



TC07806

INCOME TAX – penalties for late filing of tax returns – schedule 55 Finance Act 2009 – whether taxpayer had a reasonable excuse – whether there are special circumstances justifying a reduction in the amount of the penalties

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/06769

BETWEEN

NEIL DABBS

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ROBIN VOS

This appeal was originally categorised as a basic appeal. Following the cancellation of the hearing which had been fixed for 4 June 2020 as a result of the coronavirus pandemic, the appeal was re-characterised as a default paper case on 31 March 2020. Neither party has requested that the appeal be determined at a hearing.

The Tribunal therefore determined the appeal on 6 August 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 30 October 2018 (with enclosures). HMRC's Statement of Case (with enclosures) and acknowledged by the Tribunal on 18 May 2020, the Appellant's Reply dated 9 June 2020 (with enclosures) together with two bundles of documents and correspondence prepared by HMRC.

DECISION

INTRODUCTION

1. This appeal has had a somewhat complicated history. A hearing originally took place on 14 January 2019. However, the Tribunal stayed the appeal to allow for further discussions between the parties as to whether there might be special circumstances which would justify a reduction in the amount of the penalties which had been charged.

2. Having failed to agree matters, a further hearing was arranged for 4 June 2020. However, as a result of the cancellation of face-to-face hearings due to the coronavirus pandemic, I am now determining the appeal on the papers, neither party having required a hearing to take place.

3. The current appeal relates to late filing penalties in respect of the Appellant, Mr Dabbs' self-assessment tax returns for the years ended 5 April 2011, 5 April 2012 and 5 April 2016. The late filing penalties for each of the tax years ended 5 April 2011 and 5 April 2012 totalled £1,600. The penalty for the tax year ended 5 April 2016 is £100.

4. Mr Dabbs argues that he has a reasonable excuse for the late filing of the returns. Alternatively, he says that there are special circumstances which, in this case, justify a reduction in the amount of the penalties to nil.

LATE APPEAL

5. Mr Dabbs' appeal against the penalties to HMRC was outside the statutory time limit. However, HMRC accepted the notice of appeal, although the appeal itself was rejected. That rejection was upheld on review. The appeal to the Tribunal is within the statutory time limit. There is therefore no need for the Tribunal to give permission for any late appeal to be made.

SELF-ASSESSMENT TAX RETURNS AND LATE FILING PENALTIES

6. Schedule 55 to Finance Act 2009 provides for penalties where a self-assessment tax return is filed late.

7. There is an initial £100 penalty if the return is filed after the statutory deadline (paragraph 3 of schedule 55).

8. HMRC may charge a further penalty of £10 for up to 90 days if the return is more than three months late (paragraph 4 of schedule 55).

9. A penalty of a minimum amount of £300 is payable if the return is more than six months late (paragraph 5 of schedule 55).

10. A further penalty of a minimum of £300 is payable if the return is more than 12 months late.

11. The deadline for filing a self-assessment tax return is set out in s 8 Taxes Management Act 1970. If the return is filed in paper form, the deadline is normally 31 October after the end of the tax year. If the return is filed electronically, the deadline is 31 January after the end of the relevant tax year. In Mr Dabbs' case, this means that the tax returns for the tax years ended 5 April 2011 and 5 April 2012 were due on 31 October 2011 and 31 October 2012 respectively as they were both filed in paper form. The tax return for the tax year ended 5 April 2016 was due on 31 January 2017 as it was filed electronically.

12. If the taxpayer can satisfy HMRC or the Tribunal that he has a reasonable excuse for the failure to file the tax return on time, no penalty is payable. If the taxpayer relies on another person to do something, that is not a reasonable excuse unless the taxpayer shows that he took reasonable care to avoid the failure. In addition, if a taxpayer has a reasonable excuse, any failure must be remedied without unreasonable delay after the excuse ceases.

13. HMRC is entitled to reduce a penalty if there are special circumstances which they consider make it right to do so. The Tribunal may only interfere with HMRC's decision in relation to special circumstances if that decision is flawed in a judicial review sense. That means that the relevant officer did not take into account all of the relevant considerations or made a decision which no reasonable officer could have reached in the circumstances.

BACKGROUND FACTS

14. Mr Dabbs is a plumber. During most of the relevant period he has been self-employed with deductions being made in respect of his earnings under the construction industry scheme. There was however, a period in 2014-2015 when he was an employee.

15. In 2008, HMRC had undelivered post returned to them which had been addressed to Mr Dabbs' previous address. Their records were only updated with his new address in February 2010. That address remains Mr Dabbs' current address as shown on his notice of appeal to the Tribunal.

16. On 3 June 2011, HMRC sent Mr Dabbs a tax return to complete for the year ended 5 April 2011. Mr Dabbs submitted a paper return on 4 November 2013.

17. On 14 February 2012, HMRC assessed an initial late filing penalty for the tax year ended 5 April 2011 of £100,

18. On 6 April 2012, HMRC sent Mr Dabbs a return for completion for the year ended 5 April 2012. Mr Dabbs submitted a paper tax return on 18 November 2013.

19. HMRC assessed daily penalties totalling £900 in respect of the late filing of the tax return for the year ended 5 April 2011 on 7 August 2012. On the same day, they also assessed a further penalty of £300 as the tax return was, by then, more than six months late.

20. On 12 February 2013, HMRC assessed the initial £100 late filing penalty for the tax year ended 5 April 2012.

21. Shortly after this, on 19 February 2013, HMRC assessed a final penalty of £300 in respect of the late filing of the tax return for the year ended 5 April 2011 as the return was, by then, more than a year late.

22. The daily penalty of £900 and the six month penalty of £300 in respect of the late filing of the tax return for the year ended 5 April 2012 were both assessed on 14 August 2013.

23. On 10 December 2013, a further penalty of £300 for the late filing of the tax return for the year ended 5 April 2012 was issued as the return had been filed in paper form on 18 November 2013, more than 12 months late.

24. Mr Dabbs was sent a notice requiring him to file a self-assessment tax return for the year ended 5 April 2016 on 6 April 2016. He filed his tax return electronically on 16 March 2017.

25. As the tax return was filed late, HMRC assessed an initial late filing penalty of £100 on 7 February 2017.

26. In 2008, Mr Dabbs was using an accountant to prepare his tax returns for the year ended 5 April 2006, 5 April 2007 and 5 April 2008, Bruce Allen. At some point, he ceased working with Bruce Allen. He appointed his current accountants, Tish Press in February 2017.

27. In July 2018, Tish Press appealed on behalf of Mr Dabbs against the late filing penalties, not only in respect of the years which are the subject of the appeal to the Tribunal but also in respect of other years where late filing penalties had been charged (but which have subsequently been cancelled). HMRC rejected the appeals on 8 August 2018. HMRC subsequently carried out a review which was concluded on 3 October 2018. The review

cancelled the penalties for all years other than the years which are the subject of this appeal and for the tax year ended 5 April 2010. The penalties for the tax year ended 5 April 2010 were cancelled in November 2018.

28. Tish Press has also been dealing with other aspects of Mr Dabbs' historic tax affairs. One particular issue relates to the tax year ended 5 April 2009 where HMRC have assessed tax of £2,824.99 (plus interest) whilst Mr Dabbs asserts that, as a result of CIS deductions, he is entitled to a refund of £1,134.96. HMRC's position is that their assessment cannot be displaced by any claim or self-assessment by Mr Dabbs as, by the time his new accountants submitted a tax return, it was too late for him to make his own self-assessment.

THE ASSESSMENT OF THE PENALTIES

29. HMRC accept that they have the obligation to show that the penalties have been properly assessed and charged. Mr Dabbs does not suggest that they have not been. Based on the evidence provided, I am satisfied that the penalties have been charged in accordance with the relevant legislation and properly notified to Mr Dabbs.

REASONABLE EXCUSE

30. There is no disagreement between the parties as to the test which the Tribunal should apply in determining whether Mr Dabbs has a reasonable excuse for the late filing of his tax returns.

31. The test is objective. The question is whether, taking into account all of the circumstances and the attributes of the taxpayer, Mr Dabbs acted in a way in which a responsible taxpayer, intending to comply with his tax obligations would have acted (see *The Clean Car Co v Customs & Excise Commissioners* [1991] VATTR 234).

32. The points put forward on behalf of Mr Dabbs are as follows:

(1) He was let down by his previous accountant. He had understood that the accountant had submitted tax returns for the relevant tax years. Mr Dabbs had then lost contact with his previous accountant and only became aware that the tax returns had not been submitted when he started receiving the penalty notices.

(2) Mr Dabbs attempted to submit tax returns with the help of a friend who had accountancy experience. Although the submissions on behalf of Mr Dabbs do not say so, these were presumably the returns for the tax years ended 5 April 2011 and 5 April 2012 which were eventually submitted in November 2013.

(3) Mr Dabbs also says that he was no longer receiving correspondence from HMRC in 2011/12 and therefore assumed he was no longer required to submit tax returns as he was being taxed at source through the CIS deductions. He thought he only needed to submit a tax return if he wished to claim a repayment.

(4) In addition to this, Mr Dabbs says that he was suffering from stress and depression although he accepts that there is no medical evidence available in relation to this.

33. Turning to the tax year ended 5 April 2016, Mr Dabbs was on PAYE at the beginning of the year and was therefore outside the self-assessment criteria. Although he became self-employed again in September 2015 he says he was incorrectly advised that he did not need to register for self-assessment until one year after he had restarted his self-employment. He therefore says that his failure to file a self-assessment tax return was an innocent error.

34. HMRC do not accept that Mr Dabbs has a reasonable excuse. As far as the previous accountant is concerned, their position is that a taxpayer remains responsible for ensuring that their tax return is submitted. The fact that an accountant may have been entrusted with doing this but fails to do so is, they say, no excuse. In any event, they say that, once Mr Dabbs had

received his first penalty notice, a prudent taxpayer would have contacted their accountant or, failing that, HMRC, which Mr Dabbs did not.

35. In relation to whether or not Mr Dabbs received the penalty notices, HMRC make the point that they were sending all their communications to his new address from February 2010 onwards. There is therefore no reason why he should not have received the penalty notices.

36. I am satisfied that Mr Dabbs does not have a reasonable excuse for his failure to submit his tax returns by the statutory deadline.

37. There is no evidence at all of any communication between Mr Dabbs and his previous accountant. The only letter from his previous accountant is dated June 2008 and relates to his tax returns for the tax years ended 5 April 2006, 5 April 2007 and 5 April 2008. There is nothing to show that an accountant was instructed to prepare tax returns for the tax years ended 5 April 2011, 5 April 2012 or 5 April 2016.

38. Even if Mr Dabbs did instruct an accountant to prepare tax returns for those years and thought that the returns had been submitted, he should have followed this up from February 2012 onwards when penalty notices started being issued. There is no evidence that Mr Dabbs was not receiving correspondence from HMRC after February 2010 when HMRC updated their records to show his new address as the relevant correspondence address. In particular, Mr Dabbs does not give any evidence as to when he stopped receiving communications from HMRC and when he started receiving them again. He simply refers to the fact that he lost contact with HMRC as he failed to notify his change of address to HMRC. It is therefore fair to infer that, once HMRC had the new address, Mr Dabbs started receiving the communications once more.

39. Paragraph 23 of schedule 55 specifically provides that reliance on another person to do something cannot be a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. There is no evidence of Mr Dabbs taking any action to ensure that his accountant did in fact submit the tax returns.

40. For the tax years ended 5 April 2011 and 5 April 2012, the only other excuse put forward by Mr Dabbs is that he was suffering from stress and depression. However, given that there is no medical evidence to back this up and that he continued to carry out his work, I cannot accept that this is a reasonable excuse for his failure to submit his returns on time.

41. As far as the tax year ended 5 April 2016 is concerned, HMRC point out that Mr Dabbs had been self-employed since June 1998 and that he might therefore be expected to know that he would have to file a self-assessment tax return if he became self-employed during the relevant tax year.

42. Even if Mr Dabbs had been told that he did not have to file a tax return until he had been self-employed for a year, there is no evidence as to who gave him this advice and, in particular, whether the advice came from somebody appropriately qualified.

43. HMRC had of course sent Mr Dabbs a notice in April 2016 requiring him to complete a self-assessment tax return for the tax year ended 5 April 2016. Therefore, even if he had been told in September 2015 (when he re-started his self-employment) that a tax return was not required, this should have at least alerted him to the fact that the advice could be wrong. A responsible taxpayer, in those circumstances, would no doubt have contacted HMRC or checked with whoever had given him the advice whether a tax return was in fact required. There is no evidence that Mr Dabbs did either of these things.

SPECIAL REDUCTION

44. Tish Press submit on behalf of Mr Dabbs that HMRC's decision in relation to special circumstances is flawed as they have failed to take into account the fact that Mr Dabbs has been denied tax repayments in respect of the tax year ended 5 April 2009 for an amount in excess of the penalties for the late filing of his tax returns which he has been charged for the tax years ended 5 April 2011, 5 April 2012 and 5 April 2016. This, they say, allows the Tribunal to make its own decision in relation to special circumstances.

45. Tish Press have invited HMRC to allow Mr Dabbs' overpayment claim for the tax year ended 5 April 2009 using their powers contained in s 5 Commissioners for Revenue & Customs Act 2005. They complain that HMRC have not explained why they are not prepared to do this.

46. HMRC's response to this particular point in their statement of case is that Mr Dabbs had sufficient warning of the payments on account for the tax year ended 5 April 2009 and could have displaced these within the relevant time limits if he had been more proactive with his tax responsibilities. In their view, somebody who submits their tax return eight years late cannot expect to be offered any refunds or to receive any benefits of the tax system.

47. It is clear from HMRC's review conclusion letter, their skeleton argument prepared for the hearing in 2019 and their statement of case prepared for the paper determination that, in considering special circumstances, they have not taken into account the fact that Mr Dabbs has made a claim for repayment of tax for a different tax year which HMRC has denied. The question therefore is whether this is a relevant consideration. If it is, HMRC's decision is flawed and the Tribunal can make its own decision.

48. Neither party has referred to any authority as to whether a possible overpayment of tax in relation to a completely different tax year can be a relevant circumstance in determining whether a penalty for the late filing of a tax return should be reduced.

49. In my view, it is not.

50. I accept that, in principle, there is no limit to the range of circumstances which could be said to be special circumstances for the purposes of paragraph 16 of schedule 55. However, in my view, it is implicit in the legislation that any such circumstances must bear some relation to the filing of the tax return in respect of which the late filing penalty has been charged.

51. Some support for this proposition can be found in the decision of the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 131 (TCC), where the Upper Tribunal said at [74]:

“special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.”

52. It should be remembered that the purpose of the penalty regime in schedule 55 is to encourage taxpayers to submit their tax returns on time so that HMRC can verify the amount of tax due for the tax year in question. If it were open to taxpayers to use any penalty otherwise payable for the late filing of their tax returns as a bargaining chip to try and extract some sort of concession from HMRC in relation to a completely unconnected matter, this would defeat the object of the penalty regime as it would, in effect, allow a taxpayer to escape the liability for the penalty.

53. To illustrate this, assume Mr Dabbs had submitted his tax returns for the three tax years in question on time. He would not have incurred a penalty. He would however still not have been able to reclaim the tax which he feels he ought to be able to reclaim for the tax year ended 5 April 2009. It cannot be right that, because he filed the tax returns late and so did incur a penalty, he should then be able to reclaim the tax by offsetting it against the penalties.

54. I do not of course make any decision as to whether or not HMRC are right to withhold the repayment of tax which Mr Dabbs seeks for the tax year ended 5 April 2009. It is open to Mr Dabbs to take separate proceedings in relation to this if he believes he has grounds to do so. However, he cannot use his appeal against the late filing penalties as a back door route to reclaiming the tax for the year ended 5 April 2009.

55. As the potential tax repayment is not a relevant circumstance in determining whether the late filing penalties should be reduced, this cannot therefore form the basis of an argument that HMRC's refusal to reduce the penalties is flawed in a judicial review sense.

56. It is not suggested that there are any other circumstances which HMRC should have taken into account but which they have failed to take into account. In their review letter, they have listed in detail all of the matters which have been taken into account. I accept that they have taken into account all the relevant circumstances and, based on those circumstances that their decision is one which a reasonable officer could have reached. Their decision is therefore not flawed in a judicial review sense and the Tribunal has no jurisdiction to revisit that decision.

CONCLUSION

57. The late filing penalties for the tax years ended 5 April 2011, 5 April 2012 and 5 April 2016 totalling £3,300 have been properly charged in accordance with the relevant legislation.

58. Mr Dabbs does not have a reasonable excuse for his failure.

59. HMRC's decision that there are no special circumstances which justify a reduction in the amount of the penalties is not flawed in a judicial review sense and so cannot be revisited by the Tribunal.

60. The penalties are therefore upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

ROBIN VOS

TRIBUNAL JUDGE

RELEASE DATE: 11 AUGUST 2020