



INCOME TAX - individual tax return - penalties for late filing - late appeal - application for permission to appeal out of time - application refused - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07244

Appeal number: TC/2019/00132

BETWEEN

SAM DARCY

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE DR KAMEEL KHAN

The Tribunal determined the appeal on 1 June 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 30 August 2018 (with enclosures), HMRC's Statement of Case (with enclosures) dated 19 February 2019 .

DECISION

Background

The Appellant is appealing against penalties imposed by HMRC under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for the late filing of the Individual Tax Return for the year ending 5 April 2014.

1. 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 20 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.

The Appellant’s return for year end 2014 was filed late and penalties were imposed, under (i) and (ii), (iii), and (iv) above.

Filing date and Penalty date

2. 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 as the date after the filing date.

Reasonable Excuse

3. Paragraph 23 of Schedule 55, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal to a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.
4. The law specifies two situations that are not reasonable excuse:
 - i. An insufficiency of funds, unless attributable to events outside the Appellant’s control, and
 - ii. Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
5. 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*).
6. 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.

Findings of Fact

7. The notice to file for the year ending 5 April 2014 was issued to Mr Darcy on 6 April 2014, at the correct address and with information for filing and an explanation of the penalties for late filing.
8. The filing date was 31 October 2014 for a non-electronic return or 31 January 2015 for an electronic return. Mr Darcy's non-electronic return for the year 2013-2014 was received on 5 September 2018.
9. This meant penalties for late filing on the filing date, three months, 6 months and twelve months penalties were issued. The penalties totalled £1600.
10. As the return was not received by the filing date, HMRC issued a penalty assessment on or around 18 February 2015 in the amount of £100. A warning notice (SA326D) of daily penalties was issued on 18 February 2015.
11. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalties on or around 14 August 2015 in the amount of £900 calculated at £10 per day for 90 days.
12. As the return had still not been received 6 months after the penalty date, HMRC issued notice of penalty assessment on or around 14 August 2015 in the amount of £300.
13. As the return had still not been received 12 months after the penalty date, HMRC issued a notice of penalty assessment on or around 23 February 2016 in the amount of £300.

The Appeal

14. On 30 August 2018, the Appellant's agent appealed against the penalties, on the grounds that the Appellant "was not self-employed until 2014 and he was employed until 26 March 2018, therefore no self-assessment was due." This appeal was rejected on 27 September 2018.
15. On 2 October 2018, the Appellant's agent submitted a further appeal against the penalties, on the grounds:
 - i. For 2013/14 the Appellant was only self-employed for 2 weeks and made a profit of £330 for this period. He did not file a self-assessment return because he did not have access to a computer and at that time had not instructed an accountant.
 - ii. HMRC charged £1600 plus interest for not declaring income of £330 for the period. This is "extortionate and has caused my client extreme hardship and financial difficulties. The penalties are not proportionate to the level of profit for the period."
 - iii. For 2016/17, the Appellant was not self-employed and therefore a self-assessment was not due.

- iv. “I therefore request that HMRC reconsider the penalties and whilst my client accepts that he was at fault he and I think the level of penalties far exceed the actual value of the error.”

16. On 6 December 2018, the Appellant’s agent submitted a further appeal against the penalties, on the grounds largely following those previously submitted but adding one other ground. The new ground was that HMRC are not known for their prompt replies and the decision to time bar the appeal was “hypocritical” since HMRC are “allowed to review records of clients beyond the date of the deadline imposed on taxpayers.” On 20 December 2018 the agent notified their appeal to the Tribunal giving the grounds of their letter of 20 December 2018.

Relevant Statutory Provisions

17. Section 8 of the Taxes Management Act 1970 (‘TMA’) places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer.

Section 8(1D) provides for the due dates of filing, whereby a paper return is due by 31 October, and an electronic return is due by 31 January in the following tax year. Failure to file a return on time results in a penalty. Repeated failure to file results in further penalties.

18. The right to appeal against penalty determinations is provided under s 100B of the Taxes Management Act (‘TMA’), and the Tribunal is given jurisdiction to decide whether a ‘penalty has been incurred’, to set aside the determination, to confirm, to increase or to reduce the penalty to the correct amount

19. Appellant’s Grounds of Appeal

- (a) The Appellant was not self-employed until 2014 and no self-assessment tax return was due.
- (b) He did not have access to a computer to file his return.
- (c) He had not instructed an accountant to file a tax return.
- (d) The level of penalties is excessive and “extortionate”.
- (e) He should be allowed to appeal out of time since HMRC are allowed to review taxpayers returns beyond the date of the deadline imposed on taxpayers.

20. HMRC’s Submissions

- (a) The Appellant has not offered a reasonable excuse for the delay in appealing and therefore the appeal should not be entertained.
- (b) The charging of the penalties cannot give a reasonable excuse for the late filing of the return. The amount of penalties does not give a reasonable excuse.
- (c) The penalties have been charged because of the Appellant’s delay and the delay was substantial – 4 years after the legal due date.

- (d) The Appellant has accepted he was at fault and the late filing penalties have been cancelled for 2016/17 since he was not self-employed in that period.
- (e) There are no special circumstances which would require that the penalties are reduced.

Discussion

21. I am satisfied on the facts that an officer of the Board issued a notice to file to the Appellant under section 8 TMA 1970. The penalty notices given to the Appellant satisfy the requirements of paragraphs 4 and 18 of Schedule 55.

I have considered the Appellant's contention that he should have a right of appeal.

I do not agree. The legislation stipulates that a taxpayer is liable to penalties on returns submitted late. HMRC have no discretion on either the application of the penalties or the level of penalties.

It may seem harsh but all taxpayers are treated equally and fairly in the imposition of penalties. The penalties have been charged because of the delay of Mr Darcy in submitting his returns. He was contacted on numerous occasions. He knew and accepted that delays in submitting returns would lead to penalties. The delay in submitting returns were almost 4 years after the legal due date. He did not make contact with HMRC when the penalty notices were issued.

The justification given by the Appellant for his late appeal is that he did not have a computer and he did not have an agent. A tax return does not have to be submitted online; a paper return could have been submitted. At no time did he contact HMRC to explain any difficulties he had in submitting his returns. It is not required to have an agent to complete a tax return.

22. The Upper Tribunal in the case of *Martland (William Martland v HMRC [2018] UKUT 178)* has undertaken a detailed review of the relevant authorities and has given extremely helpful guidance on the principles in dealing with appeals out of time. A three step approach, as outlined, has been suggested:

- (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
- (2) The reason (or reasons) why the default occurred should be established.
- (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

23. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be.

24. A balancing exercise should be undertaken using the three criteria as suggested in the *Maitland case*.

Length of the delay

25. The delay was over four years. This is both serious and significant. There is a principle that litigation should be finalised as expeditiously as is reasonably possible. HMRC are entitled to expect that an Appellant would appeal within the statutory time limits and so, if he or she fails to do so, they can put away their papers.

In this case HMRC have clearly had to engage in this appeal notwithstanding that it should have been made over five years prior to the date on which was actually made.

Reasons for the delay

26. The Appellant's explanation for the delay – a lack of a computer and the non-appointment of an agent- are palpably weak reasons. Further he has acknowledged he is at fault for the delay.

27. This appeal is not concerned with difficult or abstract tax points. By the Appellant's own admission, it was only a matter of dealing with £330 of income for the relevant period.

28. Self-assessment places a responsibility on taxpayers for their tax affairs. The tax guidance website gives plenty of warning about filing and payment deadlines. The taxpayer should ensure those deadlines are met.

29. HMRC records show that during a telephone call made by Mr Darcy on 10 April 2014, he was informed that he needed to complete his 2013-14 tax return and to show the date his self-assessment ceased. His return was not submitted until 5 September 2018, more than 4 years after the telephone call.

30. In this case, the Appellant received not just late filing notices from HMRC but also, reminder letters, penalty notices, statements and warnings. He ignored all of these for several years. This is not the action of a reasonable man. He cannot now come to the tribunal and seek a reasonable excuse for delay when his actions were not themselves reasonable.

The balancing exercise

31. The tribunal can consider the merits (if any) of the Appellant's appeal in the balancing exercise. I think that this appeal has very little or no chance of success. It may have been different if the Appellant had a strong case. The Appellant should not be prejudiced by the decision of the tribunal - there is obviously much greater prejudice for an Appellant to lose the opportunity of putting forward a really strong case than a very weak one. It is also important that litigation is conducted reasonably and proportionately and the Appellant has not acted reasonably given his delay in filing returns.

32. The tribunal therefore rejects the application for permission to make a late appeal. The Appellant therefore loses his right to argue the substantive issues. It is not reasonable for HMRC to have to deal with matters 4 years after the returns should have been submitted. HMRC should have closure on cases, not have to spend time unduly on litigation and be assured that taxpayers would act in an efficient and proportionate manner.

33. Lastly, the decision of the Upper Tribunal in *HMRC v Hok [2012] UKUT 363* is binding on us, and it has made explicit at that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition is excessive or unfair.

I have concluded that the mere fact that the Appellant had little tax liability for the relevant tax year does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of “special circumstances”.

Decision

34. I have decided not to allow the Appellant to appeal out of time.

Accordingly, I dismiss his appeal and uphold the penalties which have been charged.

Appeal Rights

35. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**DR KAMEEL KHAN
TRIBUNAL JUDGE**

Release date: 25 June 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.
2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

- (1) P is liable to a penalty under this paragraph if (and only if) —
 - 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).

3. 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.

4. 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.

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

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

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

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.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

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.