appealed 40 were cancelled by HMRC some time before the hearing.

Application for permission to appeal

23. 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: 18 DECEMBER 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:

4—

(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)—

- 20 (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).

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—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
(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
30 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
35 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—

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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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22—

(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.