



TC06470

Appeal number: TC/2017/04057

Income tax - Schedule 55 Finance Act 2009 - fixed penalties for failure to file self-assessment returns - appeal out of time – merits of appeal considered - whether reasonable excuse either for failure to file returns on time or late appeals - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RODNEY JONES

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER MARYVONNE HANDS**

**Sitting in public at Tax Appeals Tribunal, Taylor House, Rosebery Avenue,
London on 24 October 2017**

Mr Richard Baptiste for the Appellant

Ms Mary Donnelly, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Rodney Jones ('the Appellant') against penalties totalling £5,100 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 of Schedule 55 Finance Act 2009 for his failure to file self-assessment ('SA') tax returns for the tax years ending 5 April 2011, 5 April 2012, 5 April 2013 and 5 April 2014, by the due dates.

Background

2. Under s 8(1D) TMA 1970 an individual's non-electronic tax return must be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following.

3. The Appellant's returns were filed as shown below.

2010-11 filed on 26 February 2016
2011-12 filed on 17 February 2016
2012-13 filed on 17 February 2016
2013-14 filed on 31 January 2016

4. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

5. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

6. The penalties for late filing of a return can be summarised as follows:

i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.

ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.

iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

7. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above for each of years 2010-11 to 2012-13 and under (i), (ii), (iii) for year 2013-14. The penalties were issued as and when the defaults occurred in each year.

8. The Appellant lodged a Notice of Appeal with the Tribunal on 16 May 2017. The appeal was out of time. Each of the penalty notices informed the Appellant that he had 30 days in which to appeal the penalty, unless he had a reasonable excuse for not appealing within the time limit.

5 9. The Appellant's appeal is against all the penalties. He says that he did not receive a notice to file in any of the years of default and has had problems with his post.

Reasonable excuse

10 10. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

11. The law specifies two situations that are not reasonable excuse:

15 (a) An insufficiency of funds, unless attributable to events outside the Appellant's control and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

20 12. There is no statutory 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" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

25 13. HMRC's view is that the 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. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that
30 standard.

14. If there is a reasonable excuse it must exist throughout the failure period.

Relevant statutory provisions

Taxes Management Act 1970

15. Section 8 - Personal return- provides as follows:

35 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by

him by way of income tax for that year] he may be required by a notice given to him by an officer of the Board-

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- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
 - b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

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- (a) the 31st January next following the year of assessment, or
 - (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

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- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
 - (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]
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(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

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(1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

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- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
 - (b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

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- (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

5 (1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

10 (2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

15 (4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

20 (4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

25 16. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

17. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

18. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

30 19. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(1) P is liable to a penalty under the paragraph if (and only if)-

35 (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.

5 (2) The penalty under the 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)-
10 (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).

20. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

15 (1) P is liable to a penalty under the 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 the paragraph is the greater of-
20 (a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

21. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

25 (1) Liability to a penalty under any paragraph of the 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)-
30 (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,
35 P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

22. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

40 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.

45 (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.

23. 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:

- 5 (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-
- 10 (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-
- 15 (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.
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The Appellant's case

24. The Appellant's grounds of appeal are that he did not receive notices to file in any of the default years and that he only received notification of the penalties in December 2015. Prior to that he was not aware of the defaults or penalties.

25 Furthermore he had no taxable income for the years 2011-12 to 2013-14

HMRC's Case

25. It is HMRC's contention that it is for the taxpayer to notify HMRC of any chargeability (s 7 of the Taxes Management Act ("TMA 1970")). The legislation requires every person who is chargeable to income tax or capital gains tax for any

30 year of assessment, who has not received a notice to file a return for the year of assessment (s 8 TMA 1970) or received a notice to file but has been notified that the notice has been withdrawn, to give notice to an officer of the Board that they are chargeable (s 8 TMA1970).

26. The Appellant's employment record shows that he was a director of the

35 Company which employed him for at least part of the default period. As a consequence he was required to complete SA tax returns.

27. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and

40 penalties are no longer linked to liability.

28. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

29. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA returns.

5 30. It is HMRC's contention that tax returns were sent to the Appellant on 5 April in each year of default.

- No mail sent to the Appellant was returned undelivered.
- The Appellant telephoned HMRC on numerous occasions between 2011 and 2015 regarding his outstanding returns.
- 10 • In November 2015, the Appellant telephoned HMRC to say that he was unable to file his outstanding returns as he did not have all the information he needed. He asked HMRC to raise determinations for all years so that he could pay the outstanding tax.

15 31. HMRC submit that the Appellant does not have a reasonable excuse. He should have completed his tax returns even if they were nil returns.

32. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

20 33. The penalty notices issued in March 2012 for £100 would have alerted the Appellant to the fact that his returns were outstanding and that if he were to appeal against HMRC's decision to charge a penalty, he must do so within 30 days of the charge date.

25 34. As he did not submit appeals against any of the penalties his appeal to the Tribunal is out of time.

Conclusion

35. In considering whether to grant permission to appeal out of time the Tribunal must consider the merits of the case and whether there is any reasonable prospect of success for the Appellant. In this case there is not.

30 36. Furthermore when a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. The Appellant has shown no reasonable excuse for his failure to file returns on time. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation
35 which otherwise they would have complied with. It is clear from the evidence that the Appellant knew his returns were late and that the reason he had not filed his returns was because he had not retained the information he needed to complete and file the returns.

37. HMRC first sent a late filing penalty to the Appellant on or around 20 March 2012 for £100. This should have acted as an additional prompt to him that a return was due and had not been submitted. If he had any difficulties regarding the filing of his returns he could have raised these with HMRC who would have advised him accordingly. Numerous further late filing notices (14 in total) were sent to the Appellant together with penalty notifications without any real response.

38. No reasonable excuse has been shown either for the late appeals or for the Appellant's failure to file his tax returns for the default years in question.

39. The appeal is significantly out of time and is therefore dismissed. The late filing penalties are confirmed.

40. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2018