



[2019] UKFTT 339 (TC)

TC07167

INCOME TAX – Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return on time – whether taxpayer had a reasonable excuse for his default – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/07437

BETWEEN

JASON SMITH

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 20 May 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 19 November 2018 (with enclosures), and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 26 March 2019.

DECISION

Introduction

1. This is an appeal by Mr Jason Smith ('the Appellant') against penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6(5) of Schedule 55 Finance Act 2009, for his failure to file self-assessment ('SA') tax returns on time for the tax year ending 5 April 2016.

Background

2. The Appellant's return for 2015-16, was due if filed electronically no later than 31 January 2017.
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.
 - (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 of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
4. The Appellant's return for 2015-16 was not filed on time and penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above. HMRC do not contend that there was any deliberate withholding of information.

Filing date and Penalty date

5. Under s 8(1D) 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.

Reasonable excuse

6. 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.
7. 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
 - (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
8. 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).

9. 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.

The background facts

10. The Appellant had been within the SA regime within the 2007-08 tax year. He then registered within the SA regime again having started self-employment on 17 August 2015.
11. The Appellant's 2015-16 return was issued on 6 April 2016 and so was due to be returned in paper form by 31 October 2016 or online by 31 January 2017. The Notice to file a return was sent by HMRC to the Appellant at his home address in the UK.
12. The Appellant says that he did not file his tax return because he believed that he was not required to do so. He believed himself to be PAYE.
13. As of the date of appeal the SA return had not been received by HMRC. It was therefore over 12 months late.
14. HMRC imposed a fixed penalty of £100 together with daily penalties [90 days at £10 for each day] totalling £900. The return still having not been received six months after the filing date HMRC then imposed a fixed penalty of £300, followed by a fixed penalty of a further £300 when the return had not been received 12 months after the filing date.
15. The Appellant appealed to the Tribunal on 19 November 2018.
16. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. 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) of TMA 1970.

The Appellant's case

17. The Appellant's grounds of appeal are that he was not required to submit a SA return for the tax year 2015-16. Accordingly, he had a reasonable excuse for the delay in filing a return.

HMRC's Case

18. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.
19. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.
20. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA tax return.

Reasonable Excuse

21. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.
22. ‘Reasonable excuse’ was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

“It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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?” [Page 142 3rd line et seq.].
23. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.
24. If there is a reasonable excuse it must exist throughout the failure period.
25. The Appellant has not provided a reasonable excuse for his failure to file his tax return for the year 2015-16 on time and accordingly the penalties have been correctly charged in accordance with the legislation.
26. 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

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. 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’.
30. HMRC have considered the Appellant’s grounds of appeal but assert that his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

31. Accordingly, 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.

FINDINGS OF FACT

32. 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. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.

33. Between September 2015 and January 2016 Mr Smith was paid by Labour Force Construction under the Construction Industry Scheme. He must have been aware that he had registered in the SA regime in August 2015, having signed the CWF1 form.

34. The notice to file was issued to Mr Smith at his home address on 6 April 2016. Similarly the penalty notices were issued to his home address on or around 7 February 2017, 11 August 2017 and 20 February 2018. Mr. Smith does not suggest that he did not receive any of that documentation, and indeed there is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries. In those circumstances, I conclude that he did receive those communications.

35. Further, on 5 March 2018 he submitted a request to remove him from the SA regime stating that his circumstances changed on 11 December 2015 when he became PAYE. He therefore must, by that date, have recognised that he was not PAYE before December 2015.

36. There is a suggestion by Mr Smith on the documentation before me that he submitted a paper return for the tax year 2015-16 on 3 April 2017. That was not received by HMRC, and Mr Smith does not appear to have attempted to submit that return again. Upon making an appeal on 7 March 2017 he indicated that he had not sent his tax return in. HMRC wrote again to Mr Smith advising him that he still needed to submit the return, but received no submission in return. In his appeal to HMRC dated 27 September 2017, he indicated that he had submitted the return on 3 April 2017. I consider it unlikely that if he had acted to correct the failure in April 2017, he would not have acted again when HMRC advised that they had not received it. Upon receiving his August 2017 penalty notice it must have been clear that the return remained outstanding. Similarly, it must have been clear upon receiving the response to his September 2017 appeal on 3 October 2017, and again upon receiving the penalty notice in February 2018. In my judgment it is likely that the return has not been submitted to HMRC.

DISCUSSION

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

38. I have concluded that the tax return for the 2015-16 tax year was not submitted. It should have been submitted by 31 March 2017. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

39. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal had explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. Having worked in

the construction industry and been paid under the CIS, Mr Smith's employer must have discussed his liabilities with him. In particular that he was being taxed at a reduced rate which was subject to reconciliation at a later date. In those circumstances, if he did honestly believe that he was PAYE and not required to submit a return, the initial belief is not objectively reasonable, particularly in light of the fact that he received a number of requests to file the SA return from HMRC and made no attempt to query or clarify those requests. Following that initial failure to file, the subsequent issuing of penalty notices to his home address should have provoked the Appellant to file the late return rather than continue to ignore the request.

40. I have also borne in mind the recent comments of the Tribunal in *Hesketh v HMRC* [2017] UKFTT 871 about whether ignorance of an obligation to file could excuse late filing. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. I conclude that Mr Smith does not have a reasonable excuse for the late filing of his return for 2015-16.
41. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.
42. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Smith.
43. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Mr Smith relied upon was his belief that he was not required to file his return. I have explained above why I do not consider that erroneous belief for failing to comply with the law can provide Mr Smith with a reasonable excuse for his late filing. Similarly, I conclude that ignorance of the severity of the Schedule 55 penalty regime does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

CONCLUSION

44. I therefore confirm the fixed penalties of £100, £300 and £300, and the daily penalties of £900.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

RELEASE DATE: 29 MAY 2019

**APPENDIX
RELEVANT STATUTORY PROVISIONS**

Finance Act 2009

46. 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.

47. 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) —

(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).

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

5—

(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.

49. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

(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 —

- (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—

- (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 —

- (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—

- (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 —

- (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.

50. 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
- (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.

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

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—
 - (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.

52. 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:

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 —
 - (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.

Taxes Management Act 1970

53. 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 the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

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

- (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 the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

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

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

- (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 the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

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

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

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

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

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