Neutral Citation: [2023] UKFTT 430 (TC)

Case Number: TC08821

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02285

INCOME TAX – strike-out application – whether an appeal to HMRC – jurisdiction to hear appeal – Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – application refused – late filing penalties – Perrin considered – whether reasonable excuse – no – whether special circumstances – no – appeal dismissed.

Heard on: 25 April 2023
Judgment date: 18 May 2023

Before

TRIBUNAL JUDGE RACHEL GAUKE
REBECCA NEWNS

Between

VIJAYASARATHI BASKARARAJULU

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Ben Williams, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by Mr Baskararajulu against £1,300 of late filing penalties for the tax year 2019-20.

2. Having heard and considered the evidence and arguments of both parties, we decided that Mr Baskararajulu did not have a reasonable excuse for the late filing. The appeal is therefore dismissed and the penalties are confirmed.

THE FORM OF HEARING

3. The hearing was conducted by video link on the Tribunal's Video Hearing Service. The documents to which we were referred were a 43-page document bundle, a 119-page bundle of legislation and authorities, a 42-page supplemental bundle relating to HMRC's strike-out application, and HMRC's statement of reason. Mr Baskararajulu gave oral evidence at the hearing.

4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

PRELIMINARY ISSUE: STRIKE-OUT APPLICATION

5. HMRC applied for the appeals against two of the penalties to be struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, on the grounds that the Tribunal does not have jurisdiction in relation to those appeals.

6. Mr Baskararajulu's appeal to the Tribunal was against three late filing penalties for the tax year 2019-20: a £100 initial late filing penalty, a £900 daily penalty, and a £300 six-month late filing penalty. HMRC submitted that the appeals of the £900 and £300 penalties were made directly to the Tribunal, rather than first being made to HMRC as is required by section 49D of the Taxes Management Act 1970 ("TMA 1970"). On this basis, HMRC argued, the Tribunal did not have jurisdiction to hear these appeals.

Strike-out: findings of fact

7. We make the following findings of fact. Further findings of fact are contained in our discussion on reasonable excuse below.

8. On or around 6 April 2020, HMRC issued Mr Baskararajulu with a notice to file a self-assessment tax return for the year 2019-20.

9. On or around 9 March 2021, HMRC assessed Mr Baskararajulu to a £100 penalty in respect of the late filing of his 2019-20 tax return.

10. On 11 May 2021, Mr Baskararajulu appealed against this penalty. He did this by completing and returning the form HMRC supplied with the penalty assessment. The form is headed "Self Assessment: Appeal against penalties for late filing and late payment."

11. On or around 17 August 2021, as the tax return for 2019-20 remained outstanding, HMRC assessed Mr Baskararajulu to a £900 daily penalty and a £300 six-month late filing penalty.

12. On 8 October 2021, Mr Baskararajulu's 2019-20 tax return was submitted online.

13. On 24 December 2021, HMRC wrote to Mr Baskararajulu. The letter was headed "Appeal against the penalties for sending your Self Assessment tax return in late for the 2019 to 2020 tax year". It stated: "I've considered your appeal against the penalties listed below for the 2019 to 2020 tax year: late filing penalty". The amount of the penalty was not specified. In the letter, HMRC rejected the appeal on the grounds that there was no reasonable excuse. HMRC informed Mr Baskararajulu that he could ask them for a review of his case, or appeal to the Tribunal. The letter enclosed a form, Form SA634, which Mr Baskararajulu could use to request a review.

14. On 1 January 2022, HMRC received a reply from Mr Baskararajulu. He sent the completed Form SA634, which referred to an enclosed letter. The letter was headed "Regarding penalty wave off (tax year 2019-2020)" and referred to HMRC's letter of 24 December 2021. The letter set out the grounds on which Mr Baskararajulu claimed he had a reasonable excuse for the late filing and ended with repeated requests to "wave my penalty". The letter did not state the amount of the penalty in question.

15. HMRC responded on 16 February 2022, saying that they had completed their review and decided that the decision to charge a penalty was correct on the grounds that there was no reasonable excuse. This letter specified the amount of the penalty at £100.

16. Mr Baskararajulu notified his appeal to the Tribunal on 18 March 2022, stating that the amount of penalty under appeal was £1,300.

17. HMRC wrote to Mr Baskararajulu on 24 June 2022, and again on 28 July 2022, requesting that he appeal the £300 and £900 penalties to HMRC. They did not receive a reply.

Strike-out: relevant law

18. The right to appeal against a penalty for the late filing of a self-assessment tax return is provided by paragraph 20 of Schedule 55 to the Finance Act 2009 ("FA 2009"). FA 2009, Sch 55, para 21 provides:

> "An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal)."

19. The right to appeal against an assessment to income tax or capital gains tax is provided by TMA 1970, s 31(1)(d).

20. TMA 1970, s 31A is about notices of appeal, and provides:

> "(1) Notice of an appeal under Section 31 of this Act must be given-
>
> (a) in writing,
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board.
>
> (2) …
>
> (3) …
>
> (4) In relation to an appeal under section 31(1)(d) of this Act (other than an appeal against a simple assessment)—

(a) the specified date is the date on which the notice of assessment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

(4A) …

(5) The notice of appeal must specify the grounds of appeal."

21. TMA 1970, s 49D is about notifying appeals to the Tribunal, and provides:

"(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where—

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H."

22. HMRC referred us to two previous decisions of this Tribunal: Judge Guy Brannan's decision in *Constantin Rotaru* [2022] UKFTT 80 (TC) ("*Rotaru"*) and Judge Anne Redston's decision in *Flash Film Transport Ltd* [2019] UKFTT 4 (TC) ("*Flash Film"*).

23. In these cases the Tribunal decided, although obiter in the case of *Flash Film*, that the effect of the relevant statutory provisions is that the Tribunal has no jurisdiction to decide a direct tax appeal which has only been notified to the Tribunal and not to HMRC: see *Flash Film* at [75] and *Rotaru* at [41].

Strike-out: discussion and decision

24. We have decided that the Tribunal does have jurisdiction in this case because Mr Baskararajulu did notify his appeal to HMRC. He notified his appeal of the £300 and £900 penalties in his letter to HMRC received on 1 January 2022.

25. The requirements for a notice of appeal are set out in TMA 1970, s 31A. This provides that a notice of appeal must be given in writing (which this was), within 30 days after the specified date (we deal with the question of lateness separately below), to the relevant officer of the Board. There is no requirement to use a particular HMRC form.

26. For these purposes, the relevant officer of the Board means the officer by whom the notice of assessment was given. In this case the notice of assessment refers to the £300 and £900 penalty assessment notices. We have therefore considered what this requirement means in the context of these notices.

27. While we had no evidence on the point, it is our understanding that assessment notices for late filing penalties are issued by HMRC using an automated process, and will not necessarily have been considered on a taxpayer-by-taxpayer basis by a particular HMRC officer. As is usual in such cases, HMRC did not supply us with a copy of the penalty assessment notices that were sent to Mr Baskararajulu, but they did supply a specimen of a

penalty notice, and it does not indicate that the notice would have been signed by a named officer at HMRC.

28. HMRC has set up a process whereby late filing penalties can be appealed online or by using a form supplied by HMRC for this purpose. HMRC does not dispute that, by completing and submitting the relevant form, Mr Baskararajulu made a valid appeal on 11 May 2021 of the £100 penalty imposed on or around 9 March 2021.

29. Having made his appeal, Mr Baskararajulu waited for HMRC to inform him of their decision. They did not do so until 24 December 2021. In the meantime, on or around 17 August 2021, HMRC had assessed the additional £300 and £900 penalties.

30. Mr Baskararajulu's letter of 1 January 2022 was expressed to be in response to HMRC's letter of 24 December 2021. It was therefore a response to a letter from HMRC that directly addressed his appeal against late filing penalties for 2019-2020, sent to an address which HMRC had provided to him for correspondence on this topic. HMRC's reply, of 16 February 2022, is expressed as being sent from HMRC's "Late Penalties Reasonable Excuse Team". HMRC has not suggested that Mr Baskararajulu's letter was not received by the correct decision-maker within HMRC.

31. Taking all of the above into account, we find that Mr Baskararajulu's letter of 1 January 2022 was sent to the relevant officer of the Board within the meaning of TMA 1970, s 31A(1)(c).

32. There is a further requirement, in TMA 1970, s 31A(5), that the notice of appeal must specify the grounds of appeal. Mr Baskararajulu's letter met this requirement by setting out the basis of his assertion that he had a reasonable excuse.

33. In addition to considering whether the letter of 1 January 2022 fulfilled the formal requirements of TMA 1970, s 31A, we must also consider whether it can correctly be construed as a notice of appeal against the £300 and £900 penalty assessment notices.

34. HMRC's letter of 24 December 2021 refers to Mr Baskararajulu's appeal against the "penalties for sending your Self Assessment tax return in late", without specifying the amount of the penalties. Mr Baskararajulu's reply to HMRC on 1 January 2022 restated his grounds of appeal and asked them to waive "my penalty", again without specifying the amount.

35. At the hearing, Mr Baskararajulu said that he had intended his letter of 1 January 2022 to refer to all of the penalties he had incurred for the late filing of his tax return for 2019-20. He said that he did not make a separate appeal against the £300 and £900 penalties at the time when they were assessed because he was waiting for HMRC to reply to his original appeal, and assumed that the additional penalties would be included as a continuation of the same appeal process. We accept that in January 2022 he intended to appeal all the penalties, because we consider it highly unlikely that he would have decided to appeal the £100 penalty but not the penalties for higher amounts, given that his grounds of appeal were the same in each case.

36. Mr Baskararajulu is a courier driver and not sophisticated in tax matters. The fact that he did not notify his appeal using a particular HMRC form is not determinative. In our view the intention of his letter of 1 January 2022 is sufficiently clear that it should be treated as a notice of appeal against the £300 and £900 penalty assessment notices.

37. We must also consider the question of lateness. The £300 and £900 penalty assessments were issued on or around 17 August 2021, and should have been appealed within 30 days. Mr

Baskararajulu's notice of appeal of 1 January 2022 was therefore between three and four months late.

38. At the hearing, we asked Mr Williams, who appeared before us for HMRC, whether, if we were to refuse the strike-out application, HMRC would wish to make any submissions on the question of lateness. He said that they would not. However, we do not think that HMRC should be taken to have agreed to late appeals in circumstances where they have applied to have those appeals struck out. We therefore considered whether to exercise our discretion under TMA 1970, s 49(2)(b) to permit late appeals of the £300 and £900 penalty assessments.

39. We applied the three-stage test set out in *Martland v HMRC* [2018] UKUT 178 (TCC), taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. In the context of an appeal right which must be exercised within 30 days, a delay of three to four months is serious and significant.

40. We must next establish the reasons for the delay and evaluate all the circumstances of the case, assessing the merits of the reasons and the prejudice caused to the parties by granting or refusing permission. The reason for the delay was that, as described above, Mr Baskararajulu was waiting for HMRC to respond to his appeal of the £100 penalty, and thought that his appeals of the £300 and £900 penalties would be included as a continuation of the same appeal process. For a taxpayer with Mr Baskararajulu's experience and attributes, we consider that this was a reasonable conclusion for him to have reached.

41. We do not consider that HMRC would suffer any prejudice or unfairness as a result of our permitting a late appeal. Mr Baskararajulu's grounds of appeal against the £300 and £900 penalties are identical to his grounds of appeal against the £100 penalty. HMRC attended the hearing fully prepared to defend the appeal against the £100 penalty. We do not consider that they would have prepared for, or argued their case, any differently if they had done so on the basis that the £300 and £900 penalties were also under appeal.

42. Similarly, a late appeal would involve no additional Tribunal time and resource, as the Tribunal would be considering the grounds of appeal in any event, in the substantive appeal against the £100 penalty.

43. Having weighed these factors, we find that it is in the interests of justice for us to permit late appeals of the £300 and £900 penalties.

44. We do not consider this outcome to be contrary to the decisions in *Rotaru* and *Flash Film*, as the circumstances in those cases were different from the present appeal. In *Flash Film,* the appellant accepted that no appeal had been made to HMRC, while in *Rotaru* the appellant's communications with HMRC were limited to phonecalls and emails complaining about HMRC's conduct. In *Rotaru*, the Tribunal found that the appellant had not indicated an intention to appeal to HMRC.

45. In *Flash Film*, in passages subsequently endorsed in *Rotaru*, Judge Redston said at [77]:

> "There are also other reasons why appeals have to be made first to HMRC: the Officer receiving the appeal may consider the reasons and change his position, and the appellant has the opportunity to ask for, or accept, a statutory review carried out by a different HMRC Officer. Appeals made first to HMRC may thus be settled between the parties without reference to the Tribunal."

46. In the present case, two different HMRC officers had considered Mr Baskararajulu's grounds of appeal before he appealed to the Tribunal. HMRC therefore had ample

opportunity to consider whether they were willing to change their position. Mr Baskararajulu did not appeal to the Tribunal until both HMRC officers had decided to reject his grounds of appeal. Therefore, the circumstances described in the passage quoted above, which the Tribunal in *Flash Film* was concerned to avoid, do not apply here.

47. HMRC's strike-out application is therefore refused.

THE LATE FILING PENALTIES

48. Under TMA 1970, s 8, HMRC may require a person to make and deliver a self-assessment tax return by 31 October following the end of the tax year to which the return relates if on paper, or by 31 January after the end of the tax year if filed online.

49. Under FA 2009, Sch 55, penalties are payable if the return is not submitted on time. A penalty of £100 is payable if the return is not delivered by the filing date. If the return is not delivered within three months of the filing date, there is a penalty of £10 for each day that it remains outstanding for a period of up to 90 days from the date specified in a notice from HMRC. If the return is not delivered within six months of the filing date, there is a penalty of the greater of £300 or 5% of any liability to tax which would have been shown in the return. If the return is not delivered within 12 months of the filing date, there is a further penalty of the greater of £300 or 5% of any liability to tax which would have been shown in the return.

50. The deadline for the electronic submission of a tax return for 2019-20 was 31 January 2021. Mr Baskararajulu's return was submitted online on 8 October 2021, over eight months late.

51. HMRC must demonstrate that they have complied with the requirement to notify Mr Baskararajulu of his obligation to submit a self-assessment tax return, and that the penalties were correctly assessed and notified.

52. HMRC have not supplied us with copies of the actual notice to file or the penalty notices. By way of evidence of the service of the notice to file, they provided an extract from their system headed "Return summary". By way of evidence of the service of the £100, £300 and £900 penalty notices, they provided a further extract from their system headed "View/Cancel Penalties".

53. The notices were all sent to an address in Croydon, which is the same address given by Mr Baskararajulu in his notices of appeal to HMRC and to the Tribunal. Mr Baskararajulu has not disputed that he received any of these notices.

54. Having considered the evidence, we find that HMRC have satisfied their obligation to prove on the balance of probabilities that the notice to file and the penalty assessment notices were properly served.

Reasonable excuse

55. FA 2009, Sch 55, para 23 provides:

> "(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. P is defined to include a person who fails to make or deliver a return on or before the filing date.

57. Mr Baskararajulu contends that he had a reasonable excuse for filing his 2019-20 tax return late.

58. The correct test to be applied by this Tribunal in cases involving reasonable excuse was described by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 0156 (TCC):

> 81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (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 and the time when that objectively reasonable excuse ceased. In doing so, it 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 FTT, 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 unreasonable 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.

59. In applying this test we are also mindful of the guidance in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234, that we should consider whether Mr Baskararajulu's actions were reasonable for a taxpayer with his experience and other relevant attributes, placed in the situation that he found himself in at the relevant time.

60. The facts which Mr Baskararajulu assert give rise to a reasonable excuse are as follows. These are not in dispute and we find them to be proven as facts.

(1) Mr Baskararajulu's brother died of coronavirus on 10 April 2020. Mr Baskararajulu arranged the funeral and had to support his brother's family for six months.

(2) Mr Baskararajulu's wife had a baby on 22 September 2020. His wife was unwell for around three months and Mr Baskararajulu had to take care of her and of their older child.

(3) Mr Baskararajulu is a self-employed courier. He entrusted the preparation of his tax return to his accountant. In December 2020 the accountant went to Sri Lanka and stayed there for around 8 months. The accountant took with him papers relating to Mr Baskararajulu's tax return for 2019-20, including the only copies of receipts which Mr Baskararajulu needed in order to calculate his expenses.

61. We sympathise with the very difficult circumstances which Mr Baskararajulu experienced starting in April 2020. These circumstances would certainly amount to a reasonable excuse for a failure to file a tax return in the time immediately after his bereavement and the birth of his second son.

62. However, we must also consider the time when that excuse ceased. On the facts which have been proven, we find that the reasonable excuse had ceased by the time that the tax return was due to be filed, on 31 January 2021. The return was then not filed for a further eight months, on 8 October 2021. This does not constitute remedying the failure without unreasonable delay and we are therefore unable to allow the appeal on these grounds.

63. Mr Baskararajulu's reliance on his accountant is not a reasonable excuse unless he took reasonable care to avoid the failure.

64. At the hearing, Mr Baskararajulu gave evidence as to the steps he had taken to ensure that his accountant filed his tax return on his behalf. He said that he had repeatedly called his accountant and sent him messages on Whatsapp. He told the accountant that he was incurring penalties and asked him to return the papers. When he replied, the accountant assured Mr Baskararajulu that he was preparing the return.

65. Mr Baskararajulu was sufficiently concerned about the situation to consult a different accountant in January 2021. The second accountant told him he needed to get his papers back but made no other suggestions, and did not suggest that he contact HMRC.

66. Mr Baskararajulu did not satisfy us that this constituted a reasonable excuse for filing his tax return more than eight months late. Besides his oral testimony, we had no evidence or records of his attempts to contact his accountant in Sri Lanka, and we are therefore unable to make findings as to the frequency of these attempts or the seriousness with which they were pursued.

67. Although Mr Baskararajulu is unsophisticated in tax matters, and we accept that he was frustrated at his accountant's inactivity, it was not the case that there was nothing he could have done. By his own evidence, he knew that he needed to submit the tax return and was aware that he was incurring penalties. But, he did not contact HMRC to seek guidance. If he had done so, he could have been advised about the rules for submitting a return using provisional figures that could be amended later.

68. He could also have sought advice from other sources. Although he did speak to a second accountant, he did not submit that this was anything beyond a single conversation in January 2021. We consider that a reasonable course of action would have been to seek further advice at some point in the following eight months before the return was finally submitted.

69. Taking all of the above into account, we have decided that Mr Baskararajulu did not have a reasonable excuse for the late filing of his 2019-20 tax return.

Special circumstances

70. FA 2009, Sch 55, para 16 provides that HMRC may reduce a penalty if they think it right because of special circumstances. "Special circumstances" is not defined other than that

it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

71. FA 2009, Sch 55, para 22(3) provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of special circumstances was "flawed", when considered in light of the principles applicable in proceedings for judicial review. A decision is flawed in this sense if HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision. A decision is also flawed in this sense if HMRC failed to think about the matter at all.

72. Mr Baskararajulu did not argue, in terms, that there were special circumstances in his case that would justify a reduction in the penalties. He said that he had a low income, but we had no evidence about his level of income that would enable us to make any findings on this matter. HMRC, in their statement of reason, took Mr Baskararajulu's grounds of appeal and submitted that none of these amounted to special circumstances.

73. We do not consider that HMRC's decision on special circumstances was flawed, and therefore our jurisdiction to make a special reduction is not engaged.

74. In conclusion, HMRC's decision to impose the penalties is affirmed and Mr Baskararajulu's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

RACHEL GAUKE
TRIBUNAL JUDGE

Release date: 18th MAY 2023