



TC07889

Appeal number: TC/2020/00876

INCOME TAX – penalties for failure to make return on time – appellant had moved to France over a year before tax return became due, and had a baby a month after it became due – she then had little support in taking care of the baby - no reasonable excuse for failing to file the return until more than six months after due date, as reasonably conscientious taxpayer in her situation would have done so prior to filing date – not right to reduce penalties due to special circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLAIRE HAMMON

Appellant

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON

The Tribunal determined the appeal without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having read the notice of appeal dated 28 February 2020 (with enclosures), the appellant's email to the Tribunal dated 8 May 2020, and HMRC's statement of case, acknowledged by the Tribunal on 21 May 2020; the Tribunal also had before it a document bundle pdf of 36 pages (containing correspondence, information from HMRC's systems and HMRC specimen documents) and a legislation and authorities bundle pdf of 107 pages, both prepared by HMRC

DECISION

1. The appellant, Ms Hammon, appealed against penalties totalling £1,300 imposed by HMRC under Schedule 55 Finance Act 2009 (“Schedule 55”) for a failure to submit a tax return for the 2017-18 tax year (the “Tax Year”) on time. In their statement of case, HMRC conceded the appeal against £900 of these penalties, leaving only £400 of penalties in contention.

2. The penalties in contention can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 Schedule 55 imposed on 26 March 2019; and

(2) a £300 “six month” penalty under paragraph 5 Schedule 55 imposed on 9 August 2019.

HMRC had also imposed “daily” penalties totalling £900 under paragraph 4 Schedule 55 on 9 August 2019; but in their statement of case they said they did not oppose Ms Hammon’s appeal against these.

3. Ms Hammon notified HMRC of her appeal in respect of the penalties on 19 September 2019. This appeal to HMRC was made outside the statutory deadline. However, HMRC’s statement of case did not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC. I therefore consider that HMRC have now given consent under s49(2)(a) Taxes Management Act 1970.

4. Ms Hammon accepted HMRC’s offer of a statutory review on 10 December 2019. On 27 December 2019, HMRC issued their review conclusion letter, upholding the decision to charge the penalties.

5. Miss Hammon notified an appeal to the Tribunal on 28 February 2020. This was about one month after the statutory deadline (30 days after the date of the statutory review outcome letter). HMRC’s statement of case says that they are not objecting to the late notification. As the statutory review outcome letter was sent to Miss Hammon in France over the New Year holiday period, it was not received until shortly before the deadline; Miss Hammon also experienced administrative difficulties notifying the appeal to the Tribunal; for these reasons, and given the relatively short period of delay, I give permission for the appeal to be notified late.

Findings of fact

6. Ms Hammon immigrated to France from the UK in July 2017, some three months into the Tax Year. She did not work during the Tax Year after moving to France; she attended university in France from September to December 2017.

7. On or around 30 August 2018, HMRC sent Ms Hammon at her address in Caen, France a tax return for the Tax Year. The filing date was 6 December 2018 for a non-electronic return or 31 January 2019 for an electronic return. The evidence for this finding is HMRC’s electronic records.

8. Ms Hammon had a baby daughter on 31 December 2018. Ms Hammon took care of her daughter with little assistance from her partner (who worked long hours) or from family or friends until August 2019, when her partner took leave from work; and from September 2019, her daughter started creche three days a week, 9 am to 2 pm.

9. On 23 September 2019, HMRC received Ms Hammon's non-electronic return for the Tax Year. The evidence for this finding is HMRC's electronic records.

10. Ms Hammon had no tax to pay pursuant to her tax return for the Tax Year, as tax deducted at source exceeded her tax liability, by some £375.

The Law

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

12. 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.”

13. 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.”

14. The Upper Tribunal in that case also considered the issue of penalties imposed for late returns where no tax was, in the event, due (at [86]):

“In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of [Sch 55](#) FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of para 16 of Sch 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.”

Burden and standard of proof

15. The burden of establishing that Ms Hammon is prima facie liable for the contested penalties which have been properly notified and assessed lies with HMRC.

16. The burden of establishing that she should not be liable for the contested penalties because there is a reasonable excuse, or that there are special circumstances, lies with Ms Hammon.

17. In each case the standard of proof is the balance of probabilities

Parties' arguments

18. Ms Hammon made the following points:

(1) She was living in a very stressful situation in France; when her child was born, it was impossible to find the time to do anything but care for her. Her partner was hardly at home: he left for work at 7 am and returned at 8 pm; she therefore did not have relief from childcare. Taking care of her child was unrelenting especially in the first year with no help and no friends & relatives for support.

(2) Moving to a new country and having a baby was extremely difficult to navigate.

(3) It was impossible to find the time to file the tax return for the Tax Year after the birth of her daughter at the end of 2018 – until her partner took leave in August 2019, which is when she submitted the tax return. She said she realised she should have made the time to file the return during her pregnancy, but she forgot about it until she realised she was too late – and then had no option but to wait for her partner's leave time to submit the return.

(4) In her email dated 8 May 2020 Ms Hammon said that her primary reason for appeal was “that it is surely illegal to charge fees for a positive balance account?”

(5) Ms Hammon proposed that, seeing as she was owed a repayment of tax and the penalties were unfair and inflated, her account be reduced to zero will no money being owed by her to HMRC or by HMRC to her – in other words, that the penalties be reduced to £375.

19. HMRC made the following in points:

(1) No explanation has been put forward that shows why the tax return for the Tax Year was not submitted during the three month period between Ms Hammon receiving the tax return for completion and the filing date of the paper return of 6 December 2018.

(2) The penalties charged are proportionate and the penalty regime is proportionate to its aim. The Schedule 55 penalty regime is an administrative means of securing the production of timely returns. Its aim is to encourage compliance, not punish defaults. In *Barry Edwards*, the Upper Tribunal

confirmed that the Schedule 55 regime was proportionate, and penalties are due even in circumstances where there is no additional tax liability. The penalty regime includes provisions for reasonable excuses and special circumstances which allow mitigation in appropriate cases.

Discussion

20. I have found that Ms Hammon's tax return for the Tax Year was submitted non-electronically on 23 September 2019. It should have been submitted by 6 December 2018. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, I further find that the contested penalties are due and have been calculated correctly.

21. The facts asserted by Ms Hammon that give rise to her excuse for failing to file a tax return for the Tax Year until more than six months after it was due were as follows:

(1) up to the birth of her daughter on 31 December 2018, she was finding it stressful to live in France (where she had been living since July 2017), and forgot to file the return;

(2) following the birth of her daughter, she was taking care of her virtually single-handedly, until she first got some relief from care of her child, which occurred when her partner took leave from work in August 2019.

22. I accept these facts as proven. I now turn to consider whether they amount to an objectively reasonable excuse for Ms Hammon's failure to file the tax return for the Tax Year until more than six months after it was due.

23. I find that a reasonably conscientious taxpayer in Ms Hammon's position – meaning one that had immigrated from the UK to France over a year before the time when the tax return became due, and was in the last four months of pregnancy – would have taken note of her obligation to complete the tax return that was sent to her at the end of August 2018, and would have found time in the next three months to complete the return. Even after the birth of her child (by which time the tax return was already overdue), such a taxpayer would have prioritised the completion of the return by using times at the weekend or late evening when her partner was available to relieve her from taking care of their child (not to mention other times when the baby was sleeping). I appreciate this was considerably more difficult following the birth of her child, but, on balance and on the evidence before me of the taxpayer's situation, the reasonably conscientious taxpayer in her situation would have managed to find the time even after the birth of her baby.

24. I therefore find that there was no reasonable excuse for Ms Hammon's failure to file the tax return for the Tax Year until more than six months after it was due.

25. I have considered whether I think it right because of special circumstances to reduce the contested penalties. I do not consider Ms Hammon's living in France, or her pregnancy and giving birth around the time when the tax return in question was due, or a combination of these circumstances, to be "special circumstances" that make

it right to reduce the contested penalties: I appreciate these circumstances, particularly in combination, were trying for Ms Hammon, but they are not sufficiently out of the ordinary, even in combination, such that the law enacted in Schedule 55 should not operate in the usual way under such circumstances.

26. Furthermore, *Barry Edwards* decided that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 disproportionate and, as a consequence, is not a relevant circumstance to be taken into account when considering whether special circumstances justify a reduction in a penalty.

27. Given that I do not think it right to reduce the penalties because of special circumstances, it is unnecessary to decide whether or not HMRC's decision in this respect was flawed.

Conclusion

28. The appeal is refused as regards the contested penalties totalling £400 imposed under paragraphs 3 and 5 Schedule 55 – those penalties are CONFIRMED.

Application for permission to appeal

29. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ZACHARY CITRON

TRIBUNAL JUDGE

RELEASE DATE: 16 OCTOBER 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.