



TC06139

Appeal number: TC/2017/04439

INCOME TAX – penalty for late filing of a return – whether there was a reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAYMOND KANE

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on Wednesday 27 September 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 26 May 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 July 2017 and the Appellant's Reply dated 17 August 2017 (with enclosures).

DECISION

The issue

1. The only issue between the parties was whether or not Mr Kane had a reasonable
5 excuse for the late filing of his self-assessment tax return online for the 2015/2016 tax
year. On 7 February 2017 the respondents (“HMRC”) imposed a £100 penalty under
paragraph 3 of Schedule 55 Finance Act 2009 for the late filing of Mr Kane’s
individual tax return for the year ending 5 April 2016.
2. Paragraph 23 of Schedule 55 Finance Act 2009 provides that a penalty does not
10 arise in relation to a failure to make a return if the taxpayer satisfies HMRC (or on
appeal, a Tribunal) that there was a reasonable excuse for the failure and that the
failure was rectified without unreasonable delay after the excuse had ended.
3. It is not disputed that, as soon as he realised that the return had not been filed
successfully, he acted promptly to rectify the position.
- 15 4. I accept Mr Kane’s argument that HMRC’s Statement of Case is less than a model
of clarity. It does, completely inaccurately, make numerous references to late payment
of tax. There is no doubt whatsoever that that simply does not arise in this instance.
The only issue is the late filing of the return and whether Mr Kane had a reasonable
excuse.

20 The Facts

5. Mr Kane has been filing online since 2007/08.
6. The Notice to File for the year ending 5 April 2016 was issued to Mr Kane on
6 April 2016 and the filing date for a paper return was 31 October 2016 and for an
25 electronic return it was 31 January 2017. The electronic return was received on
7 March 2017 and processed the following day.
7. On 7 February 2017, as indicated above, the penalty had been issued.
8. On 3 March 2017, Mr Kane appealed the penalty on the ground that he had filed
the self-assessment tax return online on 19 June 2016.
9. On 15 March 2017, HMRC replied to Mr Kane rejecting the appeal and offering a
30 review.
10. On 20 March 2017, Mr Kane requested a review on the basis that:-
 - (a) On 19 June 2016 at 11:23 Mr Kane had completed his self-assessment
return and he downloaded the “View Your Calculation” and copies of the
35 completed self-assessment return. He had appealed the penalty assuming that
the return had been properly filed.
 - (b) Having told HMRC in relation to the penalty that the return had been filed
timeously, he had later checked his self-assessment page online and saw that the

return was still there and 90% completed. He discovered that he had not submitted it.

(c) He assumed that after downloading the copies he had forgotten to go back and press the submit button.

5 (d) He accepts that the fault was his but it was a genuine error and there had been no intention not to file the return. He had always previously filed on time.

(e) He suggested that HMRC added a reminder to file to their service.

11. HMRC carried out a review and issued the review conclusion on 2 May 2017. That stated that:

10 “Following the completion of the return the customer checks and corrects any errors that are highlighted. The calculation is then viewed and following page has options to view, print and save a copy of the return. The text at the top of this page clearly states *‘Before submitting your return you can view, print and save a copy of your return to your own computer. Select Next at the bottom of the screen to go on to submit your return.’*

15 In addition to this, there is a percentage at the top right hand corner that updates to show how much of the tax return is complete.

To submit the return online the customer has to read and agree a statement confirming that the information provided is complete and correct. As an additional security check, customers are asked to re-input their details User ID and password.

20 When the return had been successfully submitted to HMRC the customer receives an onscreen message to confirm receipt and confirmation email is sent to the email address provided.

25 Your record shows me that you have been filing tax returns online for a number of years, therefore you would be aware of the process and that an email is received following successful submission. The fact that you did not receive the confirmation messages should have alerted you to the fact that the return had not been successfully submitted to HMRC.”

12. Mr Kane appealed to the Tribunal arguing that he had two reasonable excuses, namely:

30 (a) He had made a mistake in failing to press the “submit” button on the return in June 2015 (six months before the deadline) and that was simple human error, and

(b) HMRC failed to send him a reminder before the filing deadline and that is unfair.

Discussion and decision

35 13. Was there any reasonable excuse? *Rowland v HMRC*¹ at paragraph 18 makes it clear that a reasonable excuse “... is a matter to be considered in the light of all the circumstances of the particular case”.

¹ 2006 STC (SCD) 536

14. The concept of reasonable excuse is not confined to Schedule 55 Finance Act 2009 and is to be found in the general tax law in the United Kingdom and in many other statutory contexts. I do not accept Mr Kane’s argument that a subjective test should be applied.

5 15. The test articulated by Judge Medd in *The Clean Car Company Limited v CEE*² (“Clean Car”) is widely applied in the field of tax and has recently been approved in the context of Social Security legislation by Judge Rowland in *VT v SSWP*³. Judge Medd said:-

10 “...the test of whether 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 in at the relevant time, a reasonable thing to do... 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 ... 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 ... many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse”.

20 I agree with, and adopt, that approach. The excuse must be objectively reasonable and that test must be applied to the facts of the individual case.

25 16. The same principle applies to all taxpayers, whether traders or not. Applying this test to the facts, the question is whether Mr Kane had taken appropriate steps to ensure that he filed successfully and timeously since that would amount to a reasonable excuse.

30 17. I do not doubt that Mr Kane did have an honest and genuine belief that he had successfully filed the return, and had done so very early. However, in itself that does not suffice. I agree with Judge Cannan in *Coales v HMRC*⁴ (“Coales”) at paragraph 32:

“The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.”

He found that the reasonableness of a belief has to be subject to the same objective test for reasonable excuse as set out by Judge Medd in *Clean Car*.

35 18. Even if Mr Kane had not filed returns electronically before, any conscientious taxpayer would be expected to check what was required in order to successfully file online. Quite apart from the explicit instructions on screen when completing the return, there is guidance available online.

² 1991 VTTR 234

³ 2016 UKUT 178 (AAC)

⁴ 2012 UKFTT 477 (TC)

19. As HMRC say, when a return has been successfully submitted electronically an on-screen message is generated to acknowledge receipt. A confirmation of receipt is also sent to the sender's email address.

20. Mr Kane had successfully filed tax returns online for many years and should have been aware of the online filing procedures. The relevance of previous filing online is that although I accept that he might not remember the detail of how to file online he should have been familiar with how the process worked and that confirmation emails would be sent. The fact that he did not receive the confirmation messages should have alerted him to the fact that the return had not been successfully submitted to HMRC.

21. Shortly put, Mr Kane did indeed make a mistake in not actually submitting the return and checking that he had done so. I note his argument that HMRC's citation of Judge Hellier in *Garnmoss Ltd t/a Parham Buildings*⁵ at paragraph 12 is irrelevant because it refers to "confusion". I disagree with him and agree with Judge Hellier. The full quotation reads:

"What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter from mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse ...".

That case concerned a failure to pay VAT on time but the same principles in regard to mistakes apply in this case. Obviously in this case, there was a muddle and/or mistake in that, for whatever reason, Mr Kane did not complete the submission of the return. I accept that he intended to file the return but he did not. He did not follow the instructions. The Act does not provide a shelter from that type of mistake. It is not a reasonable excuse.

22. Mr Kane argues that because HMRC did not send him a reminder (but does issue reminders to some taxpayers) he was unfairly treated. The decision of the Upper Tribunal in *HMRC v Hok*⁶ ("Hok") is binding on me and makes it explicit that the Tribunal is a creature of statute and can only exercise such jurisdiction as Parliament has chosen to confer on it. Paragraph 56 of *Hok* reads:

"It is impossible to read the legislation in a way which extends its jurisdiction to include - whatever one chooses to call it - a power to...supervise HMRC's conduct".

23. HMRC have no statutory requirement to issue reminders. The fact that they may not have done so in this instance cannot amount to a reasonable excuse.

24. At paragraph 58, *Hok* makes it clear that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

25. It is for the appellant to prove that he had a reasonable excuse and he has not done so.

⁵ 2012 UKFTT 315 (TC)

⁶ 2012 UKUT 363

26. Paragraph 16 of Schedule 55 FA 2009 (see Appendix) allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. I find
5 no reason to disagree.

27. HMRC's decision in that regard does not appear to be flawed when considered in the light of the principles applicable in proceedings for judicial review (Paragraph 22 Schedule 55 - See Appendix).

28. Lastly, Parliament had laid down a deadline for submission of tax returns and has
10 provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are held to be proportionate.

29. The appeal is therefore dismissed and the late filing penalty of £100 is confirmed.

30. This document contains full findings of fact and reasons for the decision. Any
15 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.

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**ANNE SCOTT
TRIBUNAL JUDGE**

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RELEASE DATE: 28 SEPTEMBER 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalty at issue in this appeal is 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 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

10 (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,

15 (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.

20 3. 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—

25 (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—

30 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

35 4. 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

5 (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

10 (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.