



[2020] UKFTT 0023 (TC)

TC07529

INCOME TAX — Late Filing Penalties - Schedule 55 Finance Act 2009 - Whether a reasonable excuse? - No - But HMRC's decision in respect of the application of special circumstances was flawed in the light of the principles applicable in proceedings for judicial review - Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04640

BETWEEN

DANA LOUISE SANDERS

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

The Tribunal determined the appeal on 9 January 2020 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 12 July 2019, and the letter dated 26 June 2019, and HMRC's Statement of Case dated 13 August 2019 (amended on 2 September 2019) and the attachments to it.

DECISION

1. Miss Sanders appeals against penalties that HMRC has imposed on her under Schedule 55 of the *Finance Act 2009* ('the 2009 Act') in relation to her failure to submit a self-assessment tax return for the year 2015/16 on time.
2. I set out the relevant legislation in the Appendix.
3. The penalties that have been charged are as follows:
 - (1) An individual tax return late filing penalty of £100, imposed pursuant to Paragraph 3 of Schedule 55 of the 2009 Act, issued on 11 August 2017
 - (2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days) imposed pursuant to Paragraph 4 of Schedule 55 of the 2009 Act.
 - (3) A 6 month late filing penalty, £300, issued on 30 January 2018;
 - (4) A 12 month late filing penalty, £300, issued on 31 July 2018.
4. However, in its Statement of Case, HMRC indicates that it no longer pursues the daily penalties (£900). The reason for this is not stated, meaning that I cannot assess whether the reason for HMRC not pursuing the daily penalties might have any relevance to the other penalties as well. In the absence of formal confirmation that the daily penalties have been administratively withdrawn, I allow the appeal against the daily penalties.
5. The amount now in dispute and for me to consider is therefore £700: £100; £300; and £300.
6. The Appellant has appealed directly to the Tribunal without appealing to HMRC, but HMRC, pragmatically and in the interests of cost-effectiveness and efficiency, invites me to deal with this appeal as if the Appellant had appealed to HMRC. I agree with that approach.

THE GROUNDS OF APPEAL

7. In summary, the grounds of appeal are set out in Miss Sanders' letter of 26 June 2019:
 - (1) She was not living at Thorn Rise, and so did not receive what she describes as 'the initial fine'. She only mentions 'the initial fine' and does not mention the Notice to File, or the letters containing the later penalties. But Thorn Rise (which HMRC had in its records as her address) was still in her family's possession so she did not feel that she needed to change the address since she thought she would still receive post. Without her knowing, her father had these letters and never got around to delivering them since she did not see him on a regular basis;
 - (2) When she did become aware of 'the fine' (note the singular), she contacted HMRC and agreed that the payment would be deducted from her monthly pay from her employment, but those deductions were not made, meaning that 'late penalty fees' (note the plural) 'were still rising' and she was unaware of them;
 - (3) She engaged an accountant to make the appeal, and left the accountant to deal with it whilst Miss Sanders went travelling abroad for 6 months. However, when Ms Sanders arrived in the UK in April 2019, she discovered that the late penalty fees were still being charged;
 - (4) She does not have the money to pay the penalties.
8. HMRC opposes the appeal on the footing that the Appellant did not file in time, and that the postal difficulties, outlined in Ground (1) above, do not constitute a reasonable excuse.

HMRC also contends that there are no special circumstances. It is significant that HMRC does not address any ground other than Ground (1).

FACTS

9. This is a penalty appeal and therefore HMRC bears the evidential burden.
10. On the basis of the information and materials before me, and applying the usual civil standard of proof (the balance of probabilities) to disputed issues, I make the following findings of fact.
11. Ms Sanders was employed and incurred a PAYE underpayment of £380. She was asked to voluntarily pay the sum, but did not. Whilst Voluntary Payment Letters are said to have been sent, I cannot assess what those actually said because the documents in the bundle (Folio 22a and b) are not those letters, but simply a note that such letters were sent. The letter at folio 23b is a standard template, and refers to the sending of P800 calculations. I do not know whether P800 calculations were sent. Nothing is said as to why HMRC could not recover the £380 through PAYE / coding.
12. HMRC therefore decided to put her into the self-assessment system on 11 April 2017 so as to recover this £380.
13. There is no dispute that a Notice to File for 2015/16 was sent on 21 April 2017. It was sent to an address at Thorn Rise SA62.
14. The filing date for the self-assessment return for 2015/16 was accordingly 28 July 2017 (being three months and one week later).
15. On 11 August 2017, HMRC issued a notice of penalty assessment of £100, sent to Thorn Rise.
16. On 30 January 2018, HMRC issued a notice of penalty assessment of £300, sent to Thorn Rise.
17. On 31 July 2018, HMRC issued a notice of penalty assessment of £300, again sent to Thorn Rise.
18. None of the letters sent to Thorn Rise were returned to HMRC as undelivered.
19. The Appellant's self-assessment return was filed electronically on 9 November 2018.
20. It was therefore filed more than 12 months late.
21. On the basis of the above, and subject to any considerations of 'reasonable excuse' and 'special circumstances', I find that the penalties imposed and which remain subject to this appeal (i.e., the penalties set out above and excluding the daily penalties) are due and have been calculated correctly.

DISCUSSION

22. The first question for me is whether Ms Sanders had a reasonable excuse for the late filing.
23. Although there is no definition of "reasonable excuse" in the statute, its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd QC stated (in the analogous context of VAT penalties):

“ It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer 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 time, a reasonable thing to do?"

24. I apply that test here.

25. There is no suggestion of dishonesty or bad faith on Ms Sanders' part.

26. In *Perrin v HMRC* [2018] UKUT 0156 (TCC) the Upper Tribunal gave binding guidance on how to assess whether the excuse put forward is a reasonable one. I should take into account the experience, knowledge and other attributes of this particular taxpayer, as well as the situation she was in at the relevant time.

27. Here, Miss Sanders, as far as I can tell from the papers, had not been in the self-assessment system at all for 2015/16, during 2015/16. It was only well after the end of that tax year, in April 2017, when HMRC conducted an internal reconciliation check, that it identified that her non-savings income (£12,500) had exceeded her total allowance (£10,600), with the difference (£1,900) being taxable income. The total non-savings tax was £380.

28. Ground (1) is not a reasonable excuse. It was Miss Sanders' obligation to keep an eye on the post being received for her at her former address and to make arrangements for it. She does not say when she moved out, but it is clear that post was still being received at that address, and the responsibility for it not being picked up lay with Miss Sanders. This was a general obligation, and a matter of common sense and organisation.

29. As to Ground (2) there is no record in the documents before me about Miss Sanders contacting HMRC as she sets out in her letter, which led her to form the belief that the amount owed was to be paid by way of salary deduction by her employer. Nor is this referred to at all - even by way of a simple denial that such an event happened - in HMRC's otherwise extremely lengthy and detailed Statement of Case.

30. Ground of Appeal (3) is not a reasonable excuse, because the penalties had already been incurred by the time Miss Sanders went abroad.

31. Ground (4) is not a reasonable excuse, because Schedule 55 Paragraph 23(2)(a) provides that an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the taxpayer's control. There is no evidence of this latter here.

32. Taking the above into account, I have concluded, applying the above test, that Ms Sanders did not have a reasonable excuse for the late filing.

SPECIAL CIRCUMSTANCES

33. The next question which I must ask is whether there are any special circumstances.

34. For present purposes, I adopt HMRC's definition that 'special circumstances' are either uncommon or exceptional, or are such where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law. For present purposes, I adopt HMRC's description that 'the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the primary legislation'.

35. The test on appeal is to examine whether HMRC has approached the question of special circumstances in a way which can be shown to be flawed in the light of the principles applicable in proceedings for judicial review: Schedule 55 Paragraphs 16 and 22(4).

36. In my view, HMRC's approach to the issue of special circumstances can be shown to be flawed in the light of the principles applicable to proceedings for judicial review.

37. Reference need simply to be made to Paragraphs 53 and 54 of HMRC's Statement of Case, which purport to deal with special circumstances, but which refer only to what I have described as Ground (1), and which make no reference to the other grounds.

38. There is no mention whatsoever of the call which Miss Sanders said she made, which led to her understanding that the payment was to be recovered by PAYE / coding. All that I can tell is that call happened when she became aware of 'the fines', although she does not say when.

39. That is to say, HMRC has failed to consider or engage with Ground (2) at all. HMRC has therefore failed to address, at all (and even to the extent of saying whether it did or did not happen) the matter raised by the Appellant of her call to HMRC and her understanding, following that call, that no further penalties would be imposed. That is an error of a public law character because it is a failure to engage with the reasons advanced.

40. That error would not be a justiciable error if it could be shown that the answer, even had HMRC considered Ground (2), would nonetheless inevitably have been the same. I do not think that can safely be said. It is at least possible that HMRC, had it considered (i) whether such a call was made; and (ii) if it had been, what had been said, could have treated those as going to the issue of whether penalties should be imposed.

41. I have carefully considered whether this conclusion affects all the penalties, or just some of them. I have decided that this should not undermine the £100 initial late filing penalty. That is the only penalty ('the initial fine') specifically referred to in Ground (1). Ground (2) refers to call being made following 'the fine' (singular) which is consistent with the reference to 'late penalty fees' (plural).

42. On the basis of the information and material before me, it seems likeliest that Miss Sanders was moved to phone HMRC by the initial late filing penalty. Therefore, the £100 comes from before the phone call, and should stand. But after that, on her account, Miss Sanders thought that the £380 tax which was owed was going to be recovered by way of PAYE / coding, and that there would not be any further penalties. HMRC's justiciable error is the failure to have addressed that argument. The penalties affected are the £300 and £300. I accordingly quash those penalties.

DECISION

43. The appeal is allowed in part.

44. The £100 late filing penalty is upheld.

45. The other penalties are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 15 JANUARY 2020

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.

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)—
 - (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).

3. 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.

4. 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.

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.
- (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.

6. 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.

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:

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.