



TC06402

Appeal number: TC/2017/06875

INCOME TAX – penalty for failure to make returns – HMRC put no case as to daily penalties – late filing penalty only – accountant advised no need to complete – whether reasonable excuse established in respect of late filing penalty – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL WITHINGTON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 12 February 2018 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 13 September 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 2 November 2017.

DECISION

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 tax year ended 5 April 2012 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 or around 26 February 2013
 - (2) “Daily” penalties totalling £850 under paragraph 4 of Schedule 55 imposed on or around 20 August 2013

Appellant’s evidence and submissions

3. The appellant’s evidence can be summarised as follows:
 - (1) His accountants had advised HMRC on 19 April 2011 that the appellant was a director of a company when they submitted the CT41G for the company.
 - (2) His accountant had subsequently filed a form SA1 Registration for Self-Assessment to HMRC on 19 October 2011, explaining that the appellant had both become a director and subsequently ceased to be a director during the 2011/12 tax year. They had calculated that there was no tax liability arising and asked HMRC to confirm that no tax return would be necessary for the 2011/12 tax year. No response was received from HMRC.
 - (3) On 15 November 2012 the appellant received a tax return for the 2011/12 tax year. No notification of this return was sent to the appellant’s accountants.
 - (4) When a late filing penalty was issued, this was also notified only to the appellant and not to the accountants. The accountants advised the appellant to ignore the penalty notice as this was an error as no self-assessment was required.
 - (5) The accountants subsequently submitted an appeal against the penalty to HMRC. No response was received to this appeal.
 - (6) On 15 May 2013, the accountants wrote again to HMRC to follow up the appeal. The response from HMRC, dated 10 June 2013, referred incorrectly to the 2012/13 tax return.
 - (7) On 17 June 2013, the accountants telephoned HMRC to clarify the situation and were informed that the 2011/12 tax return had to be submitted before an appeal could be made against the late penalty.
 - (8) On 24 July 2013, the appellant received a letter from HMRC stating that he did not need to complete a tax return for the 2012/13 tax year.
 - (9) The accountants completed and submitted the tax return on for 2011/12 on 15 August 2013, which the accountants did not feel was an unreasonable time scale. There had been some delays in obtaining information as the accountants

had used an out-of-date email address for the appellant in correspondence with regard to the return.

5 (10) On 29 August 2013, the accountants wrote to HMRC asking for the penalties to be withdrawn on the basis that they were aware that the appellant was a director from 19 April 2011, when the accountant had filed the company's CT41G. They further stated that they had filed a SA1 registration for self-assessment for the appellant on 19 October 2011, as no correspondence had been received regarding a tax return for the 2011/12 tax year.

10 (11) On 27 September 2013 the accountants wrote again to HMRC and argued that HMRC should have issued the return on 6 April 2011 but failed to do so and arguing that the appellant was entitled to "have the ten months to complete the Return as applicable to all people who receive a Return for the 2011/12 year".

15 4. Following corresponding in 2012 and 2013, the appellant requested a review of HMRC's decision to charge daily penalties. HMRC responded on 24 August 2017, upholding the penalties on the basis that:

(1) A form SA1 was filed with HMRC on 8 November 2012 and a tax return was issued on 15 November 2012, providing the statutory three months and seven days for filing.

20 (2) The appellant was therefore required, under s8 TMA 1970, to deliver a non-electronic or electronic return by 22 February 2013. An online return was submitted on 15 August 2013. It was therefore late.

25 (3) The appellant's belief that they were making every effort to ensure that the accountants were following the correct process, and that the late filing was due to a communication error with HMRC did not amount to a reasonable excuse. It was clear from the correspondence that HMRC expected the appellant to file a tax return for the 2011/12 tax year, and there was sufficient time given for the return to be completed and filed.

30 (4) The appellant's reliance on advice from his accountants that no tax return was needed, contrary to correspondence from HMRC making it clear that a return was required and that penalties were accruing, did not provide a reasonable excuse for the late filing of the return.

35 5. The appellant explained that his accountants had advised him that the penalties arise solely from HMRC failures, specifically: the failure to act when first informed of the directorship and then the subsequent failures to respond to correspondence. The accountants had advised that HMRC should have issued a self-assessment tax return on 6 April 2011, and that the appellant was entitled to have ten months to complete a self-assessment tax return "as applicable to all people who receive a return for the 2011/12 tax year". It was "complete nonsense" for HMRC to issue a tax return late and then demand that it be completed in a restricted time.

40 6. The appellant therefore submitted that he had a reasonable excuse for the late filing of the tax return.

HMRC statement as to daily penalties

7. HMRC stated that they were not putting a case for the daily penalty and “therefore that aspect of the appeal wins”.

HMRC’s evidence and submissions in relation to the late filing penalty

5 8. HMRC evidence and submissions can be summarised as follows:

(1) The appellant was appointed as a director on 19 April 2010.

(2) The appellant’s accountants filed a CT41G for the company in April 2011. It was submitted that the form CT41G relates to the company’s self-assessment position and does not register the directors of the company for self-assessment. It remains the responsibility of the director to register himself for self-assessment.

(3) As the appellant was a company director, he was obliged to register for self-assessment and complete a self-assessment tax return every year.

(4) The appellant registered for self-assessment on 8 November 2012 with effect from 21 February 2011.

(5) The appellant was issued with a tax return for the 2011/12 tax year on 15 November 2012. The appellant has confirmed in his evidence that he received the return. Notification was not sent to the appellant’s accountants as they were not registered on his record at that time as authorised agents acting on his behalf. It was submitted that the appellant should have notified his agents on receipt of the return.

(6) The appellant was provided with the statutory 3 months and 7 days to file the self-assessment return, giving a filing date of 22 February 2013, as this was later than the filing deadline of 31 January 2013 that would otherwise have applied to the 2011/12 self-assessment tax return if filed electronically or 31 October 2013 if filed in paper form. HMRC submitted that the appellant therefore had sufficient time to arrange for completion of the return in order to submit it by the filing deadline. They further submitted that even if HMRC had caused delays in filing, which they did not accept, those delays cannot be the reason for late filing of the return as the appellant had sufficient time once the return was issued to arrange for completion and filing before a penalty was issued.

(7) A email provided by the appellant from his accountants, dated 26 October 2012, states that they had suggested to HMRC that he need not do a tax return but, if it was necessary to complete a return, “the matter was in hand and not a problem”. HMRC submitted that the appellant should not therefore have failed to notify his accountants that he had received a return.

(8) A late filing penalty notice was issued to the appellant on 26 February 2013. There was further correspondence between HMRC and the appellant and his accountants in May and June 2013, including HMRC’s responses to the appeal against the late filing penalty, advising that the return needed to be submitted.

(9) A further email provided by the appellant from his accountants, dated 20 June 2013, confirms that the return must be completed and that they required details of his income for the year in order to complete it. HMRC submitted that

this was inconsistent with the email in October 2013 which advised that “the matter was in hand”.

5 (10) The return was submitted electronically on 15 August 2013, almost six months after the filing deadline and two months after the accountants had confirmed to the appellant that the return needed to be filed.

9. HMRC submitted that it was well-established that reliance on a third party did not remove the responsibility of the appellant to ensure that his return was submitted on time. The penalties had not arisen as a result of something outside the appellant’s control or a sudden or unexpected event.

10 10. HMRC had considered whether there were special circumstances, particularly the circumstances that the appellant and his accountants had believed that a return would not be required and their belief that HMRC had caused a delay. HMRC considered that these did not amount to special circumstances which would merit a reduction in the appeal below the statutory amount.

15 11. HMRC therefore asked that the late filing penalty of £100 be confirmed.

Findings of fact

12. It is not disputed that the appellant’s electronic self-assessment return for the tax year ended 5 April 2014 was filed late and so I find that it was filed late.

13. I also find the following facts:

20 (1) HMRC correctly calculated the late filing penalty.

(2) The appellant was registered for self-assessment with effect during the 2011/12 tax year and so HMRC were entitled to exercise their discretion to issue him with a self-assessment tax return for the 2011/12 tax year.

25 (3) The appellant did not provide a copy of the return sent to him by HMRC in November 2012 to his accountants.

(4) No tax was payable by the appellant in respect of the 2011/12 tax year.

Discussion

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

30 15. I have concluded that the appellant’s electronic tax return for the tax year ended 5 April 2012 was received by HMRC on or around 15 August 2013. It should have been submitted by 22 February 2013. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

35 16. The test of whether something amounts to a reasonable excuse is not defined by statute. Whether or not a person has 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” (*Rowland* (2006) STC 536).

17. The appellant submits that he has a reasonable excuse because he had been told by his accountants that no tax return would be required, and that he should have been given more time to complete the tax return. I find that, having been told by his accountants in late October 2013 that a return should not be required but that if a return
5 was required, they would deal with, a prudent taxpayer in the appellant's position, not having heard from his accountants shortly after the receipt of the return in November 2012 and mindful of the deadline stated therein, would have told his accountants that the return had been received so that it could be dealt with. I find that the appellant does not have a reasonable excuse for the late filing on this ground. As the accountants were
10 not the appellant's authorised agents at that time, there was no requirement on HMRC to notify them.

18. The appellant also submitted that he had a reasonable excuse for the late filing because HRMC delays in dealing with his affairs meant that he should have been given the same time to complete the return as someone whose self-assessment return was
15 issued on 6 April 2011.

19. HMRC submitted there had been no such delays and that, in any event, that he had been given the statutory three months and 7 days given to a taxpayer whose self-assessment return is issued too late for them to be able to reasonably comply with the initial statutory deadlines for filing.

20. I find that the taxpayer was given the statutory time permitted for filing and notified of that deadline and so does not have a reasonable excuse for late filing of the return on this ground.

21. Although it is not necessary for me to consider whether there were any delays on the part of HMRC, for completeness I have looked at the position with regard to
25 whether there could be said to have been any delays in HMRC dealing with the registration. The appellant's accountants had stated that HMRC should have registered the director for self-assessment when they received the company registration in April 2011. I agree with HMRC that filing the CT41G in respect of the company will not register a director of that company for self-assessment. The accountants then advised
30 HMRC in their letter of 29 August 2013 that they had submitted the appellant's SA1 with a letter on 19 October 2011. I consider that the reference to 2011 there must be a typographical error and that the date should be 19 October 2012, as the accountant goes on to explain that "in this letter we explained that ... [the appellant] had ceased to be a director in that year as the company finished trading on 31 March 2012". It must,
35 therefore, have been written after 31 March 2012 and so I consider it more likely than not that the SA1 referred, therefore, is that received by HMRC on 8 November 2012. As the self-assessment return was issued by HMRC on 15 November 2012, I do not find that there were any delays in HMRC in relation to the issuance of the self-assessment return.

22. HMRC took into account the possibility of special circumstances but concluded that there were no special circumstances that could apply to reduce the penalties. I do not consider that there was any flaw in their decision that would require a review of their conclusion.

23. **Conclusion**

24. The appeal is upheld in respect of the daily penalties only at HMRC's request.

25. The appeal is dismissed in respect of the late filing penalty and the late filing penalty of £100 is confirmed.

5 **Application for permission to appeal**

26. 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 20 MARCH 2018

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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:

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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.

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

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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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(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

(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.

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(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.