



TC07366

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Appeal number: TC/2019/01227

INCOME TAX – penalty for failure to make returns

10 **FIRST-TIER TRIBUNAL
TAX CHAMBER**

BALBIR MALL

Appellant

- and -

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

Respondents

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**TRIBUNAL: G NOEL BARRETT
PRESIDING MEMBER**

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The Tribunal determined the appeal on 1st August 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 Appellant's Notice of Appeal received by the Tribunal on 7 March 2019 (with enclosed late penalty letter), HMRC's Statement of Case (with enclosures) dated 21 March 2019 and the bundle of documents prepared by HMRC and referred to therein.

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DECISION

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1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for failing to submit her self-assessment tax return for 2016/17 on time.

2. The penalties that have been charged can be summarised as follows:

10 (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018 for the late filing of the 2016/17 return.

(2) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018 for the late filing of the 2016/17 return.

15 (3) a “six month” £300 late filing penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018 for the late filing of the 2016/17 return.

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

20 (1) She argues that she has been paying an accountant to deal with his (sic her?) accounting and tax affairs.

(2) She argues that her accountants misled her into believing that all his (sic her?) tax affairs are up to date.

25 (3) It was only recently that the appellant’s new accountants managed to find out that the previous accountant has not filed quite a few self-assessment returns.

(4) The appellant has been chasing the accountant since a couple of months but with no luck.

(5) The appellant was also struggling to get hold of the paperwork as the accountant would not answer any calls.

30 (6) As this was negligence by the accountant, therefore the appellant should not be made liable for some-one else’s fault.

(7) The appellant was paying regularly to the accountant for the services he never performed.

(8) The appellant requests that the penalties and interest be reversed.

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Findings of fact

4. Whilst the appellant states in her Notice of Appeal that she believes that the penalties under appeal amount to £3,000 the penalties in fact under appeal are only for the 2016/17 tax year and amount (as above) to £1,300 plus statutory interest thereon.
5. HMRC state that they issued a notice to file a return for the year ending 5 April 2017 to the appellant on 6th April 2017. Confirmation that the notice was issued is exhibited at folio D page 9. The appellant does not appear to dispute that this notice was issued.
6. The Notice to File and the subsequent penalty notices and reminders were all posted by the respondents to the appellant at 186 Mount Road Penn Wolverhampton. This is the address provided by the appellant on her Notice of Appeal and the appellant does not dispute that she received the Notice to File or the subsequent penalty notices or reminders.
7. The filing date under that notice to file was 31 October 2017 for a non-electronic return or 31 January 2018 for an electronic return. The appellant's return was not in fact filed electronically until 31 October 2018. The appellant does not dispute that she filed her return late.
8. In total the respondents issued the three penalty notices and two further reminder letters to the appellant at her correct address between 13 February 2018 and 10 August 2018.
9. The appellant appealed to HMRC through her new accountants, on 21 November 2018.
10. HMRC considered and refused her appeal by their letter of the 18 January 2018 on the basis that reliance on another party filing a return was specifically excluded from amounting to a reasonable excuse.
11. The appellant asked HMRC to review their decision and HMRC issued their review conclusion letter on 4 February 2019. In that letter HMRC confirmed their earlier decision not to allow the appellant's appeal on the grounds as above that it was the appellant's responsibility to file her return on time and that HMRC did not consider an agent who did not fulfil an individual's expectations to be a reasonable excuse.
12. HMRC also considered where there were any circumstances which warranted a special reduction of the penalties and concluded for the same reasons that there were not.
13. I find that HMRC properly considered all they ought to have considered and did not consider anything they ought not to have considered when reaching their decision in their review.
14. The appellant had 30 days in which to appeal this Tribunal from the date of that decision.

15. The appellant's appeal is not dated, but was not received by the Tribunal until on or around the 7 March 2019

16. It is unclear as to whether the appeal to this Tribunal is in time or was late. HMRC have not raised the issue, nor have they expressly consented to the appellant appealing late. They have however prepared a full Statement of Case which deals with all of the penalties and does not suggest that the Tribunal should refuse to deal with the appeals against the penalties because they were made late. I have therefore decided that HMRC have now given consent under s49(2)(a) to the late appeal against the penalties.

10 Discussion

17. Relevant statutory provisions are included as an Appendix to this decision.

18. I have concluded that the tax return for the 2016/17 tax year was received on 31 October 2018. It should have been submitted by 31 October 2017 for a non-electronic return or 31 January 2018 for an electronic return. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

19. The appellant has argued that she should not be penalised firstly because the defaults were those of her accountant and secondly because her accountant misled her as to those defaults.

20. The appellant has not provided any evidence as to the number of times or the period over which she chased her accountant. She has not provided copies of any letters or emails between herself and her accountant, nor has she provided any specific details as to how it was that her accountant misled her as to her responsibilities to file her tax return.

21. I do find however that the appellant, must have properly received the reminder letters and penalty notices, said to have been sent to by the respondents. They were all sent to the appellant's correct address which is the same as the address she provided in her Notice of Appeal and the appellant does not dispute having received the same. In this regard, the respondents have satisfied the burden of proving service, (as the must) to the required civil standard.

22. I note that when HMRC say in their Statement of Case that "that responsibility (sic to meet tax obligations) rests with the customer and cannot be transferred to a third party" and that "relying on a third party cannot be a reasonable excuse" they are not entirely correct. Paragraph 23(2) (b) of Schedule 55 as annexed, makes it clear that what the customer or in this case the appellant had to do having relied on another person, was to still take reasonable care to avoid the failure.

23. The burden of proving a reasonable excuse to the required civil standard ie "on the balance of probabilities" rests with the appellant.

24. I take the view that when reminders and indeed when the penalty notices were received, the appellant should not have continued ignoring them. As a responsible tax payer she should have contacted HMRC directly herself to check her position. It was in my view unreasonable for her not to do so.

5 25. For the reasons I have given, I therefore find that that the appellant did not have a reasonable excuse for filing her tax return late.

26. Finally in regard to special circumstances I do not consider that the appellant's appeal reveals any matters which amount to special circumstances.

27. I therefore dismiss the appeal and allow the penalties in the sum of £1,300.

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Application for permission to appeal

15 28. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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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**G. NOEL BARRETT
TRIBUNAL PRESIDING MEMBER**

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RELEASE DATE: 12 SEPTEMBER 2019

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APPENDIX – RELEVANT STATUTORY PROVISIONS

1. 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.

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

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- (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).

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

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- (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.

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

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- (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

5 (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

10 (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

15 (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

20 (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

25 (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

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

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30 (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)—

35 (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

40 (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.

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

- 5 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—
 - 10 (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—
 - 15 (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

7. 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:

- 20 22—
- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
 - (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
 - 25 (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—
 - 30 (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.

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