

**FIRST-TIER TRIBUNAL
TAX CHAMBER**



INCOME TAX - late appeal to HMRC - late filing penalties - whether reasonable excuse - whether proportionality of penalties in comparison to the amount of tax amounted to special circumstances - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07296

Appeal number: TC/2019/02572

BETWEEN

JULIAN FRANCIS RUSSELL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER TRIGGER
SUSAN STOTT**

**Sitting in public at Llandudno Magistrates Court, Conway Road, Llandudno LL30 1GA
on 04 July 2019**

Julian Francis Russell in person, for the Appellant

Faisal Khan, Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. The appellant appealed against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for failure to submit an annual self-assessment return on time for the tax year 2016-17.

2. The penalties that have been charged can be summarised as follows:

- (1) A £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018,
- (2) A £300.00 “six” month late filing penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018,
- (3) Late filing “daily” penalties totalling £900.00 (calculated at £10.00 per day) under paragraph 4 of Schedule 55 imposed on 31 July 2018.

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

- (a) Difficulties in accessing his account caused the failure to submit the return for the tax year 2016-17;
- (b) The return was completed and the tax paid on 30 January 2018 but the appellant failed to click the send button at the end of the process, a mistake that he acknowledged;
- (c) The appellant received an email alert from HMRC to his personal email box which he did not access. This was because he believed that it was a confirmation receipt only from HMRC in his HMRC email inbox, (the “HMRC account”) as he had no reason to believe otherwise. There was no direct email message;
- (d) Due to moving house the appellant had trouble accessing his HMRC account. The access code was available only via his land line at his previous address which he could not access;
- (e) When the appellant attempted to log in for the purpose of submitting the tax return for the tax year 2017-18 in “the summer of 2018” he was unable to do so. At that time he tried to log on for one hour and then abandoned the task;
- (f) Finally on 28 January 2019 after the appellant sought help from HMRC to submit his 2017-18 tax return he discovered that the 2016-17 tax return had not been filed. Thereafter he immediately submitted the 2016-17 return;
- (g) The appellant maintains that the penalties represent 10% of his profits and furthermore that the tax due and paid (£418.31) when set against the penalties (£1,323.52) is not proportionate;
- (h) The appellant is self-employed in “a poor rural area and money is beyond tight at the moment”. The appellant cannot pay his rent without borrowing money and will have to borrow more money to pay the tax bill; he had moved house twice due to difficult and stressful circumstances and this was part of the reason that he had not pursued access to his HMRC account sooner;
- (i) As a result of the above the appellant argued that there is a reasonable excuse for the failure to submit the return on time;
- (j) The appellant argued also that owing to special circumstances the amount of the penalties should have been reduced by HMRC;
- (k) The appellant believed that this was the first year that he filed online.

4. The appellant's appeal to HMRC under section 39A of the Taxes Management Act 1970, (the "TMA 1970"), was made outside the statutory deadline. HMRC refused to admit the late appeal and on 19 March 2019 issued to the appellant a notice rejecting the appeal as late.

5. On 15 April 2019 an appeal was received by the Tribunal against the penalties for failure to file on time the 2016-17 tax return. The appellant appealed also the refusal by HMRC to admit the late appeal.

6. In their statement of case HMRC refused to extend the deadline to serve the notice of appeal out of time under section 49(2) of the TMA 1970. The grounds for HMRC's refusal are that the notice of appeal, against the late filing penalty, was not received within 30 days of the penalty date namely 13 February 2018. The notice of appeal against the late filing penalty was received by HMRC on 01 February 2019, 301 days late. The notice of appeal against the "daily" penalties was received also on 01 February 2019, 155 days late and the notice of appeal against the "six" month penalty again was received on 01 February 2019, 145 days late.

7. In deciding whether to extend the time limit in which to file an appeal the Tribunal had regard to the three tier test laid down in *Martland v HMRC [2018] UKUT 178* namely to consider - the length of the delay, the reasons for the delay and then to contrast the merits of the reasons given for the delay against the prejudice which would be caused to both parties by granting or refusing permission.

Length of delay

8. In *Romasave (Property Services) Ltd v HMRC [2015] UKUT 0254 (TCC)* it was stated that permission to appeal out of time should only be granted exceptionally. It should be the exception rather than the rule and it should not be granted routinely. Furthermore a delay of more than three months was serious and significant.

9. The Tribunal found as a fact that the delay was serious and significant. The appeal against the late filing penalty was over nine months late; the appeal against the "six" month penalty and the appeal against the "daily" penalties was in each case more than four months late.

Reasons for the delay

10. The appellant relied on the grounds of appeal cited above as the reasons for the delay. HMRC could not accept that there was a reasonable excuse shown either for the failure to file the return by the due date or in the alternative for the failure to file without undue delay after the reasonable excuse pleaded had expired. It was the view of HMRC that the appellant had failed to act with due diligence in that he had made a mistake. He had failed to access an email alert from HMRC and he had failed to inform HMRC of his change of address and change of circumstances.

11. Furthermore, HMRC contend that as the tax year 2016-17 was the third year that the appellant was required to file a return online he should, therefore, have been familiar with the process and the paperless service in general. The appellant had opted for a paperless service and HMRC had complied with the appellant's instructions. From past experience the appellant would be aware that he would receive a notice of successful filing if he had submitted the return. When such a notice was not received the appellant should have re-submitted the return or sought advice from HMRC or accessed the wealth of information within the public domain to address the problem that presented. The appellant did not do so until 28 January 2019.

12. It was agreed by the parties that alerts regarding the notice to file and the reminder emails issued, together with the notices of penalty assessment and all other correspondence, sent to the appellant by HMRC, had been sent to the email address given by the appellant to HMRC and that this email address was held on record by HMRC as the appellant's online address for service. The failure of the appellant to notify HMRC of changes in his personal details meant that the appellant had difficulty in receiving correspondence and this was a failure of the appellant's own making and could not amount to a reasonable excuse. The appellant agreed that the notices and correspondence had been received but he could not access the same until 28 January 2019.

13. The Tribunal found that the "difficult and stressful circumstances" relied on by the appellant were not relevant to the appeal having occurred after the due date and after all the penalties had been imposed. Further the Tribunal found that the appellant had no health problems during the relevant period.

14. The Tribunal found also that no email alerts to the appellant's personal email account had "bounced back".

15. The Tribunal found that the appellant was aware for the first time on 28 January 2019 that the return for the tax year 2016-17 had not been filed and that thereafter the appellant submitted his notice of appeal to HMRC four days later on 01 February 2019. The Tribunal concluded that the appellant acted with due expedition in submitting his notice of appeal to HMRC and found as a fact that the appellant had demonstrated there was a reason for the delay.

Prejudice to the parties in granting or refusing permission

16. There was no prejudice to HMRC in extending the time in which to appeal. All evidence relevant to the substantive appeal was still in the possession of HMRC. However HMRC regarded the delay as serious and significant and refused to extend the time in which to file the appeal. HMRC maintained also that there was no adequate explanation for the delay.

17. There would be prejudice to the appellant. The appellant had plans for his business. If he did not have a chance to appeal the substantive appeal he would have to pay the penalties levied. The appellant could not pay those penalties without borrowing. His income would be reduced and he would as a consequence be unable to expand his business as planned. The appellant intended in the near future to sell and supply sawn timber. Furthermore, in order to pay the penalties the appellant would need to enter into a time to pay agreement if he is unable to borrow the money required, which will affect his cash flow and impact on his present business.

18. The appellant believed that he had done all that he could to file the return before the due date and that he had made an honest mistake.

19. The Tribunal extended the time limit in which to file the appeal and accordingly admitted the appeal forthwith. Although the delay was serious and significant the appellant had, on the balance of probabilities, shown a reason for the delay namely that the 28 January 2019 was the first time he became aware that the 2016-17 return had not been filed. Furthermore, again on the balance of probabilities, there would be greater prejudice to the appellant if the permission to extend the time to submit the appeal was refused.

Findings of fact

20. (a) That a notice to file the self-assessment tax return for the tax year 2016-17 was issued to the appellant on 06 April 2017;

(b) That the appellant were required to deliver for the tax year ended 05 April 2017 an electronic return by 31 January 2018.

(c) That the appellant filed the 2016-17 tax return on 28 January 2019;

(d) That HMRC had correctly calculated the penalties for tax year 2016-17 in accordance with the legislation;

(e) That the appellant has failed to show a reasonable excuse existed for the failure to file on time. (Paragraph 23 of Schedule 55);

(f) That there are no special circumstances to justify a Special Reduction, (Paragraph 22(3) of Schedule 55).

Discussion

21. It was an agreed fact that the appellant had been served with a notice to file the return for tax year 2016-17. It was agreed also by the parties that the notice to file had been received by the appellant.

22. The penalties levied were fixed by law and applied to all taxpayers. There was no discretion in either HMRC or the Tribunal to alter those penalties save in express circumstances which are set out in paragraphs 22 and 23 of Schedule 55. Accordingly, the penalties were not disproportionate and those penalties had been correctly calculated and imposed by HMRC for the late filing of the return. In reaching this decision the Tribunal considered the case of *Barry Edwards v HMRC [2019] YKUT 0131 (TCC)* in which it was held that the mere fact that a taxpayer had little tax liability for the relevant tax year does not justify the reduction in the penalty on either the grounds of proportionality generally or because of the presence of “special circumstances”.

23. The appellant had pleaded that the special circumstances constituted the amount of the penalties when compared with the tax due. That HMRC considered whether there were special circumstances which would warrant a special reduction but found that there were none. The Tribunal found that the decision of the HMRC was not flawed when considered in the light of the principles applicable in proceedings by way of judicial review and in the light of the decision in *Barry Edwards* referred to above. It followed therefore that the Tribunal could not substitute its own decision for that of HMRC to reduce the penalties.

24. The relevant statutory provisions are included as an Appendix to this decision.

25. The Tribunal has concluded that the tax return for the 2016-17 tax year was submitted on 28 January 2019 that being after the penalty date. Subject to considerations of “reasonable excuse” set out below, the penalties imposed are due and have been correctly calculated.

26. The Tribunal had to decide if there was a reasonable excuse demonstrated by the appellant.

27. In order to reach a conclusion the Tribunal considered the decision of the Upper Tribunal in *Perrin v HMRC [2018] UKUT 156 (TCC)* which Held that a Tribunal is required to deal with the following issues when considering whether there is a reasonable excuse:

(a) Firstly, establish what facts the taxpayer asserts give rise to a reasonable excuse. The appellant relies on the contents of his notice of appeal to demonstrate a reasonable excuse. The appellant made a genuine mistake. He had completed the return on or around 30 January 2018 but accepts that he failed to submit the document. He received an email alert in his personal account but did not proceed to open his HMRC account to find out why there was an alert email. Instead the appellant made an assumption about the email alert that was not backed by any facts. The appellant tried to log in to file the 2017-18 return for approximately one hour in the summer of 2018 but he was unable to do. He made that one attempt and then abandoned the task. The appellant contacted HMRC in 28 January 2019, this was in connection with the filing of the 2017-18 return. The appellant had made no earlier contact with HMRC. Correspondence from HMRC had been sent to the appellant's previous address. The appellant had not informed HMRC of his change of address.

(b) Secondly, decide which of those facts are proven. All the facts are proved.

(c) Thirdly, decide whether, viewed objectively, those proven facts do indeed amount to a reasonable excuse. The appellant was intelligent and articulate as was evident from the letter of appeal and in evidence before the Tribunal. However, a prudent and responsible taxpayer would have recognised the duty to access his HMRC account once an alert email had been received from HMRC in his personal email account. If the appellant had acted with due diligence he would have discovered much earlier that the return for 2016-17 had not been submitted. Action could have been taken at that time to submit the return and thereby prevent the imposition or continued accrual of some of the penalties. The appellant had failed to act as a responsible taxpayer. He had failed to notify HMRC of his change of address, contact number or email until January 2019 although his change of address had been on 01 November 2018. The effect of this failure to notify was that the appellant did not receive important correspondence from HMRC. The appellant had opted to file his tax returns on line and had done so in tax years 2014-15 and 2015-16. The appellant was therefore deemed to be aware of his tax obligations and the paperless service. The appellant failed to act as a prudent and responsible taxpayer having regard to the appellant's responsibility to file the 2016-17 return by the due date.

(d) Fourthly, having decided when any reasonable excuse ceased. No reasonable excuse having been demonstrated by the appellant the Tribunal did not consider this point.

28. The Tribunal had regard to the following cases pleaded by HMRC:

Martland v HMRC [2018] UKUT 178 which established the three tier test to be considered by a Tribunal to determine the lateness of an appeal.

Romasave (Property Services) Ltd v HMRC [2015] UKUT 0254 (TCC) which found a delay of more than three months in submitting an appeal is serious and significant. Permission to admit a late appeal should be the exception rather than the rule.

The Clean Car Co ltd (1991) was cited but the Tribunal relied on the case of *Perrin* referred to above which established the test to determine whether a reasonable excuse has been shown on both a subjective and an objective test.

29. For the reasons given in the body of this judgment the appeal was unsuccessful.

30. Accordingly, the penalties totalling £1,300.00 due and payable by the appellant and remain outstanding for the tax year 2016-17.

Right to apply for permission to appeal.

31. 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.

**JENNIFER TRIGGER
TRIBUNAL JUDGE**

Release date: 30 July 2019

APPENDIX

Relevant provisions of Schedule 55 of the Finance Act 2009

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.

5 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)—

- 10 (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.

15 (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)—

- 20 (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:

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25 (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—

- 30 (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:

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35 (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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (6) Paragraph 6A explains the 3 categories of information.
5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:
- 23—
- 35 (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
- 40 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

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(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:

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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—

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(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—

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(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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.