



[2019] UKFTT 580 (TC)

TC07374

INCOME TAX - late appeal to HMRC –permission to extend the time in which to appeal - 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**

Appeal number: TC/2019/01275

BETWEEN

SIMON CLARKE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER TRIGGER
SUSAN STOTT**

Sitting in public at Manchester Tribunals Service Tax, Alexandra House, 14-22 The Parsonage M3 JA on 08 August 2019

The Appellant was not present

Victoria Halfpenny Solicitor for HM Revenue and Customs for the Respondents

DECISION

By letter, undated, received by the respondents on 04 June Mr Simon Clarke notified the Tribunal that he would not be attending the Tribunal hearing. The Tribunal decided to proceed with the appeal hearing in the absence of Mr Clarke because it was satisfied that there was sufficient information in the appeal papers before the Tribunal to proceed; that there was no

information before the Tribunal to suggest that there were issues of vulnerability that would make it unfair to proceed in the absence of Mr Scott; that there had been a clear expression by Mr Scott to proceed in his absence. The Tribunal considered the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and the overriding objective and the parties obligation to co-operate with the Tribunal. The delays inherent in adjourning the hearing and the proportionality of adjourning in relation to Mr Scott and other appellants and the respondents were also factors relied on by the Tribunal in reaching its decision to proceed to hear the appeal in the absence of Mr Scott.

1. Simon Clarke, "the appellant", appealed against penalties that the respondents, (HMRC), imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for failure to submit a annual self-assessment return on time for the tax years 2010-11; 2011-12; 2012-13 and 2013-14.

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

2010-11

- (1) £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012,
- (2) Late filing "daily" penalties totalling £900.00 under paragraph 4 of Schedule 55 imposed on 07 August 2012,
- (3) A £300.00 "six" month late filing penalty under paragraph 5 of Schedule 55 imposed on 07 August 2012.

2011-12

- (1) A £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 12 February 2013,
- (2) Late filing "daily" penalties totalling £900.00 under paragraph 4 of Schedule 55 imposed on 14 August 2013
- (3) A £300.00 "six" month late filing penalty under paragraph 5 of Schedule 55 imposed on 14 August 2013.

2012-13

- (1) A £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 18 February 2014,
- (2) Late filing "daily" penalties totalling £900.00 under paragraph 4 of Schedule 55 imposed on 18 August 2015,
- (3) A £300.00 "six" month, late filing penalty under paragraph 5 of Schedule 55 imposed on 18 August 2014,
- (4) A £300.00 "twelve" month late filing penalty under paragraph 6 of Schedule 66 imposed on 24 February 2015,

2013-14

- (1) A £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 18 February 2015,
- (2) Late filing “daily” penalties totalling £900.00 under paragraph 4 of Schedule 55 imposed on 14 August 2015,
- (3) A £300.00 “six” month late filing penalty under paragraph 5 of Schedule 55 imposed on 14 August 2015,
- (4) A £300.00 “twelve” month late filing penalty under paragraph 6 of schedule 55 imposed on 23 February 2016.

The total penalties levied were £5,800.00.

3. The appellant’s grounds for appealing against the penalties are set out in a letter to Her Majesty’s Courts and Tribunals Service, (HMCTS), dated 20 January 2019 and can be summarised as follows:

- (a) The appellant left the UK 40 years ago;
- (b) He took a contract to work in Manchester for Jacobs Engineering;
- (c) He started in September 2011 and left in December 2013;
- (d) He returned to the UK in September 2014 and had a number of meetings with his accountants who informed him that his tax returns were done;
- (e) He has received penalty demands for periods that he was not in the UK;
- (f) The appellant was not aware of the current legislation;
- (g) He relied on his accountants to do everything;
- (h) The accountant failed to submit the appellant’s self-assessment returns and the appellant was unaware of that fact for a period of three years. This was because the appellant had left the UK;
- (i) Eventually after many meetings with the accountants, after returning as a PAYE employee in September 2014, the appellant’s zero tax accounts were issued in 2017.
- (j) The appellant accepts that the returns for the tax years, the subject of this appeal, were submitted late. He asserts that the returns were late because all the accountants and the CEO of the accountancy company had left after he had been told and promised that the returns were done.
- (k) The appellant has been given the incorrect tax code and questions whether that fact will reduce the penalties imposed.

The appellant did not expressly claim that he had a reasonable excuse in the grounds of appeal pleaded but the Tribunal determined that he had raised matters indicative that a reasonable excuse was claimed.

4. On 27 March 2018 the appellant appealed to HMRC against the penalties imposed by HMRC for the tax years ending 05 April 2013 and 05 April 2014.

5. By letter dated 12 July 2018 HMRC rejected that appeal because the deadline for appealing had passed.

6. By letter dated 27 December 2018 HMRC notified the appellant that HMRC could not accept his appeal against the penalties charged for the years 2013-14, 2012-13, 2011-12 and 2010-11 because the deadline for making an appeal had passed. HMRC advised the appellant of his right to appeal to HMCTS and further advised that the appellant should write to them by 26 January 2019. (Paragraph 21 of Schedule 55).

7. 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 on 12 July 2018 and also on 27 December 2018 and issued to the appellant a notice rejecting the appeal as late.

8. By letter dated 20 January 2019, received by the Tribunal on 22 January 2019, the appellant appealed against the penalties for failure to file on time, and also the refusal by HMRC to admit the late appeal.

9. 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 each of the late filing penalties, was not received within 30 days of each penalty date. The last day to appeal the penalties detailed above was as follows:

2010-11

LFP 14 March 2012 received 27 March 2018
DP 05 August 2012 received 27 March 2018
6MP 05 August 2012 received 27 March 2018

2011-12

LFP 13 March 2013 received 27 March 2018
DP 12 September 2013 received 27 March 2018
6MP 12 September 2013 received 27 March 2018

2012-13

LFP 19 March 2014 received 27 March 2018
DP 16 September 2014 received 27 March 2018
6MP 16 September 2014 received 27 March 2018
12MP 25 March 2015 received 27 March 2018

2013-14

LFP 19 March 2015 received 27 March 2018
DP 12 September 2015 received 27 March 2018
6MP 12 September 2015 received 27 March 2018
12MP 23 March 2016 received 27 March 2018

10. 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 Schedule below sets the number of days late:

2010-11 LFP 2203 days.
2010-11 DP 2028 days.
2010-11 6MP 2028 days.

2011-12 LFP 1839 days.
2011-12 DP 1656 days.
2011-12 6MP 1656 days.

2012-13 LFP 1468 days.
2012-13 DP 1287 days.
2012-13 6MP 1287 days.
2012-13 12 MP 1097 days.

2013-14 LFP 1103 days,
2013-14 DP 926 days,
2013-14 6MP 926 days.
2013-24 12MP 733 days.

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 returns by the due date or in the alternative for the failure to file without undue delay after the reasonable excuse had expired. It was the view of HMRC that the appellant had failed to act with due diligence and had not demonstrated any form of control over his accountants.

11 The appellant had failed to inform HMRC of a change of circumstances, namely that he had left the UK. Reminders, penalty notices, statements and request for payment were served on

the appellant at the address held for the appellant by HMRC as notified to HMRC by the appellant. None of those documents were returned to HMRC under the returned mail service provided to HMRC by the Royal Mail. They were therefore deemed to have been served on the appellant under Part XI section 115 of the Taxes Management Act 1970. It follows that the documents were deemed also to have been served within the ordinary course of postal delivery in accordance with section 7 of the Interpretation Act 1978.

12 The appellant had failed to provide HMRC with any change of address until 06 December 2016.

13. Furthermore, the appellant had not notified HMRC until 27 March 2018 that Umbrella Accountancy Ltd were his accountants which was not the action of a responsible taxpayer seeking to comply with his legal obligation to submit timely tax returns.

14. The appellant accepted that the returns were late and that he had taken no steps to ensure that the returns were submitted on time.

15. The appellant had filed his return late in each of the years, the subject of this appeal. The appellant admitted that he did not understand the law but took no steps to appraise himself of the same or to contact HMRC for help.

Prejudice to the parties in granting or refusing permission

16. There was considerable prejudice to HMRC in extending the time in which to appeal. The papers relating to the tax years 2010-11 and 2011-12 were likely to have been destroyed by HMRC either in their entirety or in part in the normal course of business and in accordance with HMRC's various policies. This meant that HMRC would have difficulty in defending the appeal for those tax years.

17. There would be prejudice to the appellant. He would have to pay the penalties imposed. However, the appellant has already paid a substantial amount of the outstanding penalties. There were no details of any loan income to meet that liability before the Tribunal which could be an option to meet the liabilities. In the alternative the appellant had the option to arrange terms with HMRC to pay the outstanding penalties.

18. There was no prejudice to the appellant in the fact that there was no tax payable. The penalties have been imposed because the appellant failed to submit the returns on time. 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. The penalties were not disproportionate and those penalties had been correctly calculated and imposed by HMRC for the late filing of the returns. The Tribunal considered the case of *Barry Edwards v HMRC* [2019] YKUT 0131 (TCC) which 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". The appellant had asked that the penalties be reduced because he had been allocated an incorrect tax code.

18. 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. Accordingly, there was no prejudice to the appellant.

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

20. 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 failure of the appellant's accountants could not amount to a reasonable excuse because the appellant had failed to exercise any control or any adequate control over those accountants to prevent the delay. (Paragraph 23 Schedule 55). The delay in filing the returns was serious and significant.

(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 the various letters in the appeal bundle. However, a prudent and responsible taxpayer would have recognised the duty to require his accountants to produce evidence that his tax returns for each of the tax years in question had been filed. A diligent taxpayer would have maintained regular contact with his accountant at least annually to ensure that his tax affairs were being handled in accordance with the law. If the appellant had acted with due diligence he would have discovered much earlier than he did that returns had not been filed and he could have taken action to avoid any further delay and the continued accrual of 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 after the penalties had accrued. Furthermore, the appellant had failed also to make contact or keep any contact with HMRC during the period of default in the relevant tax years and thereby failed to comply with his legal responsibility to file the returns on time.

(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 time limit imposed in which to file an appeal was to provide finality in proceedings. There would be no finality if the time limit were extended and HMRC would be prejudiced to a far greater extent than the appellant.

29. The Tribunal relied on 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.

30. For the reasons given in the body of this judgment the Tribunal refused to extend the time in which to file the appeal. (Section 49(2) TMA)

31. Accordingly, the penalties totalling £5,800.00 are due and payable by the appellant and remain outstanding for the tax years 2010-11, 2011-12, 2012-13 and 2013-14.

Right to apply for permission to appeal.

32. 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: 16 SEPTEMBER 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:

5—

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:

6—

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

5 (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:

10 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—

15 (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—

20 (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:

25 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—

30 (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—

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

40 (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.