



**TC07089**

**Appeal number: TC/2016/06292**

*Income tax - fixed and daily penalties for late filing of self-assessment return - appellant unaware of requirement to file a return in respect of expenses which exceeded £2500 and assumed they had been taxed under his tax coding - also experienced problems receiving post and asserts that he had not received a notice to file - whether reasonable excuse - no - appeal disallowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BENJAMIN UTTLEY**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER JOHN WILSON**

**Sitting in public at City Exchange, Albion Street, Leeds on 26 October 2018**

**Mr John Parkin of PKN Chartered Accountants for the Appellant**

**Ms Loretta McLaughlin, Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal by Mr Benjamin Uttley ('the appellant') against penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 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 2012 ('the default year').
2. The appellant's appeal was made outside the 30 day time limit within which penalties must be appealed and he therefore applies for permission to appeal out of time.
3. HMRC do not object to the application to appeal out of time. The Tribunal granted the application.

### **Background**

4. The appellant was obliged to complete a SA tax return because in the default year he received more than £2,500 in untaxed income or expenses and therefore they could not be claimed on Form P86.
5. The appellant did not file his 2011-12 return by the statutory 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 the default year.
8. The appellant's appeal is against all the penalties.

### *Filing date and Penalty date*

9. Under s 8(1D) Taxes Management Act 1970 ('TMA 1970') a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date

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

### *Reasonable excuse*

11. 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.

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).

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 standard.

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

### *The background facts*

15. On 6 April 2012, HMRC issued the appellant with a notice to file for the tax year 2011-12. The notice to file was made under s 8 TMA 1970. The appellant says that he did not receive the notice to file. It would have been sent to 5 Green Street, Rotherham S61 4EE, being the address recorded on HMRC's system as his last given address.

16. As a paper or electronic return was not received by the statutory filing dates (31 October 2012 or 31 January 2013) the appellant was subject to Schedule 55 penalties.

17. On 12 February 2013, a late filing penalty was raised. The penalty assessment letter would have been sent to the appellant at 5 Green Street.

18. On 4 June 2013, a 30 day penalty reminder letter would have been sent to the appellant at 5 Green Street.

19. On 2 July 2013, a 60 day penalty reminder letter would have been sent to the appellant at 5B Green Street, (being the new address recorded on HMRC's system from 13 June 2013). (It should be mentioned that the address recorded on HMRC's system prior to 8 January 2011 was 5A Green Street).

20. On 14 August 2013, because the return was outstanding 3 months from the penalty date (the day after the filing date, i.e. 1 February 2013), daily penalties were imposed on the appellant charged at £10 per day from 1 May to 30 July. The penalties were in the sum of £900. The penalty assessment letter would have been sent to the appellant at 5B Green Street.

21. On 14 August 2013, HMRC raised a 6 month late filing penalty in the sum of £300. The penalty assessment letter would have been sent to the appellant at 5B Green Street.

22. On 25 February 2014, a 12 month late filing penalty in the sum of £300 was raised. The penalty assessment letter would have been sent to the appellant at 5B Green Street.

23. The appellant asserts that he did not receive any of the penalty notices.

24. The appellant having received a statement of account from HMRC which showed the outstanding penalties, appointed PKN Chartered Accountants who, on 27 January 2015, filed his return for 2011-12 electronically. The return was nearly two years late.

25. On 2 November 2015, the appellant's agents, PKN, appealed the penalties on behalf of the appellant. The grounds of appeal were stated to be that the appellant thought that in the tax year 2011-12 his tax code had been adjusted to take into account his ongoing claims for expenses in excess of £2,500; he therefore considered that further tax returns did not need to be completed. The appellant lived at 5B Green Street and there was also a number 5 and 5C Green Street, and over the years the appellant had experienced problems receiving his post.

26. On 23 December 2015, HMRC advised that the appeals were out of time.

27. On 16 November 2016, the appellant notified his appeal to the Tribunal.

#### *Relevant statutory provisions*

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

28. 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:**

29. 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 SA 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**

30. During the tax year 2011-12 the appellant was employed and therefore paid tax by way of PAYE. His income after expenses for 2011-12 was £18,105. The only reason for a SA tax return being issued was that the expenses reclaimed, primarily being mileage for that year, were in excess of £2,500 and therefore they could not be claimed on Form P86.

31. The appellant having completed tax returns previously noticed that his tax code had been adjusted for 2011-12. He assumed wrongly that this was to take into account the expenses he claimed, and that a tax return was not necessary.

32. Following this he says that he received no correspondence or communication from HMRC and therefore not unreasonably considered that a return was not required. The addresses on HMRC's system include two addresses for the appellant between January 2011 and July 2014 - 5 and 5B Green Street. Prior to January 2011 the address on HMRC's system was 5A Green Street. The appellant says that he did not receive any correspondence from HMRC regarding the need to file a SA return.

33. In March 2014, the appellant received a SA statement of account, which showed late filing penalties for 2011-12 [and 2012-13 - although those penalties have been waived as the appellant showed a reasonable excuse]. Following this PKN submitted the outstanding Tax Return for 2011-12 on 27 January 2015. The agents said that the appellant was due a tax repayment of £123.

34. The appellant became self-employed on 24 May 2013 and his 2013-14 Tax Return was submitted early on 24 June 2014.



35. The appellant's agent, PKN, assert that the appellant has a reasonable excuse for not filing his 2011-12 return on time as follows:

(i) Postal issues. The appellant did not receive any information prior to March 2014 and HMRC have not provided any evidence to support the fact that post has been delivered to the correct address apart from a list of postal addresses of which there is a contradictory address for part of the period anyway.

(ii) The appellant did not receive any untaxed income and assumed that the expenses were being taken into account in his tax code. As he heard nothing from HMRC he thought everything was in order.

36. The agent referred to *N Geyko-Bisson vs HMRC*, [2012] UKFTT 406 (TC) a woman (G) who was employed by Devon County Council received mileage expenses. HMRC sent her a 2009-10 Tax Return which she failed to submit on time. HMRC imposed a penalty of £100. G appealed, contending that the penalty was excessive because her additional tax liability was only £15.80. Judge Geraint Jones accepted this contention and reduced the penalty accordingly. The agent asserts that these circumstances are identical to the appellant's, who was also due a tax repayment.

37. The agent also referred to *Sabin Qureshi vs HMRC*, [2018] UKFTT 115 (TC) Judge Geraint Jones found that the "evidence" adduced by HMRC was not sufficient to prove, on the balance of probabilities, that in respect of the relevant tax year HMRC had sent the appellant a notice to file within the meaning of s 8 TMA 1970. The production of a "Return Summary Sheet" showing "Return issue date" with a date appearing alongside it is not adequate to allow an inference that any notice to file was in fact put into the post by HMRC with the post prepaid and properly addressed to the appellant.

### **HMRC's Case**

38. The appellant asserts that he has a reasonable excuse for not filing his 2011-12 SA return on time because:

- He did not receive any information/correspondence from HMRC before March 2014 and HMRC have not provided any evidence to support the fact that post was delivered to the correct address.
- He not unreasonably assumed that his PAYE tax coding [which had changed] took into account his expenses as he had not heard otherwise or received a notice to file from HMRC.

39. The appellant relies on two tax cases in support of his appeal:

*Geyko-Bisson v HMRC* which concerned penalties under the old penalty regime, in which the legislation provided that a penalty could not exceed the tax liability. HMRC submit the decision can be distinguished, as the case concerned penalties under the old penalty legislation, and not the current legislation, being

Schedule 55 FA 2009 where penalties are no longer capped if a return shows a nil liability to tax, and

*Qureshi v HMRC* which concerned Schedule 55 penalties in which the Tribunal relied on a criminal judgment from the Court of Appeal. It concerned defendants' appeals against convictions and sentences in respect of conspiracy to rape and conspiracy to murder. The Tribunal decision is not binding on the Tribunal today, but merely persuasive.

40. HMRC submit that the appellant does not have a reasonable excuse.

41. Paragraph 23 of Schedule 55, sets out that a person will not be liable for a penalty where they have a reasonable excuse. Reasonable excuse is not defined in legislation. However, Judge Medd in *The Clean Car Co Ltd v HMRC* [1991] BVC said the test of whether or not there is a reasonable excuse is an objective one:

“one must ask oneself: ‘was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’”

42. This quote is taken from a VAT case and concerns a trader. Nevertheless, HMRC submit that the test applies to all taxpayers; conscientious and responsible taxpayers. If a reasonable excuse is found to exist, the appellant must have put right the failure without unreasonable delay once the excuse ended. The appellant maintains that he was not aware of the penalties until March 2014, yet the return for 2011-12 was not filed until 27 January 2015.

43. Under s 115 (1) of TMA 1970 :

“a notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence”.

44. Section 7 of the Interpretation Act 1978, provides that where an Act authorises or requires any document to be served by post, then unless the contrary intention appears, service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

45. The appellant was therefore properly served with the notice to file, reminder letters and penalty assessments for 2011-12, which were posted to the appellant's usual or last known place of residence according to the addresses recorded on their system. The notice to file, penalty assessments and reminders would have been sent to either 5 Green Street or 5B Green Street being the addresses on record for the appellant at the time the letters would have been produced.

46. The appellant's agent states that the appellant, "over the years had ongoing problems with receiving post". It is for taxpayers to keep HMRC apprised of their current address. It was not until 13 June 2013 that HMRC's systems were updated and recorded the appellant's current address at 5B Green Street. It is also for taxpayers to ensure that they have adequate procedures for keeping their post safe, particularly in circumstances where there are multiple properties with the same door number. That is what a conscientious and responsible taxpayer would do.

47. In *Calladine v Smith* [2011] EWHC 2501 (Ch.), Mr Justice Morgan said at paragraph 26 of the decision that "*it is not enough to simply assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as the credibility of witnesses. That is the ordinary way in which the court goes about making findings of fact*".

48. In *Olalekan v HMRC* [2018] UKFTT 0142 (TC) the FtT considered a taxpayer's argument that he had not received any correspondence from HMRC until sometime after Schedule 55 penalties had been imposed. The Tribunal were persuaded by a Scottish Land Chamber Tribunal decision and agreed with that Tribunal's view, that it is only open to the alleged recipient to say that he did not receive documents where the legislation requires the document to be served by a certain time. The Tribunal remarked that in the case before them, the issue of letters and the returns was not time critical and therefore the second part of s 7 did not apply. The Tribunal relied on Mr Justice Morgan's comments in *Calladine v Smith*, noted above.

49. The appellant submitted a tax return for the tax year 2010-11 on 27 May 2011. On 13 January 2012, HMRC issued the appellant with a tax code, which included expenses in his tax code. This tax code would have been sent to the address recorded on the PAYE address system - 5 Green Street.

50. On 6 April 2012, HMRC sent the appellant a notice to file a tax return for the tax year 2011-12. The notice to file would have been sent to the address recorded on the address system - 5 Green Street.

51. On 24 June 2012, HMRC sent the appellant an automatic code change. This code would have been sent to the address recorded on the PAYE address system - 5 Green Street.

52. Applying the test set out in *Clean Car*, HMRC submit it was unreasonable for the appellant not to contact HMRC regarding his expenses and ascertain the position with regard to completing a tax return. A conscientious and responsible taxpayer wishing to comply with their tax obligations would have contacted HMRC to check the position. There is no note of the appellant having contacted HMRC in the SA notes in the bundle.

### *Special circumstances*

53. Under Paragraph 16 of Schedule 55, HMRC can reduce penalties if they think it right because of special circumstances. The courts accept that for a taxpayer's

circumstances to be special they must be ‘exceptional, abnormal or unusual’, see *Crabtree v Hinchcliffe (Inspector of Taxes)* [1971] 3 All ER 967. HMRC submit that to date, the Appellant has not put forward any ‘special circumstances’, which would warrant a reduction of the penalties.

54. 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 and warnings of penalties were clearly shown on the Notice to File issued to the appellant for each of the default years.

### *Conclusion*

55. Paragraph 23 of Schedule 55 FA 2009 sets out that a person will not be liable for a penalty where they have a reasonable excuse.

56. The test we have to apply is an objective one – “was what the taxpayer did a reasonable thing for a taxpayer conscious of and intending to comply with his obligations regarding tax, a reasonable thing to do?”

57. We do not accept that the appellant, having completed tax returns previously, and having noticed that his tax code had been adjusted for 2011-12 to take into account the expenses claimed, should have readily assumed without further enquiry that a tax return was not necessary.

58. Furthermore, when he did not receive a notice to file for 2011-12 he should have been put on enquiry and checked the position with HMRC.

59. As HMRC point out -

Under s 115 (1) of the Taxes Management Act 1970:

“a notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.”

Under s 7 of the Interpretation Act 1978:

“...unless the contrary intention appears, service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

60. We do not accept that the Notice to File, the penalty notices, penalty reminder letters and statements of account were not properly addressed to the appellant. Therefore, without any persuasive evidence to the contrary, we have to conclude that they were delivered in the ordinary course of post.

61. The appellant maintains that he was not aware of the penalties until March 2014, yet the return for 2011-12 was not filed until 27 January 2015. If a reasonable excuse is found to exist, the appellant must have put right the failure without unreasonable

delay once the excuse ended, in accordance with s 25(2)(c) but in this case he has not done so. He did not deal with the filing of his outstanding return timeously and as soon as he became aware of the problem.

62. The appellant therefore has not shown a reasonable excuse for the late filing of his 2011-12 return.

63. The appeal is therefore refused and the penalties confirmed.

64. 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: 11 APRIL 2019**