



[2020] UKFTT 0131 (TC)

TC07626

INCOME TAX – Schedule 55 Finance Act 2009 - fixed penalties for failure to file a self-assessment return on time – Residence abroad - whether taxpayer had a reasonable excuse for his default – appeal dismissed. Permission to appeal out of time – refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/06695

BETWEEN

JOSEPH GILLILAND

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 17 February 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 11 October 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 9 December 2019.

DECISION

Introduction

1. This is an appeal by Mr Joseph Gilliland ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraph 3, 4 and 5 of Schedule 55 Finance Act 2009, for his failure to file self-assessment ('SA') tax returns on time for the tax years ending 5 April 2015.

Background

2. The Appellant's return for 2014-15, was due no later than 25 May 2016.
3. The penalties for late filing of a return can be summarised as follows:
 - (i) A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
 - (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
 - (iii) If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
 - (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
4. The Appellant's return for 2014-15 was filed late and penalties of £100, £900 and £300 were imposed, under (i), (ii) and (iii) above.

Filing date and Penalty date

5. Under s 8(1G) TMA 1970 a return must normally be filed within three months of the date of a notice. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

Reasonable excuse

6. 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 ceased.
7. The law specifies two situations that are not reasonable excuse:
 - (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and
 - (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
8. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

9. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

The background facts

10. The Appellant's 2014-15 return was issued on or around 12 February 2016 to the Appellant's secure mailbox and so was due to be returned by 25 May 2016. The Notice to file a return was also sent by HMRC to the Appellant's home address, provided by the Appellant for correspondence.

11. The Appellant says that he was unable to attend to his tax obligations during the relevant period due to difficulties in moving home.

12. On 7 February 2017 the Appellant's non-electronic return was received by HMRC. The return should have been filed by 25 May 2016, and was therefore 258 days late.

13. HMRC imposed a fixed penalty of £100 together with daily penalties [90 days at £10 for each day] totalling £900. The return still having not been received six months after the filing date HMRC then imposed a fixed penalty of £300.

14. The Appellant appealed to the Tribunal on 11 October 2019.

15. Within the statement of case provided, the Respondent concedes the appeal in relation to the daily penalties of £900. It is not clear to me what the basis of this concession is, but the appeal proceeds against the fixed penalties only.

PERMISSION TO APPEAL OUT OF TIME

16. 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. For the following reasons, I have decided not to give permission for the appeal to be notified late:

17. The relevant penalty notices were dated 31 May 2016 and 29 November 2016, and were sent to the Appellant's secure mailbox along with a notification to his email address. Therefore the time limit for appealing expired on the 30 June 2016 and the 29 December 2016. In relation to the latest penalties the Appellant is 986 days late in appealing. That in itself is serious and significant. However, the appeal against the earlier penalty is almost 1168 days late.

18. The Appellant filed his self-assessment return in February 2017. He has appealed the penalty notices in October 2019. No explanation has been offered anywhere within the documentation that I have seen as to why it took him so long to make the appeal. He must have been aware of the penalties by February 2017 at the latest and yet it was a further 18 months before he filed an appeal.

19. The consequences to either party of an extension of time limits must be considered in light of my assessments of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the SA tax regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits; however, he has offered no good explanation for his delay in appealing, and I do not consider that the explanation given for his late filing of his return constitutes a reasonable excuse for either delay.

20. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) I have considered:

- a) The length of the delay;
- b) Whether there is a good explanation for that delay;
- c) The consequences of permission to appeal;
- d) The consequences of refusal of permission.

21. In the circumstance I do not consider that Mr Gilliland has a good explanation for his delay which is of some significant length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

The Appellant's case

22. The Appellant's grounds of appeal are that he moved to the USA as a permanent resident in 2015 and due to the issues resulting from that move and a subsequent injury he did not prioritise his UK tax affairs. Accordingly, he had a reasonable excuse for the delay in filing his return.

HMRC's Case

23. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

24. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

25. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of her SA tax return.

Reasonable Excuse

26. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

27. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"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?" [Page 142 3rd line et seq.].

28. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

29. If there is a reasonable excuse it must exist throughout the failure period.

30. The Appellant has not provided a reasonable excuse for her failure to file his tax return for the year 2014-15 on time and accordingly the penalties have been correctly charged in accordance with the legislation.

31. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

32. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

33. In other contexts "special" has been held to mean '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).

34. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

35. HMRC have considered the Appellant's grounds of appeal but his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

36. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

37. Mr Gilliland opted in to HMRC's self-assessment digital service on 7 June 2016 using the email address jjgilliland@gmail.com. During that procedure he consented to paperless communication through that email address.

38. The notice to file was issued to Mr Gilliland to his secure mailbox on 12 February 2016 with an email notification, but also sent to his postal address on 18 February 2016.

39. Similarly, penalty notices were issued to his mailbox with a notification to his email address on or around 1 June 2016 and 30 November 2016. He has also been sent statements of account on 13 June 2016 and 2 January 2017. In addition, he has also been sent daily penalty reminders on 28 September 2016 and 26 October 2016. None of the emails have been returned undelivered.

40. HMRC's debt management and banking team also issued debt letters to the Appellant's nominated postal address on 4 August 2016, 6 September 2016, 10 January 2017 and 24 January 2017. This continues to be the Appellant's nominated address and no post has been returned undelivered.

41. The Appellant moved permanently to the USA in 2015 and had an accident resulting in a broken leg.

42. The return was submitted in paper form on 7 February 2017. I accept that the return was not properly submitted on or around 25 May 2016. The return was submitted over 8 months after it was due.

DISCUSSION

43. Relevant statutory provisions are included as an Appendix to this decision.

44. I have concluded that the tax return for the 2014-15 tax year was not submitted until 7 February 2017. It should have been submitted by 25 May 2016. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

45. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event which prevents him or her from complying with an obligation which otherwise they would have complied with.

46. Mr Gilliland stated that he moved to the USA in 2015 on a permanent basis. In moving to another country, I would have expected him to take precautions to ensure that his correspondence continued to reach him. Most of the communications in this matter have been effected by letters sent to his secure mailbox with an email notification to his Hotmail email address. Both those methods of communication are web based and I can see no reason why they would not be equally accessible from the USA as from the UK. I therefore conclude that those communications reached his email address which was available to him at all times.

47. Mr Gilliland apparently had some bad luck upon arrival in the USA and was injured. He then entered into various disputes with the treating hospital and the medical insurance company providing cover. His correspondence indicates that this occurred “within the first month” of his settling in the US. That was in 2015 and therefore significantly before the notice to file was issued. It is not clear over what period these problems persisted, but the Appellant candidly acknowledges that this resulted in him overlooking his tax obligations in the UK. The implication from his appeal letter is that he had received the notifications of his tax liabilities, but was otherwise preoccupied and so did not prioritise them.

48. He makes reference to having been aware of the debt in 2016 and attempting to access the government gateway. He also refers to trying to contact HMRC but it is not clear in what manner he made that effort. Certainly, the Respondent’s records do not list any contact from Mr Gilliland in relation to this issue until 20 January 2017. It is surprising that he did not deal with this omission in 2016, given the fact that he was able to submit his online return for the following tax year on 6 April 2016. It must have been clear from the online account that there was an outstanding return for the previous year, and had he acted upon that notification, he would not have incurred any penalties. I conclude that he was aware of the need to file the 2014-15 return in April 2016 and yet failed to do so.

49. It in fact appears that Mr Gilliland has been resident in the USA since 2011 albeit maintaining a base in the UK. In those circumstances the usual stress and administrative burden of moving to another country would be significantly ameliorated by having already acquired a base in the receiving country. Mr Gilliland makes reference to the fact that his postal correspondence was being sent to “an old address”, however this continues to be the address provided for the appeal, and it is for Mr Gilliland to ensure that the Respondent has an up to date means of communicating with him.

50. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. The Appellant is experienced in dealing with the self-assessment regime. On the information before me, I conclude that Mr Gilliland does not have a reasonable excuse for the late filing of his return for 2014-15.

51. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

52. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Gilliland.

53. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which the Appellant relied upon was his residence abroad. I have explained above why I do not consider that the same has been shown to provide him with a reasonable excuse for his late filing. For the same reasons I conclude that there are no special circumstances which would make it right for me to reduce the penalty which has been imposed. It is in no way unusual or exceptional for a taxpayer to be resident overseas.

CONCLUSION

54. I therefore confirm the fixed penalties of £100 and £300 in relation to the 2014-15 tax year.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

RELEASE DATE: 6 MARCH 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

Finance Act 2009

56. 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.

57. 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).

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

Taxes Management Act 1970

63. Section 8 - Personal return- provides as follows:

- (1) 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-
 - 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.

- (1A) 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 the 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]
- (1AA) For the purposes of subsection (1) above-
- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
 - (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]
- (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.
- (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]
- (1D) A return under the section for a year of assessment (Year 1) must be delivered-
- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
 - (b) in the case of an electronic return, on or before 31st January in Year 2.
- (1E) But subsection (1D) is subject to the following two exceptions.
- (1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-
- (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or
 - (b) on or before 31st January (for an electronic return).
- (1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.
- (1H) The Commissioners-
- (a) shall prescribe what constitutes an electronic return, and
 - (b) may make different provision for different cases or circumstances.
- (2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.
- (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.