



TC06902

Appeal number: TC/2017/08969

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW MARSH

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 24 August 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 11 December 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 January 2018 and the appellant's Reply dated 1 March 2018.

DECISION

- 5 1. The appellant (Mr Marsh) is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2015/16 tax year on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 7 February 2017;
 - 10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 11 August 2017;
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 11 August 2017.

Appellant’s case

- 15 3. Mr Marsh’s grounds for appealing against the penalties can be summarised as follows:
 - (1) He was not technically self-employed. He was contracted to work for a company and the way in which he was employed was very cowboyish. He was on a verbal contract and had to send an invoice to request payment each week.
 - 20 (2) He had no knowledge of how to complete a tax return and was never shown how to complete a self-assessment or how to file a tax return by the company which engaged him. He had no knowledge of the tax year to complete as he left that work.
 - (3) The company absolved themselves of all responsibility for making payments by self-assessment.
 - 25 (4) He has not been self-employed since March 2016. He was employed by various companies between August 2016 and August 2017 but is now at university part-time and taking on part-time seasonal work.
 - (5) He is experiencing severe hardship.
- 30 4. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC initially refused consent under s49(2)(a) of TMA 1970. However, in their Statement of Case HMRC have said that they have no objection to the taxpayer’s appeal under s31A being made late. I therefore consider that HMRC have now given consent under s49(2)(a).

HMRC’s case

- 35 5. HMRC submitted, in summary:

(1) Mr Marsh registered as self-employed in January 2015 and so was aware that he was classed as self-employed. As he is self-employed it was his responsibility to ensure that an annual return was completed and filed before the due date.

5 (2) He completed a tax return for 2014-15 by the required deadline, showing earnings from self-employment. He was therefore able to access the self-assessment online service.

(3) Mr Marsh was issued with a notice to file on 6 April 2016 at the address held by HMRC on file. It was not returned to HMRC undelivered and so is deemed to have been served within the ordinary course of the post in accordance with s7 Interpretation Act 1978. Mr Marsh has not contended that he did not receive the notice to file.

(4) If Mr Marsh was having difficulties completing his 2015/16 tax return he should have contacted HMRC for assistance.

15 (5) The company engaging Mr Marsh was not obliged to provide him with any assistance in relation to his tax return.

(6) Mr Marsh telephoned HMRC on 15 March 2017. He confirmed that he was self-employed up to May 2016 and therefore was advised that returns for 2015/16 and 2016/17 were required as he had been self-employed during those tax years.

20 (7) Mr Marsh's return was received by HMRC on 15 September 2017.

(8) Penalty notices were issued to Mr Marsh at the address on HMRC's records at the time as set out above, together with reminders, statements and payment requests. These were not returned to HMRC undelivered and so are deemed to have been served within the ordinary course of the post in accordance with s7 Interpretation Act 1978. Mr Marsh has not stated that he did not received these reminders, notices, statements or payment requests.

(9) Mr Marsh' insufficiency of funds, unless attributable to events outside his control, is one of the situations that is specifically stated not to be a reasonable excuse in law.

30 **Discussion**

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

7. Mr Marsh did not dispute that his electronic tax for the 2015/16 tax year was submitted late. I find that it should have been submitted by 31 January 2017 and was in fact submitted more than six months late on 15 September 2017. No dispute has been raised as to the penalty notices. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, I consider that the initial £100 penalty, the six month penalty of £300 and the daily penalties of £900 imposed are due and have been calculated correctly.

8. Mr Marsh has not specifically argued that the penalties charged are disproportionate but I have taken his submission as to lack of funds as relevant to the point. 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. 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, I have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

9. There is no statutory definition of "reasonable excuse" but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

10 "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"

15 10. Mr Marsh contends that he had a reasonable excuse for the delay because he was technically not self-employed, had no knowledge of how to complete a tax return and was never shown how to complete a self-assessment or how to file a tax return by the company which engaged him.

20 11. Mr Marsh registered with HMRC as self-employed and accepted an engagement as self-employed which provided him with income. He was therefore liable to complete self-assessment tax returns. I consider that any dispute as to whether his employment status was correct is with his engager and is not relevant to his self-assessment filing obligations in this case.

25 12. I find that the company engaging Mr Marsh's services had no obligation to assist him with his self-assessment return: the filing obligation is personal to Mr Marsh. I also find that Mr Marsh submitted a self-assessment tax return for the 2014/15 tax year and so it is not credible that Mr Marsh considered he had no knowledge of how to submit a return for the 2015/16 tax year. Applying the *Clean Car* test, I consider that, if Mr Marsh was having difficulties with self-assessment filing, a prudent taxpayer in those circumstances would seek assistance. Mr Marsh has not indicated that he sought any assistance with online filing, whether from HMRC or others.

30 13. Mr Marsh has stated that he has not been self-employed since March 2016, although he advised HMRC by telephone that his self-employment had ceased in May 2016. Regardless of whether his self-employment ceased in March 2016 or May 2016, he had self-employment income in the 2015/16 tax year and so is required by statute to file a self-assessment return with HMRC.

35 14. Mr Marsh's severe financial hardship is also not a reasonable excuse for these purposes; it is clear in law that an inability to pay is not a reasonable excuse unless due to events outside the taxpayer's control. Mr Marsh's lack of funds appears to be related to his student status which is, I consider, not an event outside his control.

15. Considering whether HMRC should have made a special reduction because of special circumstances within paragraph 16, I note that 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 justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC’s decision.

Conclusion

16. The appeal is dismissed and the penalty upheld.

Application for permission to appeal

17. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 21 DECEMBER 2018

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)—

(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:

23—

(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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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.