



INCOME TAX – Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return on time – reliance on agent - whether taxpayer had a reasonable excuse for her default – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07212

Appeal number: TC/2019/00639

BETWEEN

VERONICA MICU

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 4 June 2019 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 28 January 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 15 March 2019.

DECISION

INTRODUCTION

1. This is an appeal by Miss Veronica Micu ('the Appellant') against fixed and daily penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraph 3, 4 and 5 of Schedule 55 Finance Act 2009, for her failure to file a self-assessment ('SA') tax return on time for the tax year ending 5 April 2017.

BACKGROUND

2. The Appellant's returns for 2016-17, was due if filed electronically no later than 31 January 2017.
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.
 - (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 of Schedule 55 FA 2009.
 - (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
4. The Appellant's electronic return for 2016-17 was filed on 12 October 2018. It was therefore not filed on time and penalties of £100, £900 and £300 were imposed, under (i), (ii) and (iii) 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 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 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.
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).

9. 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 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

10. The Appellant's 2016-7 return was issued to her on 28 September 2017 and was due to be returned by 31 January 2018 if returned electronically. The Notice to file a return was issued to the correspondence address provided by the Appellant.
11. The Appellant says that she instructed her previous agent to submit her return, but that they failed to do so.
12. The SA return was received by HMRC on 12 October 2018. They were therefore over 9 months late.
13. HMRC originally imposed a fixed penalty of £100 together with daily penalties [at £10 for each day, totalling £900. The initial penalty notices were issued to the postal address provided by the Appellant. The return still having not been received six months after the filing date HMRC then imposed a fixed penalty of £300.
14. The Appellant appealed to the Tribunal on 28 January 2019.

The Appellant's case

15. The Appellant's grounds of appeal are that her agent failed to submit her return as instructed and then stopped responding to attempts to communicate with them. She appointed a new accountant as soon as this became apparent and they submitted her return. Accordingly, she had a reasonable excuse for the delay in filing a return.

HMRC's Case

16. 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.
17. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.
18. 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 she has a reasonable excuse for the late filing of her SA tax return.

Reasonable Excuse

19. 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.
20. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"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.].

21. 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.
22. If there is a reasonable excuse it must exist throughout the failure period.
23. The Appellant has not provided a reasonable excuse for her failure to file her tax return for the year 2016-17 on time and accordingly the penalties have been correctly charged in accordance with the legislation.
24. 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

25. 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.
26. 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 circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).
27. 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 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’.
28. HMRC have considered the Appellant’s grounds of appeal but assert that her circumstances do not amount to special circumstances which would merit a reduction of the penalties.
29. 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.

FINDINGS OF FACT

30. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable. I am satisfied that the penalty notices dated on or around 13 February 2018, 31 July 2018 and 10 August 2018 were sent to the postal address linked to the Appellant’s SA account (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761).

31. Miss Micu does not suggest that she did not receive those penalty notices. There is no evidence before me of any postal difficulties at around the relevant times and therefore I am satisfied that the notices were received by Miss Micu.
32. No record of any communication between Miss Micu and her previous agent, or Miss Micu and HMRC has been provided to me. I have not been told what the dates of any such communication may be. HMRC have stated that there is a record of a telephone call from the Appellant on 26 September 2018. I am not satisfied that there was any communication with the Respondent in relation to the failure to file the return prior to that date.
33. Miss Micu indicated in her original request for review that her agent at the time of the filing date was not responding to communication. In her appeal notice she states that the information that they had provided to her was incorrect. The two accounts are potentially slightly different.
34. It is agreed that the return was in fact submitted electronically on 12 October 2018. The HMRC computer system does not allow a customer to submit a tax return for the same tax year twice. Therefore, the return having been submitted on 12 October 2018 effectively, it must not have been submitted effectively prior to that. I accept that the return was not properly submitted on or around 31 January 2018, or prior to 12 October 2018.

DISCUSSION

35. Relevant statutory provisions are included as an Appendix to this decision.
36. I have concluded that the tax return for the 2016-17 tax year was not submitted on time. It should have been submitted by 31 January 2018. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.
37. When a person appeals against a penalty they are required to have a reasonable 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. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.
38. Miss Micu must have been aware shortly after the 13 February that her return had not been submitted. It is not clear to me what she did in response to that penalty notice. She has indicated in her notice of appeal that there were communications ongoing with HMRC to explain the delay in filing, however, the Respondent asserts that there was no contact until a telephone call on 26 September 2018 during which she indicated that she had believed that her previous agent had filed the return. A telephone call eight months after notification that the return had been filed, does not constitute sufficient effort to “keep HMRC in the loop”. Similarly, the call log records that she believed her agent had filed the return, however, letters throughout February, June, July and August must have alerted her long before September that that was not the case. Undoubtedly, had she contacted HMRC prior to September they would have given advice on how to avoid liability to the penalties.
39. The Appellant did not file a return until October. Her new agent was not notified to the Respondent until 3 October 2018 and no explanation has been provided as to why it took so long to take that action. She evidently had all the necessary documentation to be immediately passed on to her new agent notwithstanding the inability to get a response from the previous agent.

40. No correspondence dated February 2018 to September 2018 between her and her previous agent has been supplied. If indeed the previous agent was negligent in their duties then Miss Micu may have some recourse against her former agent, however, her reliance upon an agent cannot be a reasonable excuse unless she took reasonable care to ensure that her obligations were complied with. The responsibility for complying with her tax obligations rests with her. If indeed the initial error was the fault of the agent, it could have been rectified shortly after the notice of February 2018 was received.
41. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. Had Miss Micu had an honest belief that her return had been filed on time, that belief ought to have been displaced by the February, July and August penalty notices. I am satisfied that Miss Micu took no action following the receipt of those documents until the end of September, suggesting that she was not paying due attention to her tax obligations.
42. I conclude that Miss Micu does not have a reasonable excuse for the late filing of her return for 2016-17.
43. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.
44. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Miss Micu.
45. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Miss Micu relied upon was her reliance upon an agent. I have explained above why I do not consider that reliance and subsequent failure to properly respond to communication from HMRC can provide Miss Micu with a reasonable excuse for her late filing. Similarly, I conclude that ignorance of the severity of the Schedule 55 penalty regime does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

CONCLUSION

46. I therefore confirm the fixed penalties of £100, £900 and £300.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

Release date: 19 June 2019

**APPENDIX
RELEVANT STATUTORY PROVISIONS**

Finance Act 2009

48. 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.

49. 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) —

(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.

(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

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

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

5—

(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
 - (b) £300.

51. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

(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 —

- (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—

- (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 —

- (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—

- (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 —

- (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.

52. 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
- (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.

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

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.
- (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.

54. 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:

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

Taxes Management Act 1970

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

- (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-
 - 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.

(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.

(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.

(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.