



TC07123

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Appeal number: TC/2014/03965

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return on time - Appellant unable to file online - filed a paper return - delays on the part of both Appellant and HMRC in sending and returning completed self assessment return - fixed penalty confirmed, daily penalties discharged

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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FRANCIS H MONROE

Appellant

- and -

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

Respondents

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**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SIMON BIRD**

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**Sitting in public at Tribunal Service, Centre City Tower, Hill Street, Birmingham
on 22 May 2018**

The Appellant in person

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Mr Philip Osborne, Officer of HMRC, for the Respondents

DECISION

- 5 1. This is an appeal by Mr Francis Monroe ('the Appellant') against penalties totalling £370 imposed by the Respondents ('HMRC') under Paragraphs 3 and 4 of Schedule 55 Finance Act 2009, for his failure to file self-assessment ('SA') tax returns for the tax year ending 5 April 2013 on time.

Background

- 10 2. The Appellant's return for 2012-13, was due if filed electronically no later than 31 January 2014.

3. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
- 15 ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5
20 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

- 25 4. The Appellant's return for 2012-13 was filed late and penalties of £100 and £270 were imposed, under (i) and (ii), above.

Filing date and Penalty date

5. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is
30 the date after the filing date.

Reasonable excuse

6. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure
35 without unreasonable delay after the excuse ceased.

7. The law specifies two situations that are not reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

5 8. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

10 9. HMRC's view is that the actions of the taxpayer 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 decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have
15 done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

The background facts

20 10. The Appellant has been within the SA regime since the 1999-2000 tax year. The Appellant is a pensioner. He has been resident in the UK since February 2012 having returned from living in Spain earlier that year.

11. The Appellant's 2012-13 return was issued on 6 April 2013 and so was due to be returned in paper form by 31 October 2013 or on line by 31 January 2014. The Notice to file a return was sent by HMRC to the Appellant at his home address in the UK.

25 12. The Appellant says that on 10 December 2013 and again on 13 December 2013 he tried to file the SA return online but was not successful because he was asked to enter amounts due, effectively requiring him to agree to disputed amounts [there had been an earlier appeal requesting permission to appeal which had been resolved in the Appellant's favour]. He therefore tried to enter nil and then £100 to see if that worked but in neither event would the system accept that nor allow him to continue further.

30 13. On 6 January 2014 the Appellant telephoned HMRC and requested a paper return. HMRC despatched a paper return to the Appellant. Although the date it was received by him and completed and returned to HMRC is not known it would appear to have been dealt with promptly because it was received by HMRC on 14 January 2014.

35 14. On 14 January 2014 the SA return was sent back to the Appellant because no income details had been declared - he had made a comment on the return that he had been working since July 2012.

15. The Appellant telephoned HMRC on 27 January 2014 and reiterated that he had tried to file online and was advised that he needed to complete the employment pages

and send the paper return back as soon as possible. The Appellant then sent back the return to HMRC.

16. On or before 12 February 2014 the paper return was received by HMRC but had to be sent back to the Appellant once again because it was unsigned. HMRC however
5 did not do this until Thursday 27 February 2014. The return reached the Appellant on 3 March 2014.

17. On 4 March 2014 the Appellant signed and dated the SA return. HMRC has treated the filing date as 27 February 2014. The return, being a paper return, should have been filed by 31 October 2013 and was therefore over three months late.

10 18. HMRC imposed a fixed penalty of £100 together with daily penalties [27 days at £10 for each day from 1 February 2014 to 27 February 2014] totalling £270.

19. The Appellant appealed to the Tribunal on 17 April 2014, requesting permission to bring a late appeal.

15 20. On 13 January 2015 the late appeal application in respect of the late filing penalties was granted. Daily penalties have been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "*Donaldson case*"). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties.

21. The appeal was stood behind the *Donaldson* case.

20 22. The Court of Appeal decision in *Donaldson* was that HMRC had satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment the omission did not affect the validity of the notice. The Court of Appeal decision in the *Donaldson* case is now final as the Supreme Court has refused to allow
25 any onward appeal.

Relevant statutory provisions

Taxes Management Act 1970

23. Section 8 - Personal return- provides as follows:

30 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

35 a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or 397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

5 (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

10 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

15 (5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

24. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

25. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

20 26. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

27. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

25 (1) P is liable to a penalty under the paragraph if (and only if)-

(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

30 (c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under the 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).

35 (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

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

28. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

(1) P is liable to a penalty under the 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 the paragraph is the greater of-

- (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

29. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

(1) Liability to a penalty under any paragraph of the 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
- (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.

30. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.

(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.

31. 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:

(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.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16-
 - 5 (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.
 - 10 (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

The Appellant’s case

32. The Appellant’s grounds of appeal are that he intended to file online but was frustrated by the system. He requested a paper return and submitted that timeously and in any event before 31 January 2014. Accordingly, even though that return was sent back to him for amendment he had submitted a paper return within a reasonable time of receiving it and in any event before 31 January 2014.

33. As to the daily penalties, the return had been submitted by 31 January 2014 and therefore no daily penalties should be due (i.e before the three month penalty date). The fact that HMRC were prepared to treat an unsigned return as being a return for these purposes (albeit only from 27 February) demonstrates that a defect in a return does not mean that for this purpose a return has not been made at all.

34. As to failing to submit a paper return by 31 October 2013, the Appellant had intended to submit an electronic return but was frustrated in doing so. Given the Christmas break he requested a paper return on 6 January 2014 and promptly submitted it. Accordingly, he had a reasonable excuse for the delay in filing a paper return.

35. Even if an unsigned return is thought not to be a return, given the Appellant’s prompt submission of the paper return once he had received it and his prompt resubmission of the return - twice - thereafter, his failure to sign the return in his haste to submit it is a forgivable slip which in all the surrounding circumstances amounts to a reasonable excuse.

36. In this context it is worth noting that HMRC’s letter of 27 February 2014 rejected the return as not signed, yet it had been, not once but twice previously, the first time by 14 January 2014. Accordingly had HMRC responded to the first submission by pointing out the lack of a signature, doubtless the second submission would have been signed. This constitutes a reasonable excuse for the period from submission of the first return down to the submission of the signed return, if such is needed. It is also a special circumstance.

HMRC’s Case

40 37. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already

paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

38. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

5 39. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA tax return.

10 40. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

41. ‘Reasonable excuse’ was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

15 “It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?” [Page 142 3rd line et seq.].

20 42. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

25 43. If there is a reasonable excuse it must exist throughout the failure period.

44. The Appellant has not provided a reasonable excuse for his failure to file his tax returns for the year 2012-13 on time and accordingly the penalties have been correctly charged in accordance with the legislation.

30 45. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

35 46. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. “Special circumstances” is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

47. In other contexts “special” has been held to mean ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general
5 circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

48. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may
10 rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

49. HMRC have considered the Appellant’s grounds of appeal but his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

15 50. Accordingly, HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

51. When a person appeals against a penalty they are required to have a reasonable
20 excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

52. A reasonable excuse is normally an unexpected or unusual event, either
25 unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

53. The Appellant had no excuse in respect of the late delivery of an electronic return to HMRC by 31 January 2014. Although he encountered difficulties filing online he should have contacted HMRC’s “help line” or sought professional assistance. The Appellant appears to have given up in his attempts to file online in mid December 2013
30 and asked for a paper return on 6 January 2014 when there was still ample time for him to re-attempt an online filing. We do not find any special circumstances.

54. A paper return should have been filed on 31 October 2013 and therefore by the end of January 2014 was already three months late. However we consider that there were delays on the part of both HMRC and the Appellant and in all the circumstances
35 we consider that the Appellant had a reasonable excuse for the delays which occurred after 31 January 2014.

55. We therefore confirm the fixed penalty of £100 but discharge the daily penalties of £270.

56. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 30 APRIL 2019

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