



[2019] UKFTT 0672 (TC)

TC07447

INCOME TAX – failure to file returns by due date – Schedule 55 FA 2009 - change of address - HMRC not informed -whether reasonable excuse -No-appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02350

BETWEEN

VICTOR BICA

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE DR KAMEEL KHAN

The Tribunal determined the appeal on 26 September 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 13 April 2019 (with enclosures) and HMRC's Statement of Case submitted on 29 May 2019 (with enclosures).

DECISION

INTRODUCTORY OBSERVATIONS

The appellant appealed directly to Tribunal without appealing to HMRC. Under the terms of s49D Taxes Management Act 1970 the Tribunal has no jurisdiction over such cases.

HMRC believe it is in the interest of justice to seek a timely resolution to the issues and are prepared to accept the appeal to the Tribunal as an appeal to HMRC at the same time. They believe this is the most cost-effective approach for all parties. HMRC have asked that their Paper Submission is accepted as their view of the matter and while it does not offer a review, they do not see this as an issue.

Nature of Appeal

1. This is an appeal against a penalty imposed under Paragraph 3 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2017.

Background

2. Self-assessment is based on voluntary compliance. Taxpayers who are within the self-assessment system must file their returns by the due date and pay the tax they owe by the date specified in law.

3. The filing date is determined by Section 8 (1D) TMA 1970 et seq. which states that for the year ended 5 April 2017 a non-electric return must be filed by 31 October 2017 and an electronic return by 31 January 2018. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

4. When a return is issued late the filing dates may be different. Section 8 (1G) TMA 1970 states that if a notice in respect of 2016-17 is given after 31st October 2017, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of notice.

5. The system must operate fairly. It is essential that taxpayers who file their returns at the right time feel confident that the system does not reward non-compliance and so penalties are imposed for late filing.

6. If the return is not received by the filing date a penalty of £100 (as here) is payable in accordance with Paragraph 3 Schedule 55 FA 2009.

7. Both the "filing" and the "penalty date" are defined at Paragraph 1(4) 55 FA 2009.

Burden and Standard of Proof

8. The onus of proof is for the Respondents to show that the penalties have been correctly calculated. The burden then shifts to the appellant to demonstrate that a reasonable excuse exists for the defaults.

9. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.

Findings of Facts

10. On 15 September 2017 HMRC sent Mr Bica a 2016-17 Tax Calculation (P800). HMRC advised Mr Bica that based on the information they held he had underpaid tax on his income.
11. The calculation of the tax due for 2016-17 was made by HMRC's PAYE system based on data submitted by employers, other government departments and historical data. The debt was calculated at £86.80.
12. HMRC's records show that the P800 tax calculation was returned undelivered on 22 December 2017. It appears that this letter was sent to 55 Standfast Place, Taunton TA2 8QG.
13. It is strange this was returned because the appellant only moved in June 2018 to 29 Standfast Place, Taunton TA2 8QG. He moved again in May 2019 to 26 Longridge Way BS24 7BS.
14. On 11 June 2018 HMRC sent Mr Bica an unpaid income tax letter. This letter advised Mr Bica to carefully check the calculations and if he did not agree with, or understand the calculation, to contact HMRC on the helpline number provided.
15. The letter explained why HMRC could not collect the underpayment through his code number. The letter outlined how to arrange a payment plan if the customer was unable to make payment in full and that interest would not be charge on the payment if a payment plan was arranged. Again, Mr Bica was directed to contact HMRC to discuss ways of paying the tax owed. The letter further advised that if payment was not received or if a payment plan had not been arranged the underpayment would have to be collected through the Self-assessment tax system and that a Self-assessment tax return would have to be completed.
16. As payment had not been received and a payment plan had not been arranged. A further Voluntary Payment Letter (VPL2) was issued to Mr Bica on 3 September 2018 at 29 Standfast Place, Taunton TA2 8QG, his new address.
17. As Mr Bica did not contact HMRC regarding the calculation or make any voluntary payment the £86.80 debt was transferred to the self-assessment system on 27 November 2018.
18. On 27 November 2018 HMRC sent Mr Bica a letter advising him that as he had not made a voluntary payment for the underpaid tax it would now be necessary for him to complete a self-assessment tax return.
19. The calculation in question was issued in September 2017 and HMRC did not place Mr Bica into self-assessment until November 2018, a period spanning 14 months.
20. HMRC issued the 2016-2017 Self-Assessment return to Mr Bica on 6 December 2018 at 29 Standfast Place, Taunton TA2 8QG. HMRC normally know when correspondence has not been delivered as it is returned using the Returned Mail Service with Royal Mail. There is no record of the return being returned as undelivered from Mr Bica's address.
21. HMRC have still not received the return and further penalties will be becoming due.
22. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 26 March 2019 in the amount of £100. The warning of daily penalties on the £100 penalty notice (SA326D) issued to Mr Bica on 26 March 2019 is the same as that considered in the Donaldson case, to be sufficient to comply with paragraph 4(1) of Schedule 55.
23. A copy of the penalty notice and the address, given as 26 Longridge Way, Weston Super Mare BS24 7BS, was provided in the papers.

Appellant's submissions

On 13 April 2019 Mr Bica notified his appeal to the Tribunal, giving his grounds as

“I moved from my previous address at (26 Longridge Way, BS24 7BS) and I informed my company that my address would be changing too (98 Barnsby Way BS24 7BW) this was then updated. Since this time, I haven't received any letters and was unaware of any problems.” I can put you into contact with my company's office number to settle this as this was an error that was out of my control (0117 9581581, Subway Pasco Group Avonmouth, Mollie Baker”).

HMRC submissions

24. This matter is concerned with the ordinary every day responsibilities of Mr Bica to ensure his self-assessment return for the year ending 5 April 2017 was filed by the legislative due date and payment made on time. Mr Bica is expected to arrange his affairs and finances to ensure his tax obligations are met.

25. HMRC contends that even though the original tax calculation P800 was not delivered, Mr Bica was given every opportunity to discuss with HMRC the issue of the voluntary payment letter and the letter placing him in self-assessment. HMRC contend that he was aware that non-payment would result in him being placed in self-assessment.

26. Once a taxpayer is issued with a personal tax return, they are legally obliged to ensure that it is filed on or before its filing date. The taxpayer is not relieved from their filing obligation simply because they believe they have not met the criteria for inclusion in self-assessment.

27. It is the responsibility of the taxpayer to inform HMRC of any changes in contact or personal details.

28. HMRC say that the appellant is liable for the penalties and has no reasonable excuse.

Discussion

29. Section 8(1D) TMA 1970 et seq. states that a non-electronic return must be filed by 31 October following the end of the relevant tax year or an electronic return by 31 January of the following year.

30. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

31. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

32. The law specifies two situations that are not reasonable excuse:

33. An insufficiency of funds, unless attributable to events outside the appellant's control and reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

34. These are not applicable in this case.

35. HMRC consider a reasonable excuse to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. It is necessary to consider what a reasonable person, who wanted to meet their obligation, would have done in the same circumstances and decide if the action of the person meet that standard as outlined by *Judge Medd in The Clean Car Company (LON/90/1381X)* when dealing with the subject of "reasonableness" said:

"One must ask oneself: was what the tax payer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant rime, a reasonable thing to do?"

36. I will apply the law to the facts of this case.

37. The appellant did change his address several time. He informed his employers but not HMRC. It would have been sensible to inform HMRC if there is a change of address and this would be the reasonable thing to do in the circumstances. It would have been of assistance in receiving correspondence on his tax affairs in order to meet his legal obligations to file and pay any tax due. This is what a reasonable person would have done.

38. HMRC made several efforts to contact the appellant and to provide information on his tax affairs. They sent letters to the appellant.

39. HMRC have a right, in reliance on the decision in *Tickler, (William Andrew Tickler v HMRC [2016] UKFTT 170 (TC))* to assume that letters are being sent to a taxpayer's correct address and they will be treated as correctly served under s 115 Taxes Management Act 1970, if they are sent to the taxpayer's usual or last known address. Several letters over a long period was sent to the appellant.

40. If letters are received then it is reasonable to expect the taxpayer to contact HMRC. While the original tax calculation appears not to have been received by the appellant, the voluntary payment letter and the letter placing him in the self-assessment system was, on a balance of probabilities, received. There is no record of these being returned as undelivered mail. Further, once a taxpayer receives a personal tax return, they are legally obliged to ensure that they are filed before the filing date. The filing obligations apply to all taxpayers.

41. In the circumstances, I find that the appellant did not act in a reasonable manner. He must also take some responsibility for not informing HMRC of the change of his address. It is correct that HMRC did receive some indication that the address was incorrect in the form of returned letters but they persisted in sending letters as they found new addresses for the appellant. These, at the very least, should have prompted a reply from the appellant and this was not done.

Special Circumstances

42. *In Raul Daniel Garcia [2018] UKFTT 0088 (TC)*, the taxpayer did not raise an argument relating to 'special circumstances'. Nonetheless, the tribunal observed that it must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16 of Schedule 55.

43. A special circumstance is generally taken to mean something "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe [1971] 3 All ER 967*), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152*). The special circumstances must also apply to the particular individual and not be general circumstances

that apply to many taxpayers by virtue of the penalty legislation (*David Collis [2011] UKFTT 588 (TC), paragraph 40*).

44. The tribunal's jurisdiction in this context is limited by paragraph 22 to circumstances where it considers HMRC's decision in respect of the application of paragraph 16 was flawed when considered in the light of the principles applicable in judicial review proceedings.

45. HMRC have considered the appellant's arguments and submit that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances. I can see no reason to deviate from that view.

46. The tribunal finds there are no special circumstances in this case.

Conclusion

47. The appellant has not shown a reasonable excuse for the late filing of his 2017 returns. The late filing penalties have been charged in accordance with legislation.

48. I find that there are no special circumstances which would allow penalties which have been correctly imposed to be reduced under Special Reduction regulations.

49. The penalty of £100 is therefore confirmed. Appeal dismissed.

Right to Appeal

50. Right to apply for permission to appeal

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.

Relevant statutory provisions

Returns

Section 8 - Personal return- provides as follows:

For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

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a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given.

Penalties

Schedule 55 Finance Act 2009:

The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(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).

Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

(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.

Reasonable Excuse

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

- (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.

Special Circumstances

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

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any para-graph 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.

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:

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.

**JUDGE DR KAMEEL KHAN
TRIBUNAL JUDGE**

Release date: 06 November 2019