



**TC07821**

*INCOME TAX – Schedule 55 Finance Act 2009 – fixed penalty for failure to file an Employer Real Time Information (RTI) return on time – whether taxpayer had a reasonable excuse for his default – appeal dismissed. Application for leave to appeal out of time – dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/01153**

**BETWEEN**

**OCEANIC CREATIONS LONDON LTD**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ABIGAIL HUDSON**

The Tribunal determined the appeal on 10 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 17 February 2020 (with enclosures), and HMRC’s Statement of Case (with enclosures) dated 16 June 2020.

## DECISION

### Introduction

1. This is an appeal by Oceanic Creations London Ltd ('the Appellant') against a penalty of £100 imposed by the Respondents ('HMRC') under Paragraphs 6C of Schedule 55 Finance Act 2009, for a failure to file an Employer Real Time Information ('ERI') return for the tax period ending 5 June 2019 on time.

### Background

2. An RTI employer within the meaning of Regulation 2A and 2B of the Income Tax (Pay As You Earn) Regulations 2003 ("the PAYE Regulations") is required to deliver RTI about an employee or pensioner payments and deductions to the Respondents.

3. The Appellant was required to submit a return under Regulation 67B of the PAYE Regulations 2003 and Regulation 21A of the Contributions Regulations 2001 on or before making payments to their employees.

4. The Appellant was required to submit a return monthly, with the filing date being the 5<sup>th</sup> of the month. The Appellant's return for the period 6 May 2019 to 5 June 2019 was therefore due by 5 June 2019.

5. Regulation 67I of the PAYE Regulations provides for a fixed penalty based on the number of persons employed in the period to which the return relates. Where the number of persons employed is:-

- i. no more than 9 employees, the penalty is £100;
- ii. at least 10 employees but no more than 49, the penalty is £200;
- iii. at least 50 employees but no more than 249, the penalty is £300; and
- iv. at least 250 employees, the penalty is £400.

6. The Appellant's return for the tax period ending 5 June 2019 was not filed on time and a penalty of £100 was imposed, under (i) above.

### *Reasonable excuse*

7. 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.

8. 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.

9. 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).

10. 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.

#### *The background facts*

11. For the tax period 6 May 2019 to 5 June 2019 an RTI return was due by 5 June 2019.
12. The return has not been filed. It was therefore late.
13. HMRC imposed a fixed penalty of £100.
14. The Appellant appealed to the Tribunal on 3 March 2020.

#### **PERMISSION TO APPEAL OUT OF TIME**

15. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline in relation to the tax period ending 5 June 2019. HMRC refused consent under s49(2)(a) of TMA 1970. For the following reasons, I have decided not to give permission for the appeal to be notified late:

16. The relevant penalty notice was dated 2 September 2019. It was sent to the Appellant's registered correspondence address. Therefore the time limit for appealing expired on 1 October 2019. The appeal was not submitted until 21 November 2019 and is therefore 50 days late.

17. Mr Rafiq has not indicated why he did not appeal within the time limit. There is no suggestion that he did not receive the penalty notice and the notice was not returned marked undelivered. I therefore conclude that he had the notice which clearly details the date by which an appeal must be made. I further find that there is no good explanation for the delay.

18. The consequences to either party of an extension of time limits must be considered in light of my assessments of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the RTI tax regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits, however, he has offered no good explanation for his delay in appealing, and I do not consider that the explanation given for his late filing of his returns constitutes a reasonable excuse for either delay.

19. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

- a) The length of the delay;
- b) Whether there is a good explanation for that delay;
- c) The consequences of permission to appeal;
- d) The consequences of refusal of permission.

20. In the circumstance I do not consider that the appellant has a good explanation for his delay which is of some length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

#### **The Appellant's case**

21. The Appellant's grounds of appeal are that he filed returns on 8 July 2019, 3 September 2019 and 12 September 2019. Further he runs a small company and has many personal commitments. Accordingly, he had a reasonable excuse for the failure to file a return.

## HMRC's Case

22. A late filing penalty is raised solely because a return is filed late 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. Penalties are no longer linked to liability.

23. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

24. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his return.

### *Reasonable Excuse*

25. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

26. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?" [Page 142 3rd line et seq.].

27. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

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

29. The Appellant has not provided a reasonable excuse for his failure to file his RTI return for the tax period ending 5 June 2019 on time and accordingly the penalty has been correctly charged in accordance with the legislation.

30. 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*

31. 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.

32. 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).

33. 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'.

34. HMRC have considered the Appellant's grounds of appeal but assert that the Appellant's circumstances do not amount to special circumstances which would merit a reduction of the penalties.

35. Accordingly, 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.

## **FINDINGS OF FACT**

36. Oceanic Creations London Ltd filed RTI returns on 8 July 2019, 3 September 2019 and 12 September 2019. It is not clear to me for what periods those returns covered although the first filing appears to cover month 3 and 4. I consider it likely therefore that that return covers 6 June to 5 July and 6 July to 5 August. It seems unlikely that the later returns covered an earlier period, and I therefore conclude that Mr Rafiq did not send earlier returns to cover month 1 and 2. None of those returns were sent prior to 5 June and I therefore conclude that the return for month 2 was not returned on time.

37. Mr Rafiq runs a small company with fewer than 9 employees and works within the company in both a manufacturing and managerial role.

38. Mr Rafiq and his wife provide caring services to his elderly mother.

39. Mr Rafiq sometimes falls behind with his commitments to HMRC. His company has incurred 18 late filing penalties since May 2016. As a result, a telephone call was made on 6 June 2018 to highlight the impact of late RTI submissions, and "education letters" were issued to the company on 17 April 2016 and 6 February 2019.

## **DISCUSSION**

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

41. I have concluded that the RTI return for period ending 5 June 2019 was not submitted. It should have been submitted by 5 June 2019. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

42. 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. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.

43. I fully accept that it is difficult to run a small business and that in doing so one must comply with many administrative burdens. However, just as there are advantages to running your own business, there are disadvantages. There are certain tasks an employer must do each month and the Appellant is aware of these tasks and the need to comply with them. One of the requirements is that an RTI return must be sent on or before the employees' payday. It is not clear to me whether Mr Rafiq understands the timing, but if not he must realise that having incurred 18 late filing penalties he has not fully grasped the requirement. "Education letters" having been issued because of earlier failures, after a telephone call to prompt compliance in

June 2018, in my judgment it is not reasonable to fail to investigate where he is falling into error.

44. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal had explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. Mr Rafiq indicated that he had sent three returns by 12 September 2019 but he must be aware that by September there has been a requirement for six, monthly returns. It is not reasonable to believe that half of the returns are not required.

45. He also indicates that he does most of the work in his company himself and looks after his elderly mother. He appears to be indicating there that he is extremely pressed for time, and indeed goes on to explain that he sometimes falls behind with his commitments to HMRC. Whilst I of course understand the pressures of a busy life, commitments to HMRC are not an additional but an initial requirement. If he has too much work to do to enable him to meet his tax liabilities on time, then other work must be foregone and the filing of returns and issuing of appeals against penalty matters should be the priority. Failure to prioritise these matters is not a good reason for the default.

46. The Appellant had no reasonable excuse in respect of the late filing of an RTI return for the period ending 5 June 2019.

47. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

48. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Oceanic Creations London Ltd.

49. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Mr Rafiq has relied upon are his personal circumstances. I have explained above why I do not find that those circumstances provide a reasonable excuse. Similarly, I conclude that his explanation does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

## **CONCLUSION**

50. I therefore confirm the fixed penalty of £100.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

51. 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.

**ABIGAIL HUDSON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 24 AUGUST 2020**

**APPENDIX  
RELEVANT STATUTORY PROVISIONS**

52. Regulation 2A and 2B of the Income Tax (Pay As You Earn) Regulations 2003

2A Real Time Information employers

(1) The following are Real Time Information employers

(a) an employer who has entered into an agreement with HMRC to comply with the provisions of these Regulations which are expressed as relating to Real Time Information employers,

(b) an employer within paragraph (2),

(c) and

(d) on and after 6th October 2013, all employers, except employers within paragraph (3).

(2) by the Commissioners for Her Majesty's Revenue and Customs before 6th October 2013 to deliver to HMRC returns under regulation 67B (real time returns of information about relevant payments).

(3) An employer is within this paragraph if the employer (a) has an existing special arrangement under regulation 141 (direct collection and special arrangements), and

(b) has not been given a direction under paragraph (2) by the Commissioners for Her Majesty's Revenue and Customs.

53. 2B Real Time Information pension payers

(1) The following are Real Time Information pension payers

(a) a pension payer who has entered into an agreement with HMRC to comply with the provisions of these Regulations which are expressed as relating to Real Time Information pension payers or Real Time Information employers,

(b) a pension payer within paragraph (2),

(c) on and after 6th April 2013, pension payers to whom regulation 67D (exceptions to regulation 67B) applies, and

(d) on and after 6th October 2013, all pension payers.

(2) A pension payer is within this paragraph if the pension payer has been given a general or specific direction by the Commissioners for Her Majesty's Revenue and Customs before 6th October 2013 to deliver to HMRC returns under regulation 67B (real time returns of information about relevant payments).

### **Finance Act 2009**

54. The penalties at issue in this appeal are imposed by Schedule 55.

Paragraph 6C:

(1) If P fails during a tax month to make a return on or before the filing date, P is liable to a penalty under this paragraph in respect of that month.

(2) But this is subject to sub-paragraphs (3) and (4).

(3) P is not liable to a penalty under this paragraph in respect of a tax month as a result of any failure to make a return on or before the filing date which occurs during the initial period.

(4) P is not liable to a penalty under this paragraph in respect of a tax month falling in a tax year if the month is the first tax month in that tax year during which P fails to make a return on or before the filing date (disregarding for this purpose any failure which occurs during the initial period).

(5) In sub-paragraphs (3) and (4) “the initial period” means the period which—

(a) begins with the day in the first tax year on which P is first required to make a return, and

(b) is of such duration as is specified in regulations made by the Commissioners,

and for this purpose “the first tax year” means the first tax year in which P is required to make returns.

(6) P may be liable under this paragraph to no more than one penalty in respect of each tax month.

(7) The penalty under this paragraph is to be calculated in accordance with regulations made by the Commissioners.

(8) Regulations under sub-paragraph (7) may provide for a penalty under this paragraph in respect of a tax month to be calculated by reference to either or both of the following matters—

(a) the number of persons employed by P, or treated as employed by P for the purposes of PAYE regulations;

(b) the number of previous penalties incurred by P under this paragraph in the same tax year.

(9) The Commissioners may by regulations disapply sub-paragraph (3) or (4) in such circumstances as are specified in the regulations.

(10) If P has elected under PAYE regulations to be treated as different employers in relation to different groups of employees, this paragraph applies to P as if—

(a) in respect of each group P were a different person, and

(b) each group constituted all of P's employees.

(11) Regulations made by the Commissioners under this paragraph may—



- (a) make different provision for different cases, and
- (b) include incidental, consequential and supplementary provision.

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

23—

- (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.

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

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—
  - (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.

57. 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:

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 —
  - (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.