



**TC06864**

**Appeal number: TC/2013/09053**

*INCOME TAX – penalty for failure to make returns – tax already deducted  
at source – whether reasonable excuse - no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**H N BINGHAM**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 11 September 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 received on 27 November 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 9 July 2018.**

## 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 2010/11 tax year 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) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012
  - (3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 19 February 2013
  - 15 (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012
3. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC initially refused consent under s49(2)(a) of TMA 1970. However, HMRC have now prepared a full Statement of Case which deals with the substantive appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a).
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### **Appellant’s case**

4. The appellant’s grounds for appealing against the penalties can be summarised as follows:
- 25 (1) He had only worked for five weeks in 2010/11 and although he was self-employed, all tax was taken at source. He had claimed Job Seekers Allowance for the rest of the year, having ceased self-employment in October 2010.
  - (2) The fines are unreasonable as he earned less than the Personal Allowance amount in the 2010/11 tax year.
  - 30 (3) He had overpaid tax for the 2010/11 tax year.
  - (4) He cannot afford to pay the penalties.

### **HMRC’s case**

5. HMRC’s submissions are, in summary:
- 35 (1) The appellant was issued with a tax return for the 2010/11 tax year on 6 April 2011; this was sent to the address that HMRC have held for the appellant since 2005 and which is the address used by the appellant when filing his appeal. HMRC submitted that the appellant had not denied receiving the return.

(2) The appellant did not contact HMRC until 20 September 2012, when he called HMRC for assistance with his 2010/11 and 2011/12 tax returns. His return for 2011/12 was cancelled following that telephone call as the appellant was no longer within the criteria for self-assessment.

5 (3) The appellant had self-employment income in the 2010/11 tax year and was therefore still required to complete a return for that tax year, even though tax was deducted at source from that income.

(4) Although the appellant submits that the fines are unreasonable, the fines are based on failure to file rather than the amount of income received or tax paid.  
10 HMRC are required to be seen to be fair to those who have complied with their tax obligations.

6. HMRC considered whether there were special circumstances which could merit a return in the penalty but concluded that cessation of self-employment did not amount to such special circumstances and that inability to pay is precluded by law from being  
15 special circumstances so that no reduction in the penalty was appropriate.

### **Discussion**

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

8. The appellant filed a paper tax return for the 2010/11 tax year on 20 September 2013; the filing deadline for a paper tax return for that tax year was 31 October 2011.  
20 It is not disputed that the appellant's tax return for the 2010/11 tax year was submitted late. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

9. The appellant has argued that the penalties charged are unreasonable as he did not earn over the Personal Allowance. The Tribunal's powers on an appeal are set out  
25 in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate, or unreasonable in comparison to tax due. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, I have considered the question of  
30 "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

10. The test of whether something is a "reasonable excuse" for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company*  
35 [1991] VTTR 234 should be applied:

"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, but who in other respects shared such attributes of the particular appellant as the  
40 tribunal considered relevant to the situation being considered"

11. It is clear that the appellant had a mistaken belief that no return was required because tax had been deducted at source from his self-employment income. I agree with the decision of the First-tier Tribunal in the case of *Garmoss* [2012] UKFTT 315 (TC) which concluded that:

5           “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 for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.....”

10       12. Although *Garmoss* related to a failure to pay VAT on time, I consider that the same principle can be applied when considering whether there is a reasonable excuse for the late filing of self assessment returns.

13. Accordingly, I find that the appellant’s mistaken belief that he did not need to complete a tax return does not amount to a reasonable excuse.

15       14. It should also be noted that a reasonable excuse must exist throughout the period of default: the appellant did not file his tax return until September 2013, almost two years after the filing deadline for a paper return, during which time he received a number of penalty notices which would have made it clear to him that HMRC considered that he needed to complete a tax return, and had contacted HMRC for  
20 assistance in completing the return in September 2012. Even if his mistaken belief had amounted to a reasonable excuse, I consider that such a reasonable excuse would have expired when he received the first of the penalty notices in February 2012. He was clearly aware in September 2012, a year before he filed the return, that a return was required.

25       15. The overpayment of tax for 2010/11 also does not amount to a reasonable excuse for the delay in filing the return; a person within self-assessment is required to complete a return issued by HMRC even if they have no tax to pay.

30       16. The appellant’s inability to pay the penalties is, by para 23(2) of Schedule 55, not a reasonable excuse as the appellant has not shown that the lack of funds is due to events outside his control.

35       17. Finally, I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal’s jurisdiction in this context is limited to circumstances where it considers HMRC’s decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC’s decision.

## **Conclusion**

18. The appeal is dismissed and the penalties are confirmed.

## **Application for permission to appeal**

19. This document contains full findings of fact and reasons for the decision. Any  
5 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  
10 accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies  
and forms part of this decision notice.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

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**RELEASE DATE: 13 DECEMBER 2018**

## 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.

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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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

(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.