



[2019] UKFTT 623 (TC)

TC07407

INCOME TAX – penalty for failure to make returns - Schedule 55 of the Finance Act 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02161

BETWEEN02

CHRISTINE NOBLE

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE MALEK

The Tribunal determined the appeal on 9 October 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 9 April 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 23 May 2019.

DECISION

SUMMARY REASONS AND DISCUSSION

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 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.
 - (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.
3. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC have refused consent under s49(2)(a) of TMA 1970. Accordingly, it becomes a matter for the exercise of this Tribunal’s discretion as to whether or not the appeal should be considered.
4. In coming to a decision as to whether or not I should exercise my discretion to give permission I am not confined to the matters set out in s.49 of the TMA 1970 (i.e. whether or not there was a reasonable excuse for the delay) and my discretion is at large [see *O’Flaherty v Revenue and Customs Commissioners - [2013] STC 1946*]. My discretion must be exercised in light of the overriding objective as set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and the principles established in *Denton v White [2014] EWCA Civ 906* [see paragraph 44 of Tribunal Judge Berner’s decision in the Upper Tribunal in *William Martland v The Commissioners for HM Revenue and Customs:[2018] UKUT 0178 (TCC)*].
5. Stage 1 of the Denton test requires that I look at the seriousness and significance of the breach. In this instance the late filing penalty notice was sent on 7 January 2017, the daily penalty notice and the six month penalty notice was sent on 9 October 2017. Appeals in relation to these penalties were made to HMRC on 28 January 2019. The delay in notifying the appeals to HMRC range from over 15 months to over 22 months. This delay is, in my judgment, serious and significant. It is clearly not a case where there has been a small slip which is more form than substance.
6. Stage 2 requires me to examine the reasons for the delay. None have been provided by the Appellant. The grounds of appeal do not address why there was a delay in appealing the penalty. There is, accordingly, no good reason for the delay.
7. The last stage of the Denton process is to look at all the circumstances including the need to deal with cases fairly and justly and particularly the factors set out at CPR 3.9 (1) (a) and (b). It is appropriate under this heading to consider the relative prejudice to the parties. The prejudice to the Appellant is obvious: she will be denied the right to argue the merits of her substantive appeal in the event permission is refused. Whilst this is not the forum to embark upon a forensic examination of the merits of the substantive appeal I am, in my judgment, entitled to form a preliminary view of those merits. In my view there is little substantive merit in the appeal. The prejudice to the Respondent is equally obvious. Parties to litigation generally, and in these proceedings, should be entitled to rely upon time limits (subject to appropriate safeguards and oversight by the courts and tribunals) as a means of giving finality. There are no other relevant factors for consideration.

8. Taking into account all the circumstances of the case I am led to the inevitable conclusion that permission for the Appellant to pursue her appeal should be refused.

CONCLUSION

9. The Appellant's appeal was notified late to HMRC and for the reasons given above I have not considered the substantive merits of the appeal. The Appellant's appeal accordingly stands struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

10. 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.

**ASIF MALEK
TRIBUNAL JUDGE**

RELEASE DATE: 15 OCTOBER 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

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.

1. 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).

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

Section 49 of the Taxes Management Act 1970 deals with proceedings brought out of time and provides:

- (1) An appeal may be brought out of time if on an application for the purpose an inspector or the Board is satisfied that there was a reasonable excuse for not bringing the appeal within the time limited, and that the application was made thereafter without unreasonable delay, and gives consent in writing; and the inspector or the Board, if not satisfied, shall refer the application for determination by the Commissioners.
- (2) If there is a right to elect to bring the appeal before the Special Commissioners instead of before the General Commissioners, the Commissioners to whom an application under this section is to be referred shall be the General Commissioners unless the election has been exercised before the application is so referred.