



**TC07836**

*INCOME TAX – penalties for failure to make returns – appellants provided information to their accountant late – accountant was not attending to client matters due to his father’s illness and death – held: reasonable excuse for late-filing post-date of provision of information to accountant – decision not to reduce for special circumstances flawed – it was right to reduce because of special circumstances in respect of period prior to provision of information by appellants to accountant – penalties cancelled*

**FIRST-TIER TRIBUNAL**

**Appeal numbers: TC/2020/01283,  
TC/2020/01284**

**TAX CHAMBER**

**CHRISTOPHER STOKES  
MADELEINE STOKES**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ZACHARY CITRON**

The Tribunal determined the appeals 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 notices of appeal dated 26 March 2020 (with enclosures), HMRC’s statements of case, the appellants’ representative’s response dated 25 May 2020 (with enclosure), and a “court bundle” for each appellant of 27 pages and 26 pages respectively (containing documents, correspondence and information from HMRC’s systems) prepared by HMRC.

## DECISION

1. The appellants appealed against penalties imposed under Schedule 55 Finance Act 2009 (“Schedule 55”) for failure to submit their 2017-18 tax year self-assessment returns (the “tax returns”) on time.
2. The penalties charged on each appellant can be summarised as follows:
  - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 26 March 2019 (this penalty was not appealed against)
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 9 August 2019
  - (3) “daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 9 August 2019
3. The Tribunal directed on 17 April 2020 that the appeals of the two appellants proceed together and be heard together by the same tribunal.
4. The question in these appeals is whether
  - (1) there was a “reasonable excuse” for the appellants’ failure to submit the tax returns on time and/or
  - (2) owing to the presence of “special circumstances”, the amount of the penalties should have been reduced.
5. The appellants’ appeal to HMRC under s31A Taxes Management Act (“TMA”) 1970 was made outside the statutory deadline. However, in their statement of case HMRC said that they have no objection to the taxpayer’s appeal under s31A being made late. I therefore consider that HMRC have now given consent under s49(2)(a) TMA 1970.
6. Notification of the appeals to the Tribunal was made within the statutory deadline.
7. The appellants’ grounds for appealing against the penalties were set out in different documents as follows:
  - (1) In a letter from the first appellant, Mr Stokes, to the “appeals team” (of HMRC, it would appear) dated 19 December 2019, Mr Stokes said that he sent his “completed accounts” to his accountant, Mr James, later than required, as the deadline had slipped his mind. The letter said Mr Stokes sent these “detailed accounts” to Mr James on 17 June 2019 and that expected Mr James would submit completed tax returns to HMRC shortly afterwards (as Mr Stokes considered that the tax returns were relatively “simple” for Mr James to draw up) – in a day or two. However, despite Mr Stokes sending follow-up emails to Mr James on 28 June, 10 July and 3 August 2019, Mr James did not submit the tax returns until 18 August 2019 – and this was because Mr James had been attending his father in hospital for several weeks prior to his father’s death on 15 June 2019.

(2) In two letters from Mr James to HMRC dated 19 January 2020, and written in similar terms, Mr James said that the appellants had sent him “the information” towards the end of April 2019; that his father was seriously ill in hospital at the time, and he was spending a lot of time at his father’s bedside, and so he got behind with his clients’ affairs. Mr James’ letter also said the contested penalties would be “disproportionate” as the appellants were not “liable to UK tax”.

(3) In their notices of appeal, the appellants’ grounds for appeal are set out in a similar way to Mr James’ letter of 19 January 2020.

(4) In Mr James’ response to the Tribunal dated 25 May 2020, Mr James said that he spent a large part of most days with his father from April 2019 to the time of his death; the inquest after his father’s death was a difficult experience; all this had an enormous impact on the time he spent on client matters; and he had no staff able to complete and submit tax returns. Mr James said that under normal circumstances he would have contacted clients as the trigger for the £10 daily penalties approached (in this case, 1 May 2019), but did not do so due to the time he was spending with his dying father.

### **Findings of fact**

8. The appellants lived in South Africa and were in receipt of rental income from UK property. They had been in this position for several years prior to the tax year in question. They had appointed Mr James as their UK accountant and tax agent. The evidence for these findings is the parties’ correspondence in the “court bundle” and facts asserted in HMRC’s statements of case.

9. On or around 6 April 2018, HMRC sent both appellants a notice to file a tax return for the 2017-18 tax year. The evidence for this finding is HMRC’s electronic record of their having sent such notice to the address of the appellants (in South Africa) on HMRC’s records.

10. The due date for filing those tax returns electronically was 31 January 2019.

11. Mr Stokes sent Mr James the information required to file the tax returns on 17 June 2019. The evidence for this finding is Mr Stokes’ letter dated 19 December 2019. I preferred that evidence to the evidence in Mr James’ letters to HMRC dated 19 January 2020 (and repeated in the notices of appeal) to the effect that Mr James received this information from the appellants two months earlier, at the end of April 2019, since

(1) Mr Stokes’ letter is more specific about the information provided (the “detailed accounts”) and about the precise date when he sent this to Mr James; Mr James’ letter referred more vaguely to “the information” and “towards the end of April”; greater precision gives Mr Stokes’ account greater credibility; and

(2) Mr James, on his own account, was, understandably, not focusing on client matters at the time this information came in from Mr Stokes; so Mr Stokes’ account of when the information was sent is more likely to be accurate.

12. Mr James would have taken about a week to prepare and submit the tax returns, based on the information he provided to Mr James on 17 June 2019. Mr Stokes’ letter said that he expected it would only take Mr James a day or two; however, I am not persuaded on the evidence that Mr James, who (based on the evidence) had a number

of clients, could reasonably have been expected to prepare and submit these tax returns in only a day or two; I also infer from the fact that it took Mr Stokes 11 days to first chase up Mr James, that a week was a more reasonable expectation of the time it would take Mr James to prepare and file the tax returns.

13. Mr James' father was seriously ill in hospital from April 2019 to his death on 15 June 2019 and Mr James much of his time with his father in hospital in that period; as a result, Mr James got behind with his clients' affairs (Mr James had no staff able to complete and submit tax returns); and after his father's death, much of Mr James' time was taken up in preparing for an inquest which took place in September 2019. The evidence for this is Mr James' response dated 25 May 2020.

14. HMRC received the tax returns electronically on 18 August 2019. The evidence for this finding is HMRC's electronic record of the date the tax returns were received.

15. On or around 26 March 2019, HMRC sent both appellants a notice of penalty assessment under paragraph 3 of Schedule 55 in the amount of £100. The evidence for this finding is HMRC's electronic record of their having sent such notice to the address of the appellants (in South Africa) on HMRC's records.

16. On or around 9 August 2019, HMRC sent both appellants a notice of penalty assessment under paragraph 4 Schedule of 55 in the amount of £900, calculated at £10 per day for 90 days. The evidence for this finding is HMRC's electronic record of their having sent such notice to the address of the appellants (in South Africa) on HMRC's records.

17. On or around 9 August 2019, HMRC also sent both appellants a notice of penalty assessment under paragraph 5 of Schedule 55 in the amount of £300. The evidence for this finding is HMRC's electronic record of their having sent such notice to the address of the appellants (in South Africa) on HMRC's records.

## **The Law**

18. Relevant Schedule 55 provisions are summarised in the Appendix to this decision.

19. Paragraph 23 of Schedule 55 gives a defence to a penalty where there is a "reasonable excuse" for a failure to make a return. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

"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?..."

It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects

shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.”

29. That this is the correct test was confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether there is a reasonable excuse for a person’s failure to do something:

“(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default....In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without reasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

20. While “special circumstances” are not defined in the statute, the following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC) explains the concept:

“73. The FTT then said this at [101] and [102]:

“101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.

102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC’s decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.”

74. We respectfully agree. As the FTT went on to say at [105], 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.”

## **Discussion**

21. I have found that the tax returns were submitted on or around 19 August 2019. They should have been submitted by 31 January 2019. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, I further find that the penalties imposed are due and have been calculated correctly.

22. The excuse put forward in Mr Stokes’ 19 December 2019 letter is that, although the appellants provided the information necessary to complete the tax return to their accountant, Mr James, late, there was further, unexpected delay because Mr James took much longer than normal to prepare and file the tax returns (because he had got behind with client work due to his father’s illness prior to his death on 15 June 2019, and the inquest after his death). I find the facts underlying this excuse to be sufficiently proven.

23. Mr Stokes’ letter states that he did not expect HMRC to reduce the penalties on account of his “forgetfulness” (the reason for his late provision of information to Mr James). However, Mr James’ response dated 25 May 2020 indicates that there is an excuse for Mr Stokes’ forgetfulness, namely that, due to Mr James not attending to client matters due to his father’s illness, Mr James did not send the appellants a reminder to provide the information required to file the tax returns, as Mr James would ordinarily have done prior to the date on which “daily” penalties could potentially accrue (here, 1 May 2019). I accept as sufficiently proven facts that Mr James would ordinarily send such a reminder, and that in this instance he did not.

24. I now turn to whether these excuses are reasonable.

25. I have found as facts that the appellants provided the necessary information to Mr James on 17 June 2019, knowing (realistically) that it would take Mr James a week – to 24 June 2019 - to prepare and then file the tax returns.

26. The excuse given for not filing the tax returns prior to 24 June 2019 is that the appellants did not receive a reminder from their accountant, as they normally would have. Under paragraph 23 Schedule 55, this excuse – the appellants’ reliance on Mr James - is reasonable only if the appellants took reasonable care to avoid the failure. In my view, reasonably careful taxpayers – including those living abroad and receiving UK property income – would make themselves aware of the filing deadlines and would contact their accountants if they had not heard from them by the time of the deadline. The appellants did not take reasonable care in this sense; and so there is no reasonable excuse for the appellants’ failure to file prior to 24 June 2019.

27. The appellants’ excuse for not filing on or after 24 June 2019 is, however, in my view, reasonable: by chasing up Mr James at regular intervals, the appellants did take reasonable care to avoid further delay beyond 24 June 2019 in the filing of the tax returns.

28. This means that the “six month” penalty should in my view be cancelled, as should the “daily” penalties in so far as they accrue on or after 24 June 2019.

29. I now turn to HMRC's decision that it would not be right to reduce the penalties because of special circumstances (the "special reduction" powers).

30. HMRC's decision was, in my view, flawed, because it did not take into account a relevant fact, being that the appellants' tax agent was not paying attention to his clients' affairs between April 2019 and the time the tax returns were filed, due to his father's illness and death. This means that the Tribunal can reduce the penalties if it thinks it right because of special circumstances.

31. As I have already found that there was a reasonable excuse for the late-filing as from 24 June 2019 (and so no penalties should accrue from then), this "special reduction" power is in practice relevant only if it were to be used to reduce penalties accruing prior to 24 June 2019.

32. In my view, the illness of Mr James' father, causing Mr James to devote less time to his clients than he normally would have, was a special circumstance. I have also accepted as a fact that, due to this circumstance, Mr James did not send his clients the reminders he would ordinarily have sent prior to the time when "daily" penalties started to accrue. Although this does not, in my view, provide a reasonable excuse for the appellants' late-filing, I nevertheless find that, if such reminders had been sent by Mr James, the appellants would in all likelihood have provided the necessary information to Mr James in time to avoid the "daily" penalties; and the reason this did not happen, was the special circumstances surrounding the appellants' accountant and his dying father. I therefore think it right, because of these special circumstances, to reduce the "daily" penalties to nil.

### **Conclusion**

33. The appeal is allowed: the contested penalties are cancelled.

### **Right to apply for permission to appeal**

34. 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.

**ZACHARY CITRON  
TRIBUNAL JUDGE**

**RELEASE DATE: 08 SEPTEMBER 2020**

## **APPENDIX – RELEVANT SCHEDULE 55 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:

4—

- (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:

5—

- (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:

6—

- (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
  - (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
  - (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
  - (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
  - (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
  - (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:

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.

6. 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.

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:

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.