



TC07218

Appeal number: TC/2016/00337

Income tax - fixed and daily penalties for late filing of self-assessment returns - late filing returns for two years - Donaldson considered - Appellant's accountant failed to file returns - second accountant had erroneously advised that Appellant did not need to file a return - Appellant moved address and had not received the notices to file and penalty notices - whether reasonable excuse - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

KALIM HANIF

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NOEL BARRETT**

**Sitting in public at Bradford Tribunal Service, Phoenix House, Rushton Avenue,
Bradford on 19 September 2018**

The Appellant in person

Ms Rosemary Grainger, Officer of HMRC, for the Respondent

DECISION

1. This is an appeal by Mr Kalim Hanif ('the appellant') against penalties totalling £3,200 imposed by the Respondents ('HMRC') under Paragraphs 2, 3, 4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment ('SA') tax returns for the tax years ending 5 April 2011 and 2012.
2. The appeal was made outside the 30 day time limit within which penalties must be appealed. He therefore applies for permission to appeal out of time. HMRC do not oppose the application.

Background

3. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.
4. 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 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.

2010-11

5. For the year ending 5 April 2010, the appellant's SA return showed that he was employed as a director in his company, Kuchena Limited.
6. The notice to file for the year ending 5 April 2011 was issued to the appellant on 6 April 2011. The notice to file was sent to the appellant at the address recorded on HMRC's system records, 39 Montague Street, Bradford, which was the address recorded on HMRC's system since March 2003. The appellant says that he sold that property in July 2011 around the time of his divorce, but did not provide HMRC with his new address.
7. The appellant's 2010-11 return, if filed electronically, was due on 31 January 2012.

8. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 14 February 2012 in the amount of £100. The penalty notice was sent to 39 Montague Street.

9. On 5 June 2012 a 30 day daily penalty reminder letter was sent to the appellant at the same address.

10. On 30 July 2012 HMRC received notice of the appellant's new address at 129 The Gatehaus, Leeds Road, Bradford.

11. On 30 July 2012 a 60 day daily penalty reminder letter was sent to the appellant at the new address.

12. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 7 August 2012 in the amount of £900, calculated at £10 per day for 90 days.

13. As the return had still not been received 6 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 7 August 2012 in the amount of £300.

14. On 22 August 2012 the appellant appealed the £900 and £300 penalties to HMRC, on the grounds that he had not received a notice to file and that he was "only employed by a company and did not get any other income". He enclosed his P 60 for 2010-11 which showed income of £12,065 and tax deducted of £1,117.

15. On 14 September 2012 HMRC replied that they could not consider the appeal as the appellant had not yet filed his 2010-11 SA return. HMRC asked the appellant to file his return electronically no later than 12 October 2012.

16. On 8 November 2012 HMRC sent the appellant a reminder that he had still not filed his 2010-11 return.

17. On 11 January 2013 HMRC considered but refused the appellant's appeal against the £900 and £300 penalties because he had not shown a reasonable excuse for not filing his personal 2010-11 return

18. As the return had still not been received 12 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 19 February 2013 in the amount of £300.

2011-12

19. The appellant's 2011-12 return, if filed electronically, was due on 31 January 2013. The return was received on 26 October 2015.

20. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 12 February 2013 in the amount of £100.

21. On 23 April 2013, HMRC wrote to the appellant reminding him that he had not responded to their earlier correspondence.

22. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 14 August 2013 in the amount of £900, calculated at £10 per day for 90 days.

23. As the return had still not been received 6 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 14 August 2013 in the amount of £300.

24. As the return had still not been received 12 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 19 February 2013 in the amount of £300.

25. On 28 July 2015 the appellant's accountants IK Associates (UK) Ltd wrote to HMRC saying that they had appealed all penalties imposed for the years ending 2011, 2012 (and 2013). They said that the appellant had never been asked to file a return and that correspondence from HMRC had been sent to an address that he had moved out of. They said that the appellant's returns had now been filed and asked for the penalties to be waived.

26. On 29 September 2015 HMRC rejected the appeal on the basis that it was out of time in respect of the penalties levied for each of years 2011 and 2012, and that returns for these years had still not been filed.

27. The appellant's returns for 2010-11 and 2011-12 were received by HMRC on 26 October 2015.

28. On 16 November 2015 the appellant appealed all penalties on the grounds that he had been advised by his accountants that he did not need to file a return.

29. He said that he had sold 39 Montague Street in July 2011. He went through a divorce and moved to 129 The Gatehaus in June 2012. Because of the various changes of address he had not received the notices to file, penalty notices or HMRC's correspondence. He had left it to his accountants to advise his change of address.

30. The appellant appealed all the penalties to the Tribunal on 14 January 2016. His grounds of appeal are:

- i. Up to December 2010, his first accountants Fazak & Co (UK) Limited, dealt with all his tax affairs, which he assumed were up to date.
- ii. In January 2011 he moved to another accountant and at around the same time was in the process of selling 39 Montague Street as part of his divorce settlement.
- iii. Until he received a penalty notice at his new address he had not been aware that he was required to file tax returns for 2011 and 2012.

- iv. His accountant told him that he did not need to file a return because he had not received any other income apart from his income as a director of Kuchena Ltd. His accountants had therefore given him misleading advice.
- v. He changed accountants again and his tax returns for 2010-11 and 2011-12 had now been filed.

31. 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.

32. On 26 January 2016, because the outcome of the *Donaldson* appeal was relevant to the appellant’s appeal against daily penalties, the appeals were stood behind *Donaldson* until that appeal was determined.

33. The three issues before the Court of Appeal in respect of daily penalties were:

- a) whether HMRC had made a decision required by paragraph 4(1)(b) of Schedule 55 FA 2009 to charge daily penalties;
- b) whether HMRC had given notice required under paragraph 4(1)(c) of Schedule 55 FA 2009, specifying the date from which the daily penalties were payable;
- c) whether HMRC had specified the period in respect of which the daily penalties were assessed in the notice of assessment, required under paragraph 18 of Schedule 55 FA 2009.

34. Although only issue (b) was before the Upper Tribunal, Mr Donaldson was given permission to raise the two further points (a) and (c).

35. The Court of Appeal decided that:

- a. Parliament had not intended that HMRC should only be able to exercise discretion under para 4(1)(b) on an individual taxpayer-by-taxpayer basis. The policy decision taken by HMRC in June 2010 that all taxpayers who were at least three months late in filing their returns would be liable to a daily penalty, satisfied the requirements of para 4(1)(b).
- b. HMRC had given notice under paragraph 4(1)(c) specifying the date from which the penalty was payable in the SA reminder and SA326 Notice. Both notices stated in terms that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three months late and specified the date from which they were payable depending on whether the person filed an electronic or paper return. The notice could be given in advance of any default.
- c. HMRC’s notice of assessment under paragraph 18 did not specify the period for which the daily penalties had been assessed. The notice should have specified the period over which the penalty had been incurred and

should also have specified the three month period for which the penalty had been charged, or at least state the date when the penalties started. However, the court decided the omission fell within the scope of s 114(1) TMA 1970 and thus did not affect the validity of the notice of assessment. The court's view was that Mr Donaldson was not misled or confused by the omission and the period of assessment could be worked out without difficulty.

36. The *Donaldson* appeal lasted for several years, as the *Donaldson* decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761).

The Court of Appeal's decision became final when the Supreme Court refused permission for leave to appeal on 21 December 2016.

How the Court of Appeal decision affects this appeal

37. HMRC submit that following the Court of Appeal decision, the Tribunal should find that in the present appeal, HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice.

Filing date and Penalty date

38. Section 8(1D) TMA 1970 et seq. states that a non-electronic return must be filed by 31 October following the end of the relevant tax year or an electronic return by 31 January of the following year. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

Reasonable excuse

39. 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.

40. 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.

41. 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).

42. 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 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.

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

Relevant statutory provisions

Taxes Management Act 1970

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 this section is given after the 31st October next following the year, the last j 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 this 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 this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this 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 this 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 this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

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

(4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this 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 this section and sections 8A, 9 and 12AA of this 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:

44. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

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

- (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).

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 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.

Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

- (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

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 para-graph 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.

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--
 - (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.

The appellant’s case

45. The appellant’s case is as set out in his Notice of Appeal to the Tribunal.

HMRC’s Case

46. Late filing penalties for the years ended 5 April 2011 and 2012 are due 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.

47. When a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the notices to file issued to the appellant on 6 April 2011 and 2012.

48. If the appellant changed address he should have notified his new address to HMRC. If necessary he should have also arranged for his post to be redirected.

49. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the appellant to ensure his tax returns were filed by the legislative date and any payment made on time.

50. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

51. The appellant has been making SA tax returns for many years. Therefore, HMRC consider him to be experienced with the SA system, including the due dates for paper and online returns.

52. HMRC consider that having been continuously within the SA regime for many years, the appellant would know that once a notice to complete a tax return was issued to him, this placed a legal obligation on him to complete the tax return and file it on time. The appellant would also be aware of the consequences of failing to meet his legal obligations.

53. Reliance on a third party does not constitute a reasonable excuse. It is the taxpayer's own responsibility to ensure their tax return is received on time and they are liable to penalties if it is not. The SA system places a greater degree of responsibility on customers for their own tax affairs.

54. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time. 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

55. 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

56. 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.

57. 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).

58. HMRC have considered the appellant's arguments and submit that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

59. 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'.

60. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, if the Tribunal disagrees, HMRC further submit that there are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

61. 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.

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

63. The appellant had previously filed tax returns for many years and should have been aware of the filing procedures and the penalties payable in the event of default.

64. HMRC sent a late filing penalty to the appellant on 14 February 2012 for £100. Further penalties followed on 7 August 2012 for £900 and £300. A 12 month penalty was issued on 19 February 2013. Each of these penalty notices should have acted as a reminder to the appellant that his return was outstanding. It is no excuse that the appellant did not receive any of these penalty notices simply because he had changed address. The appellant is under a statutory duty to keep HMRC updated with any changes of address and that obligation cannot be delegated to a third party.

65. Similarly in respect of the 2011-12 year, the appellant received penalties of £100 on 12 February 2013 and £900 and £300 on 14 August 2013.

66. He filed both outstanding returns, but not until 26 October 2015.

67. If a reasonable excuse exists for the late filing of a return the excuse must endure for the entire period of delay. Any excuse which the appellant may have initially had did not continue until 26 October 2015.

68. Late filing penalties are raised solely because the return is filed late. They are no longer linked to liability and remain fixed even if there is no tax due.

69. The appellant has not shown a reasonable excuse for the late filing of his 2010-11 and 2011-12 returns. The late filing penalties have been charged in accordance with legislation.

70. I find that there are no special circumstances which would allow penalties which have been correctly imposed to be reduced under Special Reduction regulations.

71. The penalties totalling £3,200 are therefore confirmed.

72. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 21 JUNE 2019