



**TC06889**

**Appeal number: TC/2017/07009**

*Income tax - fixed and daily penalties for late filing of self-assessment return - Appellant claimed to be very ill and his previous agent had led him to believe that his return had been filed - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MOHAMED SHEIKH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 16 July 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 20 September 2017 and HMRC's Statement of Case received by the Tribunal on 9 April 2018 with enclosures. The Tribunal wrote to the Appellant on 10 April 2018 stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.**

## DECISION

5 1. This is an appeal by Mohamed Sheikh ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4, and 5 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2014.

2. The Appellant's return, if filed electronically, was due no later than 31 January 2015, but was filed on 8 October 2015.

10 3. 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.

15 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.

20 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.

4. Penalties of £100, £900 and £300 were imposed, (i), (ii) and (iii) above.

5. The Appellant's appeal is against all the penalties.

25 *Filing date and Penalty date*

6. Under s 8(1D) TMA 1970 et seq. for the year ended 5 April 2014 a non-electronic return must be filed by 31 October 2014 and an electronic return by 31 January 2015. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

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

*Reasonable excuse*

35 8. 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.

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

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

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

10. 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).

10 11. 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  
15 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 standard.

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

20 *The background facts*

13. The notice to file for the year ending 5 April 2014 was issued to the Appellant on 6 April 2014.

14. The filing date was 31 October 2012 for a non-electronic return or 31 January 2015 for an electronic return.

25 15. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 18 February 2015 in the amount of £100.

16. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 14 August 2015 in the amount of £900, calculated at £10 per day for 90 days.

30 17. As the return had still not been received 6 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 14 August 2015 in the amount of £300.

18. The Appellant's electronic return for the year 2011-12 was received on 8 October 2015.

35 19. On 24 July 2017 the Appellant (via his agent) appealed against the penalty on the grounds that:

“The previous agent told the taxpayer all returns were filed on time and any penalties had been waived by HMRC. He has since ceased trading due to HMRC's investigation without informing any clients and without returning any paperwork. Clients were in no position to know what was happening until receiving HMRC's most recent letter.”

5 20. On 18 August 2017 HMRC sent the Appellant a letter rejecting his appeal because it was late.

21. On 20 September 2017 the Appellant lodged an out of time appeal with the Tribunal. The grounds of appeal were that he was very sick at the time and attending New Queen Elizabeth Hospital, Birmingham as an outpatient under the care of Dr Mutimer's Hepatology Clinic, and unable to deal with his affairs. He provided a copy of an appointment at the clinic on 22 November 2017.

*Relevant statutory provisions*

**Taxes Management Act 1970**

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

15 (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-

20 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-

25 (a) the 31st January next following the year of assessment, or

(b) where the notice under this 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-

30 (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

35 (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.]

5 (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 this 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.

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

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

- 10 (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.

15 (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-

- (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).

20 (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.

(1H) The Commissioners-

- (a) shall prescribe what constitutes an electronic return, and
- (b) may make different provision for different cases or circumstances.

25 (2) Every return under this 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.

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

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

35 (4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(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 (5) In this section and sections 8A, 9 and 12AA of this 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:**

23. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

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

10 Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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 this paragraph if (and only if)-
- 15 (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.
- 20 (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)-
- 25 (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).

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

- (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-
- 35 (a) 5% of any liability to tax which would have been shown in the return in question, and  
(b) £300.

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

- (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-

(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-

(a) staying a penalty, and

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

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:

(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

(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

(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.

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

(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

(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.

24. The Appellant’s grounds of appeal are as set out in his Notice of Appeal to the Tribunal.

*HMRC's Case*

25. HMRC do not oppose the late appeal.

26. If a customer employs an agent to file the tax return on their behalf, it remains the customer's complete responsibility to ensure it is received. If the agent misadvised the taxpayer, he should seek redress directly from them. HMRC dispute Mr Sheikh's claim that the first he knew that his return was late was on receipt of HMRC's 'most recent' letter. The following comprises a list of all the notices and reminders sent to him which should have acted as a prompt that his agent was badly misinforming him. So he actually knew his return was outstanding from early 2015, yet it took nearly another 8 months to finally submit it:

- A Statement on 8 March 2015 showing the Late Filing Penalty;
- 30 day reminder letter on 2 June 2015;
- Another Statement on 18 June 2015 showing the Late Filing Penalty;
- 60 day reminder letter on 30 June 2015;
- Another Statement on 3 September 2015 showing all the penalties due.

27. For reasonable excuse to apply, it must last throughout the period in question and be remedied within a reasonable time after it has ended. The above shows this was not the case. The period for which the reasonable excuse must prevail in this case is the date by which the return was due up to the date it was actually received. That is 31 January 2015 to 8 October 2015. The date of Mr Sheikh's evidence: an appointment letter dated 24 May 2017 confirming an appointment 6 months later, does not cover any part of this period at all. If illness is ongoing, he would be expected to make alternative arrangements to ensure his return is completed and submitted on time as this is a statutory obligation under s 8(1) Taxes Management Act 1970.

28. Late filing penalties for the year ended 5 April 2014 are due 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.

29. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the 2013-14 notice to file issued to the Appellant on 6 April 2014.

30. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure his 2013-14 tax return was filed by the legislative date and payment made on time.

31. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and



HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

5 32. The Appellant has been making SA tax returns for a number of years. Therefore, HMRC consider him to be experienced with the SA system including the due dates for paper and online returns.

33. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

10 34. 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.

#### *Special Reduction*

15 35. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

20 36. In other contexts "special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

25 37. HMRC have considered the Appellant's ill health and the fact that he had no tax liability. These are not special circumstances which would merit a reduction of the penalties below the statutory amount.

30 38. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55 FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

35 39. HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

#### *Proportionality*

40. HMRC submits that the penalties under appeal are not criminal in nature for the purpose of Article 6 ECHR:

- the “offence” is merely administrative (i.e. the failure to file a return on time).
- 5 • the nature of the offence requires no proof of qualitative misconduct. All that is required is for a return to be filed after the proper filing date.
- the penalties are simply an administrative means of securing the production of timely returns. Their aim is to encourage compliance, not punish defaults.

10 41. In any event, even though HMRC do not accept that Article 6 rights are engaged in respect of these penalties, HMRC contend that it has fully complied with the requirements of Article 6. In particular the Appellant was told what he had done wrong and the statutory basis for the allegation against him. There could not therefore  
15 be any reasonable doubt about the “nature and cause of the accusation” against the person. Likewise, the person was made fully aware of their right to a statutory review or to appeal to an independent tribunal.

42. HMRC also submit that the penalties are not disproportionate and the penalty regime is proportionate to its aim. In order for a national measure to be considered disproportionate, it must be “not merely harsh but plainly unfair” (see *International  
20 Transport Roth GmbH v SSHD* [2002] EWCA Civ 158). HMRC contend that the penalties imposed here are not ‘plainly unfair’ and fall within the wide margin of appreciation in framing and implementing taxation policies (*Bysermaw* at para.71). Moreover, the regime includes provisions for ‘reasonable excuse’ and ‘special circumstances’ which allow mitigation in appropriate cases.

### 25 *Conclusion*

43. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

30 44. 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 which otherwise they would have complied with.

45. The Appellant had successfully filed previous tax returns online and should have been aware of the filing dates. The Appellant has not produced any evidence to  
35 show how his illness affected him and why in particular he could not have appointed an agent or put in place measures to ensure the timely submission of his year-end tax return.

46. For illness to be a reasonable excuse for late filing of a tax return, it must have been so serious that it prevented the taxpayer from controlling his business and

private affairs immediately before the deadline for filing the tax return and from that date to the time the return was received.

47. The Appellant has not shown that he was incapable of handling his business and private affairs from the filing date to the date he filed his 2013-14 return.

5 48. A notice to file was issued to the Appellant for the 2013-14 tax year which also included a flyer to explain the changes to the penalty regime and to encourage customers to file their return on time and make payment. The information regarding penalties is also available on the HMRC Gov.UK website.

10 49. HMRC issued to the Appellant a late filing fixed penalty notice on 18 February 2015 informing him that he had been fined because his tax return had not been received and to submit his tax return to prevent further penalties being charged.

50. HMRC standard practice is to issue a 30 day daily penalty reminder letter to taxpayers who are late filing their return; informing them that their tax return is still outstanding and to send it to HMRC to prevent further penalties.

15 51. HMRC wrote to the Appellant again on 30 June 2015 with a 60 day daily penalty reminder letter informing him that more penalties had been applied and that if he did not submit his tax return, there would be further penalties.

20 52. On 3 September 2015 HMRC sent the Appellant a six month late filing penalty notice and the daily penalty notice, again informing him to send in his completed SA tax return to prevent further penalties.

53. HMRC have not indicated that the Appellant contacted HMRC after receiving any of the notices.

25 54. I take into account and accept HMRC's submissions as set out above, which address the grounds of the Appellant's appeal, and special circumstances. The Tribunal Service invited the Appellant to respond to HMRC's statement of case (from which the submissions have been extracted) but nothing further was received from the Appellant. He does not provide for example further details of his illness and how it affected him.

30 55. The Appellant's 2013-14 return was received by HMRC over nine months late. Any reason given for the delay, put forward as a reasonable excuse, must subsist for the entirety of the period of delay. The Appellant has not produced any evidence to show that between the date his return fell due for filing and its actual submission to HMRC, he was either mentally or physically unable to file or make arrangements for the filing of his tax return.

35 56. The late filing penalties have been charged in accordance with legislation and no reasonable excuse has been shown for the Appellant's failure to file his tax return on time.

57. I find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations

58. The appeal is therefore dismissed and the late filing penalties confirmed.

59. 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**

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**RELEASE DATE: 20 DECEMBER 2018**