



TC07274

Appeal number: TC/2018/05263

Application for permission to appeal out of time - Income tax - fixed and daily penalties for late filing of self-assessment returns for three years and late payment of tax for five years - appellant said he was ill and had been hospitalised during the default years - whether reasonable excuse continuing throughout default period - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN JAMES AYRES

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER CHARLES BAKER FCA**

Sitting in public at Taylor House, Rosebery Avenue, London on 25 March 2019

The appellant did not attend and was not represented

Ms Elizabeth Edley, Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal by Darren James Ayres ('the appellant') against penalties totalling £3,100 imposed by the respondents ('HMRC') for the late filing by the appellant of his self-assessment ('SA') tax returns for the years ending 5 April 2010, 2012 and 2013 and penalties imposed totalling £1,139 for the late payment of tax in the years ending 5 April 2010, 2011, 2012, 2014, 2016 and 2017 ('the default years').
2. The appeal was made outside the 30 day time limit within which penalties must be appealed. The appellant therefore applies for permission to appeal out of time.
3. The appellant's application is made pursuant to rule 20(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.
4. HMRC object to the appellant's application.
5. The appellant did not attend the hearing. The Tribunal was satisfied that the appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed

Background

6. During the default years the appellant was the proprietor of various roofing and construction companies. He was appointed a director and/or the company secretary of the following companies:

- On 12 July 2013, Roofseal Roofing Ltd
- On 2 July 2014, Ayres and Ansell Property Development Ltd
- On 30 April 2016, Roofseal Roofing and Construction Ltd
- On 6 September 2016, SEH Supply and Hire Ltd
- On 12 February 2018, Construction Serve UK Ltd

7. The appellant ran his own businesses in a self-employed capacity and was also employed:

SATR 2011: States self-employed roof repairs and turnover £30,025

SATR 2012: States self-employed roofer and turnover £30,696

SATR 2013: No detail available

SATR 2014: States self-employed roof repairs and turnover £78,515

SATR 2015: Employed and also received director dividend of £33,333

SATR 2016: Employed and also received £33,333 director dividend. This was then amended to employed and he also received £42,222 director dividend

SATR 2017: Employed and also received director dividend £34,000.

8. The appellant's individual tax returns, if filed electronically, were due on no later than 31 January in the year following each tax year.

Filing date

9. 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

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

Payment/return date and penalties

11. Tax must be paid on or before 31 January (first payment on account) in the tax year and 31 July (second payment on account), following the tax year.

12. Up to 2009-10, penalties for tax overdue were levied at 5% of the unpaid tax at 28 days following the due date and at 6 months following the due date.

13. From 2010-11, penalties for tax overdue were levied at 5% of the unpaid tax at 30 days, 6 months and 12 months following the due date.

14. The appellant's returns were all filed several years late.

15. Penalties for the late filing of returns for years up to 2009-10 are imposed under s 93 TMA 1970 at £100 if the return is not filed by the filing date and a further £100 if the return has not been filed after 6 months.

16. The penalties for late filing of a return for years after 2009-10 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 £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

17. Penalties of £100 and £100 were imposed for the late filing of the appellant's 2009-10 return.

18. Penalties of £100, £900 and £300 were imposed for year 2011-12 under paragraphs 3 to 5 above and £100, £900, £300 and £300 for year 2012-13 under paragraphs 3 to 6.

19. Penalties were imposed under Schedule 56 FA 2009 for the late payment of tax in years 2009-10 (£75), 2010-11 (£75), 2011-12 (£75 x 3), 2013-14 (£168 x 3), 2015-16 (£79 x 3) and 2016-17 (£98).

20. The appellant's appeal is against all the penalties.

Reasonable excuse

21. With regard to the late filing of a return, 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.

22. There are similar provisions under TMA 1970

23. 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.

24. 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).

25. 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.

26. If there is a reasonable excuse it must exist throughout the failure period.
27. The notice to file for the default years was issued to the appellant on 6 April for each tax year. The filing date was 31 October for a non-electronic return or 31 January in the following year for an electronic return.
28. Section 31A TMA 1970 requires that appeals against a penalty are made within 30 days.
29. The late filing penalties were imposed in March, August and September or October in the years ending 2010, 2012 and 2013.
30. The late payment penalties were imposed in 2010, 2011, 2012, 2014, 2016 and 2017.
31. On 10 May 2018, the appellant via his agent submitted late appeals to HMRC against all the penalties.
32. On 25 June 2018 HMRC wrote to the appellant rejecting the late appeals because they were out of time.
33. On 23 July 2018 the appellant lodged an out of time appeal with the Tribunal.
34. The grounds of appeal as stated by the appellant's agent were that the appellant had suffered ongoing medical problems which had resulted in him being hospitalised many times over the previous eight years. They added that his health was constantly deteriorating and slowly improving only to deteriorate again sometime later. He had been too unwell to keep track of his financial affairs and in 2018 had instructed the agent to take on the role of organising past and present returns on his behalf which they duly prepared and submitted so that they were up-to-date as at the date of appeal to HMRC. The agents said that the appellant had been unaware of the penalties until his agents started the appeal process. That was why he was late appealing the penalties.

Relevant statutory provisions

Taxes Management Act 1970

35. 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 [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.

Section 31A; provides that notice of appeal must be given within 30 days after the specified date.

Appeals: notice of appeal

- (1) Notice of an appeal under section 31 of this Act must be given -
 - (a) in writing,
 - (b) within 30 days after the specified date,
 - (c) to the relevant officer of the board.

Schedule 55 Finance Act 2009:

36. The penalties for the default years after 2009-10 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 self-assessment 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 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.

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.

HMRC's case

37. The appellant has not submitted any of the appeals within the 30-day time limit. The allowing of an extension of time should be the exception rather than the norm.

38. Rule 20(1) of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (SI2009/273) provides that a notice of appeal must be sent or delivered to the tribunal within the time limit imposed by an enactment.

39. The burden of proof lies with the appellant to demonstrate why the tribunal should exercise its discretion to admit an appeal that is brought late. HMRC objects to the application and contends that the tribunal should not exercise its discretion to allow the appellant's application to appeal out of time. There has been a lengthy delay; the appeals against the penalties are up to seven years out of time.

40. HMRC therefore submit that the appellant's delay cannot be considered anything but serious and significant.

41. Where 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 and warnings of penalties were clearly shown on the Notice to File issued to the appellant for each of the default years.

42. 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 payment of any tax due made on time.

43. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. 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.

44. The Notice to File issued to the appellant in each default year included generic information relating to the penalty regime in order to encourage customers to file their return on time.

45. In each default year HMRC issued penalty reminder letters to the appellant and these would have informed him that his tax return or payment of tax was still outstanding and to send or remit it to HMRC to prevent further penalties.

46. Notices of reminder and Penalties Notices were issued for all the default years.

47. 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.

48. The appellant's grounds of appeal even assuming his application for permission to appeal was granted, are without merit.

Special Reduction

49. 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.

50. 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).

51. HMRC have considered the appellant's ill health. Without more information these are not special circumstances which would merit a reduction of the penalties below the statutory amount.

52. 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'.

53. 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

54. The appellant's appeal to the tribunal is inordinately out of time.

55. Rule 20(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

20(4) If the Notice of Appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the Permission of the Tribunal –

(a) the Notice of Appeal must include a request for such permission and the reason why the Notice of Appeal was not provided in time; and

(b) unless the Tribunal gives permission, the Tribunal must not admit the appeal.

56. As HMRC say, the tribunal should grant permission to appeal out of time, only exceptionally and based on compelling reasons showing why an appeal could not have been made in time, or at least within a reasonable time after the 30 day time limit.

57. The discretion to admit appeals out of time is placed on the tribunal by s 49 Taxes Management Act ("TMA") 1970. The time limit for Income Tax appeal to the Tribunal is set by s 49H TMA 1970.

There is a clear statement in *Romasave [Romasave (Property Services) Ltd v HMRC 2015 UKUT 254]* at [96] that:

"...Permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

The approach to take in deciding whether to allow a late appeal is set out in the case of *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195, by Morgan J:

“Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.” [1311]

58. Purpose of the time limit - There clearly is a purpose behind the statutory time limits and a tribunal should only be prepared to relax those time limits if, having weighed up all of the factors, including the need for finality in tax matters, it is right to do so in order to deal with a case fairly and justly.

59. Length of delay - In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1 the Upper Tribunal states:

196] “..... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

60. Consequences of granting the application - There should be finality in litigation. Taxpayers are expected to act with reasonable prudence, diligence and timeously in dealing with their tax affairs.

61. What will be the consequences for the parties of a refusal to extend time? If the application is refused, then the penalties are payable by the appellant, but that is the necessary consequence of the penalties being appealed out of time with no reasonable explanation for the extended delay.

62. The appellant received numerous penalty assessments between February 2010 and April 2018. In addition, he would have received periodic statements showing each penalty plus accruing interest.

63. When a person appeals against a penalty any reasonable excuse offered must exist for the whole period or periods of the default. 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 they would have complied with.

64. The appellant has not produced any evidence to show why he was unable to appeal the penalties as and when they arose. He has not offered any reason why he

could not have sought help to file returns, pay outstanding taxes or submit an appeal to HMRC sooner than 10 May 2018, eight years after the first penalty.

65. Even if it is accepted that the appellant was ill during the default years, we have not been provided with any medical evidence to show that he was unable to deal with his tax affairs or delegate that to an agent. In fact it is clear from the appellant's self-assessments that he continued to work throughout the default years.

66. Having taken into account the length of delay in bringing the appeal out of time and the merits of the appeal generally, the application to appeal out of time is refused and the late filing and late payment penalties are confirmed.

67. 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: 20 July 2019