



TC06970

Appeal number: TC/2018/01248

INCOME TAX – late filing penalties – reasonable excuse – special circumstances – HMRC reliance on minority judgment – homeless – Schedule 55, Finance Act 2009 – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KRZYSZTOF POKOROWSKI

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House on 10 December 2018

The Appellant in person

Ms Murphy, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Pokorowski against penalties for the late filing of his
5 2014-15 tax return as follows:

Date	Penalty	Amount
17 February 2016	Individual tax return late filing penalty	£100
12 August 2016	Daily penalties	£900
12 August 2016	6 month penalty	£300
21 February 2017	12 month penalty	£300

2. Mr Pokorowski appeared in person. HMRC were represented by Ms Murphy. We heard evidence from Mr Pokorowski, on which he was cross-examined by Ms Murphy. In addition, a bundle of documents was produced in evidence.
- 10 3. Mr Pokorowski's appeal was initially placed into the default paper category. However, when the appeal papers were reviewed by Judge Hellier, he decided that a fair consideration of the appeal would require an oral hearing, and gave directions accordingly.

The law

- 15 4. The filing date for self-assessment income tax returns for the tax year 2014/15 that are filed on paper is 31 October 2015, and for returns that are filed electronically is 31 January 2016.
5. Penalties are payable for tax returns that are filed late. Paragraph 3, Schedule 55, Finance Act 2009 provides for a £100 fixed penalty for a late return. Paragraph 4 of
20 Schedule 55 imposes daily penalties of £10 per day (for a maximum of 90 days) if the return is filed more than three months late. Therefore, the maximum penalty chargeable under paragraph 4 is £900. Paragraphs 5 and 6 of Schedule 55 impose further penalties if the return is more than six and 12 months late. In the circumstances of Mr Pokorowski's case, the amount of these penalties is £300 under both paragraphs.
- 25 6. Schedule 55 sets out circumstances under which these penalties do not arise, or can be reduced. The paragraphs of Schedule 55 that are relevant are as follows:

Special reduction

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
 - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

- 5 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

10 [...]

Appeal

20(1) P may appeal against a decision of HMRC that a penalty is payable by P.

- 15 (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

[...]

20 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—

- (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- 25

(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.
- 30

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

35 (5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

[...]

Reasonable excuse

5 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,
 - 10 (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
 - (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
15 ceased.

7. "P" is defined in paragraph 1 as being the person liable to the penalty.

Background Facts

8. Mr Pokorowski is a self-employed electrician. Until April 2014, he shared a house in London E17 and was in work. In April 2014, he travelled to Poland. His evidence,
20 which was unchallenged, was that he was in a bar and his drink was spiked with drugs. He returned to the UK. What happened on his return to the UK is not wholly clear, but his unchallenged evidence was that he lost his job, he exhausted all of his savings, he was evicted from his house, and all of his belongings were thrown into the street – where they were lost or stolen. All of his documents were either lost or stolen. Mr
25 Pokorowski said that he reported the disappearance of his documents to the police, but that he no longer has the crime report.

9. Mr Pokorowski's unchallenged evidence was that he eventually ended up sleeping on the street. At around Christmas 2016 he was told about a homeless shelter, and from January 2017, he was living in hostel accommodation. Later in 2017, he found a job
30 and moved to permanent accommodation in London.

10. HMRC issued a notice to file a tax return for 2014/15 on 6 April 2015, which was sent to Mr Pokorowski at his London E17 address, which was the address HMRC had on their file. The subsequent penalty notices were sent to the same address.

11. Mr Pokorowski filed his 2014/15 tax return on 8 July 2017 on paper.

35 **Submissions of HMRC**

12. It is not disputed that Mr Pokorowski did not file his 2014/15 tax return by the due date.

13. Ms Murphy submits that the notice to file a tax return was sent to Mr Pokorowski at his last known address, as were the various penalty notices. Ms Murphy submitted

that it was the responsibility of Mr Pokorowski to notify HMRC if he should change his address. Mr Pokorowski had a responsibility to complete a tax return, and as he did not do so by the relevant filing date, the penalties were properly chargeable.

14. HMRC in their Statement of Case submit that Mr Pokorowski's circumstances are not "special" and therefore there are no grounds for a special reduction under paragraph 16 of Schedule 55. The Statement of Case refers to the decisions of the courts that considered the meaning of "special" in other contexts. In the Statement of Case it says that in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 it was held that "special" meant "exceptional, abnormal or unusual", and in *Clarks of Hove v Bakers Union* [1979] 1 All ER 152 it was held that "special" meant "something out of the ordinary run of events". The Statement of Case also referred to a decision of the First-tier Tribunal in *David Collis* [2011] UKFTT 588 (TC), which held that special circumstances must relate to the particular individual, and not to circumstances that apply to many taxpayers by virtue of the penalty legislation.

15. None of these decisions was included within the authorities bundle. However, on reviewing them after the hearing, I noted that the decision in *Crabtree v Hinchcliffe* that was cited was a decision of the House of Lords (and strictly the citation should have been given to the official report at (1971) TC 419). Their Lordships considered the meaning of "special" in the context of whether there were "special circumstances" such that the quoted price for listed shares was not a proper measure of market value. Lords Reid and Morris decided that the particular circumstances applying in this case (where the company's directors were in possession of information that was not available to the general public) did not amount to "special circumstances", but expressly declined to identify what circumstances might be "special".

16. Viscount Dilhorne in his speech said

For circumstances to be special they must be exceptional, abnormal or unusual ...

17. Lord Donovan agreed with Lord Morris. Lord Pearson concurred generally, but without stating whether he agreed with Viscount Dilhorne.

18. As Lords Reid, Morris and Donovan specifically declined to identify what circumstances might amount to "special", Viscount Dilhorne's statement does not represent the majority opinion of the House of Lords.

19. The *Clarks of Hove* case was a decision of the Court of Appeal relating to redundancy payments. The question was whether the insolvency of the employer amounted to "special circumstances" rendering it impractical to consult the union. Lane LJ said in his decision (with which the other members of the court agreed):

Accordingly, it seems to me that the industrial tribunal approached the matter in precisely the correct way. The distilled the problem which they had to decide down to its essence, and they asked themselves this question: do these circumstances, which undoubtedly caused the summary dismissal and the failure to consult the union as required by s99, amount to special circumstances?; and they went on, again

5 correctly, as it seems to me, to point out that insolvency simpliciter is neutral, it is not on its own a special circumstance. Whether it is or is not will depend on the causes of the insolvency. They define 'special' as being something out of the ordinary run of events, such as, for example, a general trading boycott, that is the passage which I have already read. Here, again, I think they were right.

20. In the *David Collis* case, the Tribunal said at [40] that:

10 To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves.

21. Ms Murphy also submitted that Mr Pokorowski did not have a reasonable excuse for his default. HMRC submit that his actions should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The Tribunal needs to determine what a reasonable taxpayer, in the position of Mr Pokorowski, would have done in those circumstances and by reference to that test to determine whether his conduct was reasonable.

22. I was referred to the decision of the VAT and Duties Tribunal in *Clean Car Company* (1991) Decision 5695, which addressed the meaning of "reasonable excuse" in the context of VAT, and in which Judge Medd said:

25 It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had 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. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.

35 23. Ms Murphy noted that the notice to file a tax return was issued to Mr Pokorowski on 6 April 2015, and that the return was filed on paper on 8 July 2017. This is more than one year and five months late. Ms Murphy submits that such a long delay cannot in any circumstances be considered to be reasonable. Ms Murphy drew my attention to paragraph 22(2)(c) which requires a tax return to be filed without unreasonable delay once any excuse has ceased.

Mr Pokorowski's submissions

24. Mr Pokorowski submits that as he had lost all of his belongings and his documents, and as he was homeless, he had a reasonable excuse for failing to file on time.

Conclusions

25. HMRC's decision to pursue Mr Pokorowski for penalties in the circumstances of this appeal is a scandal. For HMRC to expect a homeless person to keep HMRC up-to-date with their address is ridiculous – and just needs to be stated to show its absurdity.
- 5 26. I find that Mr Pokorowski had a reasonable excuse for his defaults, and therefore allow his appeal.
27. I also find that HMRC's decision that there were no "special circumstances" to be flawed – in other words, no reasonable HMRC officer acting reasonably could have reached this decision, and if Mr Pokorowski did not have a reasonable excuse (which
10 eliminated his liability to penalties), I would have reduced the penalties to zero.
28. It is not acceptable that HMRC cite cases in their Statement of Case or in submissions where the report of that case is not included in the Bundle. Whilst it is possible for the Tribunal to access the relevant report after the hearing (assuming the decision is reserved), this is unfair and unjust on an appellant acting in person (who
15 does not have ready access to law reports). It is especially unacceptable where the citation is wrong. *Crabtree v Hinchcliffe* is not authority for the statement that "special" means "exceptional, abnormal or unusual" – this was a statement made by Viscount Dilhorne in his minority judgment, and one with which (at least on this point) the majority of their Lordships disagreed.
- 20 29. As regards the meaning of "reasonable excuse", although the definition given by HMRC has some limited basis in the decision in *Clean Car Company* it is based on an incomplete reading of the decision. Judge Medd makes express reference in his decision to "... the incidence of some particular difficulty or misfortune and, doubtless many other facts ..."
- 25 30. Mr Pokorowski was essentially homeless (or living in temporary hostels) throughout the periods that are the subject of this appeal, and for some part of that time, he was sleeping on the street. All of his belongings (including documents) had been lost or stolen. Whilst I have no medical evidence before me, it appears likely (given some
30 of the statements made in his correspondence with HMRC and the Tribunal and in his oral submissions) that Mr Pokorowski has (or had) issues with his mental health, and this should have been obvious to the HMRC officers dealing with his affairs.
31. Mr Pokorowski only found permanent accommodation in around April 2017, and his tax return was filed within three months of that time.
32. I consider that these circumstances are exactly the kinds of "particular difficulty
35 or misfortune" to which Judge Medd refers in *Clean Car Company* and I find that he had a reasonable excuse for his failure to file his tax return on time. Given that Mr Pokorowski's belongings and documents had all been lost or stolen, I consider (and find) that his tax return was filed without unreasonable delay once his excuse had ceased.

33. In any event, I find that HMRC's decision that Mr Pokorowski's circumstances were not "special" to be flawed. Being homeless and having to sleep on the street has to be "something out of the ordinary run of events" and is particular to Mr Pokorowski and not to taxpayers in general. No reasonable HMRC officer acting reasonably could
5 have reached a decision that Mr Pokorowski's circumstances were not "special". Given all the circumstances of this case, if Mr Pokorowski did not have a reasonable excuse (thus eliminating his liability to penalties), I would have made a special reduction to reduce his penalties to zero.

34. This document contains full findings of fact and reasons for the decision. Any
10 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
15 and forms part of this decision notice.

NICHOLAS ALEKSANDER

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TRIBUNAL JUDGE
RELEASE DATE: 08 FEBRUARY 2019