



TC05767

Appeal number: TC/2013/02070

*INCOME TAX – penalty for failure to make returns – appeal partly
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LISA FALA

Appellant

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT

The Tribunal determined the appeal on 28 March 2017 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 8 March 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 January 2017

DECISION

5 1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the year ended 5 April 2011 on time.

2. The penalties that have been charged can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012

10 (2) “Daily” penalties totalling £570 under paragraph 4 of Schedule 55 imposed on 26 June 2012.

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

15 (1) She argues that there was a “reasonable excuse” for any failure to submit the return on time.

4. The appellant’s appeal was notified to the Tribunal late. For the following reasons, I have decided to give permission for the appeal to be notified late:

20 5. I have been provided with (part of) an Appeal Notice stamped as received by the Tribunal on 4 February 2013, which would have been in time to make an appeal. The Appellant states she sent everything to the Tribunal but they returned her supporting documents with a blank notice of Appeal. In light of this and the fact that HMRC do not appear to object to the late appeal, I am allowing the appeal out of time.

25 **Findings of fact**

6. The tax return for the year ended 5 April 2011 was due on 31 January 2012 and filed on 26 June 2012. This filing date is agreed by the appellant.

30 7. Miss Fala has habitually filed her tax returns late, including for all of the years from the return for the year ended 5 April 2008 to the return that is the subject of the present appeal.

8. The return for the year ended 5 April 2010 was submitted on 2 February 2012. It included the information that the return contained provisional figures as her accountant had died in November 2011.

35 9. Miss Fala’s new accountants wrote to HMRC on 28 March 2012 explaining that they had yet to receive Miss Fala’s paperwork from the executors.

Discussion

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

11. It is agreed that the tax return for the 2011 tax year was submitted on or around 26 June 2012. It should have been submitted by 31 January 2012. Subject to
5 considerations of “reasonable excuse” set out below, the penalties imposed are due and have been calculated correctly.

12. The appellant has (briefly) raised the issue that the penalties charged are disproportionate. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as
10 those charged in this appeal. Mr Justice Warren made clear ‘it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair.’

13. The main ground of appeal is that the death of Miss Fala’s accountant in November 2011 constitutes a reasonable excuse for the failure to file a tax return.

15 14. The law is clear that if a reasonable excuse exists, the failure to file must be remedied ‘without unreasonable delay’ after the excuse ceased. This is found in para 23 (2) (c) of Schedule 55 Finance Act 2009 in the Appendix below.

15. HMRC contend there is no reasonable excuse because the return could have been filed with provisional figures.

20 16. Miss Fala (or her accountant) must have known that the return could be filed on such a basis, as her 2010 return was filed on such a basis.

17. There is no 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. HMRC contend that it means that the
25 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.

18. It is clear from para 23 (2) (b) of Schedule 55 Finance Act 2009 that reliance on
30 any other person (either the deceased accountant, his executors, or the new accountants) is not a reasonable excuse unless Miss Fala ‘took reasonable care to avoid the failure’.

19. I consider that the death of the accountant was not something that Miss Fala could have foreseen. It happened reasonably close to the filing date of 31 January 2012 (I have not been provided with the date of death), and the death then meant that
35 recovery of documents from the executors or compilation of new documents was necessary, in addition to finding a new accountant.

20. I consider that this does constitute a reasonable excuse. I then need to consider at what time this reasonable excuse ended, and whether the return was filed ‘without undue delay’.

21. I bear in mind that the tax return for the year ended 5 April 2010 was filed on 2 February 2012. I do not know who filed this return, but it shows that it was filed with provisional figures.

5 22. I consider I have not been provided with any reason why the tax return for the year ended 5 April 2011 could not have been filed at this date or shortly afterwards.

23. Miss Fala had appointed new accountants by 28 March 2012 as they wrote to HMRC on her behalf appealing the £100 penalty.

24. A letter issued by HMRC to Miss Fala on 6 March 2012 warned that daily penalties would accrue from 1 May 2012.

10 25. The tax return was filed on 26 June 2012.

26. I consider that the reasonable excuse ended shortly after 2 February 2012.

27. I therefore consider that the daily penalties are properly charged, but that there was a reasonable excuse for the failure to file the tax return up to 2 February 2012.

Conclusion

15 28. For the reasons set out above, I cancel the decision made by HMRC to charge a £100 late filing penalty. I affirm HMRC's decision to charge the £570 daily penalty. This appeal is therefore partially allowed.

Application for permission to appeal

20 29. 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)"
25 which accompanies and forms part of this decision notice.

**SARAH ALLATT
TRIBUNAL JUDGE**

30 **RELEASE DATE: 31 MARCH 2017**

APPENDIX – RELEVANT STATUTORY 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.

5 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)—

10 (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.

15 (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

20 (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—

25 (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

30 (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—

35 (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—

- 5 (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—

- 10 (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—

- 15 (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—

- 20 (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—

- 25 (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.

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

23—

35 (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

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(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:

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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—

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(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—

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(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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.

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