



**TC07012**

**Appeal number: TC/2017/05307**

*Income tax – fixed and daily penalties for late filing of self-assessment return – appellant completed paper return late – caused accountant to file online return late – whether reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JORDAN SWABE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 8 February 2019 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 5 July 2017, and HMRC's Statement of Case received by the Tribunal and appellant on 17 August 2017 with enclosures. The Tribunal wrote to the appellant on 23 August 2017 stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days of receiving a copy from HMRC. The appellant did not respond.**

## DECISION

1. This is an appeal by Mr Jordan Swabe ('the appellant') against a penalty of £100 imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 55 Finance Act 2009 for the late filing of his self-assessment ('SA') tax return for the tax year ending 5 April 2016.
2. 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 at £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 of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
3. A Penalty of £100 was imposed, under (i) above, on 7 February 2017.

### *Filing date and Penalty date*

4. Under s 8(1D) TMA 1970 et seq. a non-electronic return must be filed by 31 October following the end of the relevant tax year or an electronic return by 31 January of the following year. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
5. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

### *The background facts*

6. The notice to file for the year ending 5 April 2016 was issued to the appellant on 6 April 2016.
7. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. [The appellant's non-electronic return for the year ending 5 April 2016 was received by HMRC on 23 February 2017].
8. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 7 February 2017 in the amount of £100.

9. On 1 March 2017, the appellant appealed to HMRC against the penalty on the grounds below:

“I sent back my tax return (to my accountant) on 20<sup>th</sup> of January, way before the deadline. I also pay my tax on 30<sup>th</sup> of January, before the deadline. I can only assume the tax return was delayed in the post as I sent it in good time..... I am trying to get an answer from Royal mail to see why it was delayed so long.”

10. HMRC sent the appellant a decision letter on 10 March 2017 rejecting his appeal on the grounds that the deadline for a paper return was 31 October 2016. The appellant’s electronic return was filed on 23 February 2017 by his accountants.

11. On 1 June 2017 the appellant responded that he had submitted his tax return in paper form via his accountant, but that it must have been delayed in the post by over two weeks which caused the accountant to submit it late online. He therefore says the delay in the return being submitted “was simply down to Royal Mail”.

12. On 31 July 2017 HMRC replied, reiterating that a paper return was due by 31 October 2016, but that in any event if a taxpayer employs an agent to complete and file a return on their behalf they nonetheless remain responsible for ensuring that the return is received by HMRC by the relevant deadline, which was 31 January 2017. Any delay by the agent was not a reasonable excuse. HMRC is not responsible for any delays in the postal system.

13. Prior to HMRC’s reply of 31 July 2017 the appellant had lodged a notice of appeal with the Tribunal on 5 July 2017. The appellant reiterated his earlier grounds of appeal.

#### *Relevant statutory provisions*

#### **Taxes Management Act 1970**

Section 8 - Personal return - provides as follows:

(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-

- 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-

- (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-

(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.]

(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-

- (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-

- (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.

(1H) The Commissioners-

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

(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.

(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.

(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) 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:**

14. 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'

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)--
  - (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.
- (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
  - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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--

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

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

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.

*The appellant's case*

15. The appellant's grounds of appeal are as set out in correspondence. His Notice of Appeal to the Tribunal repeated the grounds expressed in correspondence with HMRC.

*HMRC's Case*

16. The notice to file a return for the year ending 5 April 2016 was issued to the appellant on 6 April 2016 at the address held on HMRC's records at the time.

17. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return.

18. The appellant's electronic return for the year 2015-16 was received on 23 February 2017 and was processed on the same day.

19. As the return was not received by the filing date, HMRC issued a notice of penalty assessment in the amount of £100.

20. The appellant has not explained why he believes that the tax return was delayed in the post to his accountant and how he knows it was delayed. HMRC are not aware of any postal strikes during this period.

21. Furthermore, the appellant has said that the return was posted on 20 January 2017; however the return was submitted online on 23 February 2017, almost 5 weeks after he sent it in paper form to his agent.

22. HMRC contend that the appellant had not taken into account the possibility of postal delays or that his agent may be busy during the days to 31 January 2017.

23. Although proof of postage is not a legislative requirement, in cases where the grounds for reasonable excuse are cited as postal delays or when it is contended that the return was posted in good time, it is reasonable to expect that some evidence of actual postage should be provided.

24. HMRC have no discretion in the calculation of the penalty amount as it is set in statute and all taxpayers who fail to submit a tax return by the legislative date will be subject to penalty under Schedule 55 FA 2009.

25. 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. 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.

26. In order for the appellant's appeal to succeed, he must demonstrate that a reasonable excuse existed which prevented him from complying with his Income Tax obligations. I have to conclude, based on the evidence held, that no reasonable excuse exists, and as a consequence the penalty of £100 was correctly charged in accordance with legislation.

### *Special Reduction*

27. 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.

28. 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).

29. HMRC have considered the appellant's submissions and assert that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

30. 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’.

31. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed, but in any event there are no special circumstances which would require the Tribunal to reduce the penalties.

### *Conclusion*

32. 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.

33. 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).

34. 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 standard.

35. 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 at the correct time. It is the tax payer's responsibility to make sure they meet the deadlines.

36. As HMRC say, although proof of postage is not a legislative requirement, in cases where the grounds for reasonable excuse are cited as postal delays or when it is contended that the return was posted in good time, it is reasonable to expect that some evidence of actual postage should be provided.

37. A paper return was due by 31 October 2016. If a taxpayer employs an agent to complete and file an online return on their behalf they nonetheless remain responsible for ensuring that the return is received by HMRC by the relevant deadline which was 31 January 2017.

38. The Tribunal has no discretion in the calculation of the penalty amount as it is set in Schedule 55 FA 2009, and all taxpayers who fail to submit a tax return by the legislative date will be subject to penalty under this schedule.

39. The late filing penalty has been therefore charged in accordance with legislation and I find that no reasonable excuse has been shown for the appellant's failure to file his tax return on time, nor by the date the penalty arose.

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

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

42. 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: 28 FEBRUARY 2019**