



**TC07303**

**Appeal number: TC/2019/01726**

*INCOME TAX – penalty for failure to make returns – whether reasonable  
excuse – no – whether special circumstances – no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MATHEW HOCKING**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 23 July 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 10 March 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 May 2019.**

## DECISION

- 5 1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2015-16 tax year on time.
2. The penalties that have been charged can be summarised as follows:
- (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 7 February 2017;
  - 10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 11 August 2017;
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 11 August 2017.
- 15 3. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC refused consent under s49(2)(a) of TMA 1970. Although HMRC have objected to the appellant being given permission to make a late appeal, HMRC have now prepared a full Statement of Case which deals with the substantive appeal. I therefore consider that HRMC would not be unduly prejudiced, in comparison to the potential prejudice to the appellant, and so give permission for the appeal to be
- 20 made late.

### **Appellant’s case**

4. Mr Hocking’s grounds for appealing against the penalties can be summarised as follows:
- 25 (1) The first correspondence that he received relating to the penalties was a letter dated 5 November 2018.
  - (2) HMRC have a duty to ensure reminders are sent to taxpayers. The letter of 5 November 2018 starts “Our records show that you may not have received recent letters that we sent you” and he argues that this means that HMRC have acknowledged that they had not sent any earlier correspondence relating to the
  - 30 penalties and had failed in their duty to send reminders;
  - (3) The amount of the penalty is unreasonable;
  - (4) The high penalty amount arose without his knowledge and without the information necessary to give him the opportunity to pay earlier;
  - (5) Although HMRC consider that his appeal was late, he appealed within 30
  - 35 days of first receiving correspondence about the penalties from HMRC;
  - (6) He earns only £680 per month and cannot afford to pay the penalty, even in instalments.

## HMRC's case

5. HMRC's case is, in summary:

- (1) A notice to file for the 2015-16 tax year was issued to Mr Hocking on 6 April 2016, by post to the address HMRC had on file.
  - 5 (2) Mr Hocking's online return was received on 8 November 2017. It should have been received on or before 31 January 2017.
  - (3) As the return was not received by the due date a late filing penalty was issued on 7 February 2017. Mr Hocking had opted on 20 June 2016 to receive  
10 communications from HMRC electronically and so the penalty notice was issued digitally to Mr Hocking's secure mailbox and an email alert sent to his email address.
  - (4) As the return had not been received three months after the penalty date, a notice of daily penalties was issued digitally on 11 August 2017 and an email alert sent to Mr Hocking.
  - 15 (5) As the return had not been received six months after the penalty date, a notice of a six month late filing penalty was issued digitally on 11 August 2017 and an email alert sent to Mr Hocking.
  - (6) Mr Hocking has provided no reason why his tax return was filed late.
  - (7) Mr Hocking has been in self-assessment since 2008 and HMRC would  
20 expect him to be aware of his obligation to file his return by the due date.
  - (8) None of the email alerts sent to Mr Hocking bounced and so are deemed to have been delivered.
  - (9) On 8 November 2017, Mr Hocking contacted HMRC to query penalties  
25 charged for the 2015-16 tax year and offered £300 in full and final settlement. A copy of HMRC's record of that contact was provided to the Tribunal. A customer service message refusing the offer was issued on 9 November 2017 and Mr Hocking was advised to file his tax return and appeal the penalties. A copy of this response was also provided to the Tribunal. No further contact was made by Mr Hocking until 12 November 2018. HMRC Debt management had written to Mr  
30 Hocking on 8 November 2018 in respect of the overdue amount.
  - (10) Self-assessment places responsibility on the taxpayer for their own tax affairs, including ensuring that HMRC receive the correct amount of tax and national insurance on time. The tax guidance and HMRC website have plenty of information and warning about filing and payment deadlines.
  - 35 (11) The penalties charged are set down in the legislation. HMRC has no discretion over the amount charged.
6. HMRC submitted that no reasonable excuse had been established and that no special circumstances existed which would merit a reduction in penalties.

## Discussion

7. Relevant statutory provisions are included as an Appendix to this decision.
8. It was not disputed that the tax return was filed late and so I find that Mr Hocking's online tax return for the 2015-16 tax year was submitted on or around 8 November 2017. It should have been submitted by 31 January 2017.
9. Mr Hocking has also not disputed receiving the notice to file, and it was sent to the address used by Mr Hocking in his appeal to this Tribunal, and so I find that that was correctly issued.
10. I have considered the evidence put forward by HMRC and conclude that the penalty notices were correctly issued and that email alerts in respect of those notices were sent to the same email address as that used by Mr Hocking to make this appeal.
11. Considering HMRC's evidence further, I find that Mr Hocking contacted HMRC on 8 November 2017 and stated that he had received a "significant penalty" and offering £300 in full and final settlement of the penalties. He filed his tax return on the same day and I find therefore that Mr Hocking was aware by 8 November 2017 that the penalties had been charged in respect of the late filing of his 2015-16 tax return.
12. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.
13. Mr Hocking has provided no reason for the late filing of his tax return and so I find that he has no reasonable excuse for the late filing of that return.
14. Mr Hocking has argued that the penalties charged are disproportionate because HMRC failed to remind him that penalties were accruing. I do not consider that HMRC have any obligation in law, enforceable in this Tribunal, to remind taxpayers that they have outstanding penalties. It has been established in case law that this Tribunal has no freestanding jurisdiction to consider whether HMRC has acted fairly in general terms (see, for example, *Hok Limited v HMRC* [2012] UKUT 363 (TCC), which also considered the question of whether penalties were fair where HMRC had not notified the taxpayer that the penalties were accruing and concluded that this Tribunal did not have jurisdiction to consider the point).
15. This Tribunal does, in certain circumstances, have the power to reduce a penalty because of the presence of "special circumstances". As I have concluded that the penalty notices were correctly issued and that Mr Hocking was aware of the penalties by 8 November 2017, I consider that there is no justification for a reduction in the penalty because of the presence of "special circumstances".
16. Mr Hocking also argued that he could not afford to pay the penalties. An inability to pay is specifically excluded from being a special circumstance by paragraph 16(2) of Schedule 55.

17. As noted above, this Tribunal does, in certain circumstances, have the power to reduce a penalty because of the presence of “special circumstances”. In *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC), the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

18. It follows that, if Mr Hocking’s low income would have meant that he had little or no tax liability for the relevant tax year, that does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of “special circumstances”.

### **Conclusion**

19. The appeal is dismissed, and the penalties upheld in full.

### **Application for permission to appeal**

20. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

**ANNE FAIRPO**

**TRIBUNAL JUDGE**

**RELEASE DATE: 1 AUGUST 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.

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)—

(a) may be earlier than the date on which the notice is given, but

20 (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—

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

30 (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—
- (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.
- 35 (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—

(a) ability to pay, or

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(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

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(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

(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.

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