

[2020] UKFTT 235 (TC)



TC07720

Appeal number: TC/2019/06743

FIRST-TIER TRIBUNAL
TAX CHAMBER

Income Tax – application for permission to appeal out of time – granted – appeal against late filing and penalties under Schedule 55 Finance Act 2009 – whether reasonable excuse – No – appeal dismissed.

Warren Brown

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 7 April 2020 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 24 October 2019 and HMRC Statement of Case submitted on 11 December 2019.

INTRODUCTION

The matter before the Tribunal is an appeal against late filing penalties charged under Schedule 55, Finance Act (FA) 2009 in respect of the late filing of a Self-Assessment Individual Tax Return for the year ending 5 April 2017 and against late payment penalties charged under Schedule 56, Finance Act (FA) 2009 in respect of the late payment of tax for the year ending 5 April 2017.

The late filing penalties and late payment penalties charged in the amount of £1382.00 are as follows:

| Tax Year ending | Date penalty Created/issued | Description | Amount (£) |
|------------------------|------------------------------------|--------------------------------|-------------------|
| 2016-2017 | 20/02/2018 | Individual late filing penalty | £100 |
| | 28/08/2018 | Daily penalty | £900 |
| | 28/08/2018 | 6 months late filing penalty | £300 |
| 2016-2017 | 28/08/2018 | 30-day late payment penalty | £41 |
| | 28/08/2018 | 6 months late payment penalty | £41 |
| | | Total | £1382.00 |

PRELIMINARY

1. This appeal includes an application to the Tribunal, to appeal out of time.
2. HMRC object to the late appeal.
3. Under paragraph 21 of Schedule 55, an appeal is to be treated as an appeal against an assessment to the tax concerned.
4. Section 31 Taxes Management Act (TMA) 1970 gives the right of appeal against tax assessments, and Section 31A says the appeal must be within 30 days of the specified date, being the date, the notice was given.
5. HMRC received an appeal dated 24 September 2018 from Mr Brown's agent Lambert Chapman. It was 171 days late.
6. The table below shows the extent of the delay.

| TAX YEAR | PENALTY NOTICE DATE | LAST DATE TO APPEAL | APPEAL RECEIVED | DAYS LATE |
|-----------|---------------------|---------------------|-----------------|-----------|
| 2016-2017 | 20/02/2018 | 06/04/2018 | 24/09/2018 | 171 |

7. When an appeal is received by HMRC more than 30 days after the penalty has been issued, HMRC can consider the appeal if there is a reasonable excuse for the delay in appealing.

HMRC considered the late appeal under Section 49 TMA 1970 and did not agree to the late notice being given and refused the late appeal.

8. Mr Brown's reasons for appealing late are as follows:

Towards the end of 2017 I had a dispute with my then accountant regarding his bill which resulted in the breakdown of our relationship.

During the ensuing months I had to appoint a new accountant to take over the work. I instructed my new accountant to file the return but there was a misunderstanding which resulted in a delay not of my doing.

9. The grounds for the appeal against the penalty appear to be the same as the grounds for the case appeal.

10. The Appellant says that his fellow director had the same reasons for late filing and penalties which were accepted as a reasonable excuse by the Tribunal.

11. For this reason and pursuant to the guidance given in *Martland v HMRC (2018)* UKUT 178 (TCC) that “all circumstances of the case” must be considered, the appeal will be heard even though it is significantly late. Permission to appeal late is given.

BACKGROUND

12. Taxpayers who are within the self- assessment system must file their returns by the due date and pay the tax they owe by the date specified in law.

Late Filing

13. The filing date is determined by Section 8(1D) TMA 1970 et seq. which states that for the year ended 5 April 2017 a non-electronic return must be filed by 31 October 2017 and an electronic return by 31 January 2018. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Late Payment

14. Payment is due in accordance with Section 59B Taxes Management Act (TMA) 1970 and in this instance the due date for payment was 31 January 2018 under Section 598(4). A late payment penalty is chargeable where a taxpayer is late in paying tax due.

FACTS

15. The SA 316 notice to file for the year ending 5 April 2017 was issued to Mr Brown on or around 6 April 2017. The address the SA316 notice to file was issued to Martlets, CM6 3SQ. This is the correct address.

16. The filing date for a non-electronic return and for an electronic return was deferred to 15 February 2018.
17. Mr Brown's electronic return for the year 2017 was received on 23 August 2018.
18. The return was submitted 189 days late.
19. Mr Brown filed online whereby the liability was automatically calculated.
20. Mr Brown's tax liability for the year was £829.20.
21. The tax was due to be paid on or before 31 January 2018 in accordance with Section 59B TMA 1970.

Late Filing

22. In accordance with Paragraph 3 of Schedule 55 FA 2009, as Mr Brown did not submit a return by the deferred filing date of 15 February 2018, he was liable to a penalty of £100. HMRC issued a notice of penalty assessment SA326D on or around 20 February 2018 in the amount of £100. The notice (SA326O) serves as a warning of the daily penalties so satisfies the requirement of Schedule 55 FA 2009 para 4(1)(c).
23. Pursuant to Paragraph 4 of Schedule 55 FA 2009, as the return had still not been received 3 months after the penalty date, Mr Brown was liable to daily penalties of £10 per day up to a period of 90 days. HMRC issued a notice of daily penalty assessment SA370 on or around 28 August 2018 in the amount of £900.
24. Pursuant to Paragraph 5 of Schedule 55 FA 2009, as the return had still not been received 6 months after the penalty date, Mr Brown was liable to a penalty of £300. HMRC issued a notice of penalty assessment SA370 on or around 28 August 2018 in the amount of £300.
25. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2009.

Late Payment

26. In accordance with Paragraph 3(2) of Schedule 56 FA 2009, at the penalty date of 3 March 2018, £829.20 of the tax liability remained unpaid, HMRC issued a notice of penalty assessment SA370 on or around 28 August 2018 in the amount of £41.00, 5% of the tax unpaid at the penalty date (£829 @5%= £41).
27. Pursuant to Paragraph 3(3) of Schedule 56 FA 2009, 5 months after the penalty date of 3 March 2018, £829.20 of the tax liability remained unpaid, HMRC issued a notice of penalty assessment SA370 on or around 28 August 2018 in the amount of £41.00, 5% of the tax unpaid at the penalty date (£829 @5%= £41).

28. The tax liability was finally paid in full on 14 September 2018.

THE APPEAL

29. HMRC was in receipt of an appeal dated 24 September 2018 under the terms of paragraph 20 Schedule 55 FA 2009 and paragraph 13 Schedule 56 FA 2009 in respect of the penalties charged.

30. HMRC considered the appeal and issued a late appeal refusal letter for the £100 penalty to Mr Brown on 18 October 2018. This letter offered Mr Brown an opportunity to provide a reasonable excuse for appealing late or the option to appeal to the First Tier Tribunal by 17 November 2018 to admit a late appeal.

31. Also, on 18 October 2018 a second appeal refusal letter was issued in respect of the other late filing and late payment penalties charged. This letter offered a review of Mr Brown's case or to continue with his appeal by asking a Tribunal to consider the matter.

32. Mr Brown accepted an offer of a review. HMRC issued its conclusion of review letter to Mr Brown (which also included the first £100 late filing penalty) which upheld the decision to charge late filing and late payment penalties.

33. On 24 October 2019 Mr Brown lodged an appeal before the First Tier Tribunal.

POINTS AT ISSUE

34. Whether the Appellant has a reasonable excuse for the late filing of the individual tax return and for the late payment of tax for the period ending 2017.

35. If a reasonable excuse exists, whether the return was received without any unreasonable delay once any excuse had ended.

BURDEN OF STANDARD OF PROOF

36. The onus of proof is for the Respondents to show that the penalties have been correctly calculated. The burden then shifts to the Appellant to demonstrate that a reasonable excuse exists for the defaults. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.

LEGISLATION & CASE LAW

37. Section 7 Taxes Management Act 1970
Section 8 Taxes Management Act 1970
Section 9 Taxes Management Act 1970
Section 598 Taxes Management Act 1970
Schedule 55 Finance Act 2009 - paragraph 1 (1), (4) & (5)

Schedule 55 Finance Act 2009 - paragraph 3, 4, 5 and 6
Schedule 55 Finance Act 2009 - paragraph 16
Schedule 55 Finance Act 2009 - paragraph 20
Schedule 55 Finance Act 2009 - paragraph 22
Schedule 55 Finance Act 2009 - paragraph 23
Schedule 56 Finance Act 2009 - paragraph 1 (1), (4) & (5)
Schedule 56 Finance Act 2009 - paragraph 3 (2), (3) & (4)
Schedule 56 Finance Act 2009 - paragraph 9
Schedule 56 Finance Act 2009 - paragraph 13
Schedule 56 Finance Act 2009 - paragraph 15
Schedule 56 Finance Act 2009 - paragraph 16
Section 31 Taxes Management Act 1970
Section 31A Taxes Management Act 1970
Section 49 Taxes Management Act 1970
Section 7 Interpretation Act 1978
Section 115 Taxes Management Act 1970
CH170600 What are Special Circumstances

APPELLANT'S CONTENTIONS

38. Mr Brown's agent, Lambert Chapman appealed to HMRC on 24 September 2018 on the grounds –

“Our client engaged an accountant to handle his business and tax affairs, as part of his engagement the client, expected his Tax Return to be completed on his behalf.

As a result of the accountant's actions, his tax return was not completed on time, and he was therefore not able to pay any tax due as he was not aware of the amount that was outstanding. Our client has now taken the appropriate action by making payment due.

Our client's previous agent has now been sacked and he engaged us in order to update his tax affairs. He in good faith, believed his tax was being handled correctly, and has now sought the appropriate action by changing his accountant.”

39. The review request from Mr Brown's accountant Lambert Chapman dated 21 May 2019 reinstated the grounds of appeal -

“Failure by the previous agent to submit the return and included-

Both directors of Igloo Environmental Ltd appealed the penalties and Mr Sturgess was accepted and penalties cancelled, this was not the case for Mr Brown. It is difficult to understand why one set of penalties could be credited whilst the other could not. We completed self-assessment returns for them both advising the individuals to pay their tax liabilities.

Mr Brown continues to run the business on his own and accepting the penalties without

question will work against him in any review.

The company is currently struggling and looking to recover its position. Our client is looking to continue the business but is needing to inject personal funds in to achieve this.

We often see penalties withdrawn when cooperation is provided because the taxpayer will find it difficult to pay both the tax and the penalties for multiple years. Whilst this is only one year the financial implication is the same and you can see from the self-assessment record that this might not have been a deliberate action on our client's part."

40. The Tribunal Appeal made by Mr M Brown stated -

"Towards the end of 2017 I had a dispute with my then accountant regarding his bill which resulted in the breakdown of our relationship.

During the ensuing months I had to appoint a new accountant to take over the work. Our previous accountant was very unhelpful and my personal self-assessment return was not filed. I instructed my new accountant to file the return but there was a misunderstanding which resulted in a delay not of my doing.

Our company and personal tax returns were submitted and both my partner and I were given penalties which we both appealed on exactly the same basis. My business partner's appeal was accepted and penalties dropped but my appeal was denied despite identical circumstances for late filing. It has taken numerous telephone calls from both my accountant and myself to get this matter resolved and despite promises from HMRC it has taken many months to reach this point."

HMRC'S CONTENTIONS

41. HMRC's records show Mr Brown has been within the self-assessment regime since 1996 and expect him to be well aware of his obligations under self-assessment. Those obligations include filing the return and making any payment due without prompt or reminder from HMRC. He should be aware of the consequences of filing the return late and paying the tax late as he has had penalties charged in previous tax years.

42. The Appellant does not have a reasonable excuse and cannot rely on a third party's failures to present a reasonable excuse. Further a reasonable excuse must exist throughout the failure period and it not in this case.

43. HMRC records show the 2016-2017 tax return was received on 23 August 2018 and should have been delivered to HMRC by 15 February 2108, in accordance with Section 8(1D) TMA 1970. The return was received 189 days late.

DISCUSSION

44. Let us start by looking at the law.

45. A reasonable excuse needs to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. It is necessary to consider what a reasonable person, who wanted to meet their obligation, would have done in the same circumstances and decide if the action of the person met that standard

46. Reasonable excuse was considered in detail in the Upper Tribunal decision in *Christine Perrin v Commissioners for HMRC* ([2018] UKUT 0156 (TCC)). The relevant paragraphs are:

*"In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co and Coates*).*

47. And at paragraph 74:

"Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on - e.g. 'I did not think it was necessary to file a return', or 'I genuinely and honestly believed that I had submitted a return'. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however, that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

48. Whether a person has a reasonable excuse depends on the particular circumstances and the abilities of the person who has failed. What is a reasonable excuse for one person may not be a reasonable excuse for another person. If there is a reasonable excuse it must exist throughout the failure period.

49. Paragraph 23(2)(b) of Schedule 55 to FA 2009 and paragraph 16(2) (b) of Schedule 56 to FA 2009 specifically precludes reliance on a third party unless the Appellant took reasonable care to avoid the failure.

50. The responsibility to submit a self-assessment tax return and make payment by the due date remains with Mr Brown regardless of whether he has delegated that task to another person. Unless the failure of the Agent, considered in the light of all the circumstances, amounts to a reasonable excuse and the Appellant could not have taken reasonable steps to meet their obligation. Entrusting the Agent with responsibility to file the return does not absolve Mr Brown of his responsibility to ensure the return is filed on time and HMRC

submit that this does not amount to a reasonable excuse.

51. If the Appellant feels his accountants have failed in their professional capacity or not followed specific instructions then he should seek redress directly from the accountant or appropriate regulatory authority.

52. Mr Brown has not stated at what date he realised his personal self-assessment return was not being prepared for submission by his previous accountant, but as the return was not received by the filing deadline of 15 February 2018 a SA326D notice of penalty assessment was issued on 20 February 2018 which also warned of further penalties. This was followed by a 30-day penalty reminder (SA372-30) on 19 June 2018 and 30-day penalty reminder (SA372-60) on 17 July 2018.

53. Despite the penalty notice Mr Brown's return was not submitted until 23 August 2018 some 6 months later, nor does HMRC's records show he contacted them regarding the issues with his agent. Had he contacted HMRC after the first penalty notice he would have been advised to make a return with estimated figures and make a payment on those estimates to avoid further penalties. These penalties did not occur as a result of something which was entirely out of his control. Not contacting HMRC after receiving penalty notices does not help the Appellant. One would have expected acting without unreasonable delay and contacting HMRC helpline and corresponding on the difficulties with agents. This was not done in a timely manner.

54. HMRC's self-assessment notes show Mr Brown telephoned them on 30 January 2018 regarding his user ID but no further communication was received from him or an agent until 3 August 2018 (64-8 agent update). Various other calls and letters were received between 17 October 2018 and 24 September 2019.

55. HMRC's Debt management office notes show they first issued a IDMS99 Self-Assessment debt letter to Mr Brown on 1 May 2018 followed by further letters on 11 May 2018, 29 August 2018, 13 October 2018, 29 October 2018, 20 February 2019 and 4 March 2019 but neither he nor his agent contacted them until 2 April 2019. These are not considered the actions of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Taxes Acts.

56. Each case is taken on its own merits and the Tribunal does not have access to the records of Mr Brown's business partner.

57. On making payment on 23 January 2019 for £904.50 Mr Brown did not specify what the payment was to cover so within HMRC's procedure's the payment was allocated against earlier charges outstanding on his account. Had he specified at the time that the payment was to cover his 2017-2018 balancing charge the payment would have been allocated accordingly. After the agent's telephone call of 28 August 2019 (7 months later) the payment was allocated against the charge as requested.

58. The due date for payment for self-assessment tax liabilities is set out in statute and

readily ascertainable. Statute is clear that it is the taxpayer's responsibility to comply with such due date and there is no statutory obligation on HMRC to notify a taxpayer of the due date for payment. A failure on the part of a taxpayer to correctly establish the due date for payment is not, therefore, a reasonable excuse for late payment of a self- assessment tax liability.

59. The late filing of the return cannot in itself be deemed a reasonable excuse for the late payment of the tax liability. The law requires all tax bills to be paid on time.

60. 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. 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.

61. The Tribunal has concluded, based on the evidence, that no reasonable excuse exists for the late submission of the individual tax return or late payment and the penalties were correctly charged in accordance with legislation.

SPECIAL REDUCTION

62. Paragraph 16 of Schedule 55 and paragraph 9 of Schedule 56, Finance 2009 provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances.

63. HMRC's policies on penalties are set out in the Compliance Handbook, and CH170600, defines "special circumstances" as follows:

Special circumstances are either

uncommon or exceptional, or

where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.

64. To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

65. At paragraph 86 in the Upper Tribunal case of *Barry Edwards v HMRC* (2019] UKUT 137 (TCC), it was confirmed that the Schedule 55 regime was proportionate and penalties are correctly due even in circumstances where there is no additional tax liability,

66. Mr Brown and his accountants made several statements about his circumstances in the appeal dated 24 September 2018, 21 May 2019 and appeal to the Tribunal dated 24

October 2019, to support their view that he should not have been charged penalties under schedule 55 FA 2009 and schedule 56 2009. In summary, the submissions were:

- Failure by the previous agent and a misunderstanding with the new agent.
- Mr Brown's business partner's appeal was accepted and penalties cancelled.
- The business is struggling and Mr Brown will find it difficult to pay the tax and the penalties.

67. HMRC have considered the circumstances described by Mr Brown in his correspondence. They are neither uncommon nor exceptional, nor do they suggest that the strict application of the penalty law produces a result that is contrary to the clear compliance intention of the relevant law in his case.

68. The decision not to reduce the penalties under paragraph 16 schedule 55 or paragraph 9 schedule 56 was not flawed and there are no special circumstances which would require the tribunal to reduce the penalties.

CONCLUSION

69. The Tribunal finds as fact that Mr Brown did not have a reasonable excuse lasting throughout the period for the late submission of his individual return for the period ending 5 April 2017.

70. The Tribunal finds that Mr Brown did not have a reasonable excuse for his failure to pay his tax on time, nor by the date the penalty arose.

71. The Tribunal finds that there are no special circumstances which would allow the penalties to be reduced under Special Reduction.

72. The Tribunal finds that the penalties imposed in the amount of £1,382 were correctly charged in accordance with legislation and that the appeal be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

DR KAMEEL KHAN

TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2020