



TC07694

Appeal number: TC/2019/06656

Income Tax – penalty for failure to file returns on time – late payment penalty – whether reasonable excuse – No – whether special circumstances – No – Appeal Dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Pieter Fredirick CLOETE

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: DR K KHAN

The Tribunal determined this appeal on 7 April 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 30 October 2019 with enclosures and HMRC Statement of Case submitted on 5 December 2019 and the Appellant’s Comments of 14 January 2020.

BACKGROUND

1. The appellant has appealed directly to the Tribunal without appealing to HMRC. Under the terms of S49 Taxes Management Act 1970 the Tribunal has no jurisdiction over such cases. HMRC, in the interest of justice, has raised no objections to the matter being heard. The matter would be heard by the Tribunal.

MATTER UNDER APPEAL

The late filing penalties and late payment penalties charged in the amount of £1322.00 are as follows:

Tax Year ending	Date penalty Created/issued	Description	Amount (£)
2017-2018	09/08/2019	Daily penalty	£900
2017-2018	09/08/2019	6-month late Filing penalty	£300
2017-2018	17/09/2019	30-day late payment penalty	£61
2017-2018	17/09/2019	6- months late payment penalty	£61
		Total	£1322

Late Filing

3. The filing date is determined by Section 8(1D) TMA 1970 et seq. which states that for the year ended 5 April 2018 a non-electronic return must be filed by 31 October 2018 and an electronic return by 31 January 2019. A late filing penalty is chargeable where a taxpayer is late in filing their individual tax return.

Late Payment

4. Payment is due in accordance with Section 59B Taxes Management Act (TMA) 1970 and in this instance the due date for payment was 31 January 2019. A late payment penalty is chargeable where a taxpayer is late in paying tax due.

5. It is essential that taxpayers who pay the right amount of tax at the right time feel confident that the system does not reward non-compliance. So, in addition to interest on late payment there is also a system for imposing late payment penalties.

FACTS

6. The notice to file for the year ending 5 April 2018 was issued to Mr Cloete on or around 6 April 2018. The address the notice to file was issued to is 30 Glenville Avenue LE2 9JF.

7. The filing date was 31 October 2018 for a non-electronic return or 31 January 2019 for an electronic return. Mr Cloete's electronic return for the year 2017-2018 was received and processed on 16 September 2019. The return was submitted 228 days late.

8. Mr Cloete chose to calculate his liability and therefore knew the sum to pay by the due date. Mr Cloete's tax liability for the year was £1,227.20. The tax was due to be paid on or before 31 January 2019.

Late Filing

9. In accordance with Paragraph 3 of Schedule 55 FA 2009, as Mr Cloete did not submit a return by the filing date of 31 January 2019, he was liable to a penalty of £100. HMRC issued a notice of penalty assessment on or around 26 March 2019 in the amount of £100. The notice (SA3260) serves as a warning of the daily penalties so satisfies the requirement of Sch 55 FA 2009 para 4(1)(c). This view was confirmed in the Upper Tribunal decision *HMRC v Donaldson* [2014] UKUT 535.
10. Pursuant to Paragraph 4 of Schedule 55 FA 2009, as the return had still not been received 3 months after the penalty date, Mr Cloete was liable to daily penalties of £10 per day up to a period of 90 days. HMRC issued a notice of daily penalty assessment on or around 9 August 2019 in the amount of £900, calculated at £10 per day for 90 days.
11. Pursuant to Paragraph 5 of Schedule 55 FA 2009, as the return had still not been received 6 months after the penalty date, Mr Cloete was liable to a penalty of £300. HMRC issued a notice of penalty assessment on or around 9 August 2019 in the amount of £300.
12. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2009.

Late Payment

13. In accordance with Paragraph 3(2) of Schedule 56 FA 2009, at the penalty date of 3 March 2019, 31 days after the due date £1227.20 of the tax liability remained unpaid. HMRC issued a notice of penalty assessment on or around 17 September 2019 in the amount of £61 being 5% of the tax unpaid at the penalty date (£1227.20 @5%= £61).
14. Pursuant to Paragraph 3(3) of Schedule 56 FA 2009, 5 months after the penalty date of 3 August 2019 £1227.20 of the tax liability remained unpaid, HMRC issued a notice of penalty assessment on or around 17 September 2019 in the amount of £61, being 5% of the tax unpaid at the penalty date (£1227.20 @5%= £61).
15. The tax liability was finally paid in full on 25 October 2019.
16. The 'penalty date' as defined at Paragraph 1(4) Schedule 56 FA 2009 means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after 30 days from the date specified in Section 596(3) or (4)).

THE APPEAL

17. On 18 October 2019 Mr Cloete lodged an appeal before the First Tier Tribunal.

POINTS AT ISSUE

18. Whether the Appellant has a reasonable excuse for the late filing of the individual tax return and for the late payment of tax for the period ending 2018.

19. If a reasonable excuse exists, whether the return was received without any unreasonable delay once any excuse had ended.

BURDEN OF PROOF

20. 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 default.

STANDARD OF PROOF

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

LEGISLATION & CASE LAW

22. Section 7 Taxes Management Act 1970
Section 8 Taxes Management Act 1970
Section 9 Taxes Management Act 1970
Section 59B Taxes Management Act 1970
Schedule 55 Finance Act 2009 - paragraph 3, 4, 5 and 6
Schedule 55 Finance Act 2009 - paragraph 1 (1), (4) & (5)
Schedule 55 Finance Act 2009-paragraph 20
Schedule 55 Finance Act 2009- paragraph 23
Schedule 55 Finance Act 2009- paragraph 16
Schedule 55 Finance Act 2009 - paragraph 22
Schedule 56 Finance Act 2009 - paragraph 3 (2), (3) & (4)
Schedule 56 Finance Act 2009 • paragraph 1 (1), (4) & (5)
Schedule 56 Finance Act 2009 - paragraph 13
Schedule 56 Finance Act 2009 - paragraph 16
Schedule 56 Finance Act 2009 - paragraph 9
Schedule 56 Finance Act 2009 - paragraph 15
CH170600 What are Special Circumstances
Section 101 Late Payment Interest FA 2009

APPELLANT'S CONTENTIONS

The appellant stated the following in correspondence.

“I have received a letter from HMRC informing me I have not completed the above return. I know myself I did it on Nov. I rung HMRC on numerous occasions trying to get this resolved, being told A. they need a reference number that I repeatedly asked to help me get it as my landline and internet uses the same line, so when I ring HMRC, I cannot access the internet. B. Going through the whole log in process only to be told right at the end after a 15 min call there is nobody available to help and to ring back. C. when I asked to speak to a manager get hung up on. I ended up paying somebody to help me as I could not get HMRC to help me. I have then logged a complaint with a decision date given to me as the 30th September. On 4th October I received a letter from Debt Management informing me I need

to pay the penalty, without receiving any feedback on why my appeal have been rejected. (The paid service found that the box "Verify address" have not been ticked, however you were using this address to send me the post to?)”.

“I have accepted HMRC decision, however I would like the following information please. A. a transcript of all my conversations with HMRC, including the one where I got cut off by one of HMRC employees. B. remove all my personal expenses allowances from my account as I end up paying in every single year due to HMRC allowing me too much personal allowances (I did request this previously). C. I will repay the incurring penalties on the direct debit I have set up.”

HMRC'S CONTENTIONS

23. On 16 September 2019 HMRC was in receipt of a complaint from Mr Cloete. HMRC, Complaints Team issued a reply.

24. The Complaints Team have reviewed HMRC's handling of Mr Cloete's tax affairs. They will not look at the penalties charged. This is because a statutory review is part of the appeals resolution process. This means, if Mr Cloete did not agree with an appeal review conclusion, he would be entitled to ask the Tribunal Service to make a judgement on his appeal. The fact that Mr Cloete has that right puts appeals against late filing and late payment penalties outside the scope of the complaints process. No appeal has been received by HMRC from Mr Cloete.

25. Mr Cloete has been required to complete an annual tax return for several years now and should be aware of his obligations under self-assessment. Filing the tax return and paying any tax due by the deadline forms part of his responsibility to meet these obligations.

26. HMRC records show the 2017-2018 tax return was received on 16 September 2019 and should have been delivered to HMRC by 31 January 2019, in accordance with Section 8(1D) TMA 1970. The return was submitted 228 days late.

27. Paragraph 1 of Schedule 55 to FA 2009 provides that a penalty is chargeable if a person fails to deliver a return by the due date.

28. HMRC submit that the 2018 self-assessment return was not delivered by the filing date, and penalties are therefore payable under paragraph 3, 4 and 5 of Schedule 55 to FA 2009.

29. The tax was due to be paid on or before 31 January 2019 but was not paid in full until 25 October 2019.

30. Paragraph 1 of Schedule 56 to FA 2009 provides that: -

1(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax on or before the due date.

31. HMRC thereby submit that the payment was not made by the penalty date of 17 September 2019 and penalties are therefore payable under Schedule 56 to FA 2009. There is no reasonable excuse.

DISCUSSION

Let us first look at the law as it relates to a reasonable excuse.

32. Paragraph 16 of Schedule 56 FA 2009 specifically provides that a penalty does not arise in relation to a failure to make a payment if the person satisfies HMRC (or on appeal, a Tribunal) that there is a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

33. Paragraph 23 of Schedule 55 FA 2009 specifically 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 there is a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

34. In accordance with both Paragraph 16 Schedule 56 FA 2009 and Paragraph 23 of Schedule 55 FA 2009 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.

35. There is no statutory definition of reasonable excuse, which "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).

36. A reasonable excuse needs 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 met that standard as outlined by Judge Medd in *The Clean Car Company (LON/90/138X)*.

'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? Put in another way which does I think alter the sense of the question; was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?'

37. Reasonable excuse is not further defined beyond paragraph 23 (2) of Schedule 55 or paragraph 16 (2) of schedule 56 but was considered in detail in the Upper Tribunal decision in *Christine Perrin v Commissioners for HMRC ((2018) UKUT 0156 (TCC))*. Whilst confirming at paragraph 70 of that decision that reasonable excuse should be judged objectively, Judge Herrington stated at paragraph 71:

"In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should consider all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse. The experience,

knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the Clean Car Company case).”

And at paragraph 74:

"Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on - e.g. 'I did not think it was necessary to file a return', or 'I genuinely and honestly believed that I had submitted a return'. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however, that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse”.

38. Whilst *Christine Perrin v HMRC* concerned a late filing penalty under schedule 55 FA 2009, the conclusions of Judge Herrington in a section headed "Final comments", summarised his comments on reasonable excuse in relation to the general principle, rather than any particular provision.

39. Whether a person has a reasonable excuse will depend on the particular circumstances in which the failure and the abilities of the person who has failed. What is a reasonable excuse for one person may not be a reasonable excuse for another person. If there is a reasonable excuse it must exist throughout the failure period.

40. Shortage of funds to pay tax owing is not regarded as a reasonable excuse. Where HMRC are satisfied that an individual cannot pay a tax liability by the due date a Time to Pay arrangement acceptable to HMRC may be agreed within 30 days of the due date depending on the circumstances of the case.

41. In line with Section 108 Finance Act 2009 when someone does not have the means to make payment in full by the due date HMRC can consider and negotiate a deferred payment plan to clear the liability. In these circumstances, customers can avoid a late payment penalty if they make payment proposals prior to the late payment penalty trigger date which HMRC agrees to and certain conditions are met. This is known as a Time to Pay (TTP) arrangement. The taxpayer must stick to the arrangement, otherwise the TTP is cancelled and any relevant late payment penalties are imposed as if there was no TTP arrangement in the first place.

42. Mr Cloete has accepted that the penalties are due and has agreed to pay the amounts charged by way of Direct Debit under a Time to Pay Arrangement as indicated in his appeal to the Tribunal. He has therefore accepted he does not have a reasonable excuse.

43. With regard to Mr Cloete's appeal to the Tribunal requesting his personal expenses to be removed, HMRC assume Mr Cloete has asked for his allowances to be removed from his tax code. HMRC explained that Mr Cloete had obtained the benefit of relief by way of expenses through an adjustment of his tax code. As his expenses are more than £2,500 Mr Cloete is expected to complete a return under self-assessment. If there is any inaccuracy in the relief given

through the coding adjustment, this can be corrected when the return is submitted. However, Mr Cloete failed to tick the correct box on the return for 2017-2018 to say he wanted any tax due to be paid through his tax code.

44. As expenses have been due in previous years, there is an obligation by HMRC to code out an estimated amount, provided it is a reasonable estimate and expenses continue to be incurred in the current year. The level of expenses claimed in earlier years is looked at a current year's expenses and deductions and are based on those figures.

45. As expenses vary from year to year and for the year 2017-2018 these were in excess of £2,500, it should have been clear to Mr Cloete with a responsible attitude to compliance that he should have to inform HMRC of his actual expenses. Even if there was genuine lack of knowledge that could constitute a reasonable excuse for a period of time, it could not be sufficient as it did not continue throughout the period of the failure.

46. Mr Cloete has been advised by the Complaints Team that the tax code for the year 2020-2021 will be issued to reflect the changes.

47. When Mr Cloete rang HMRC he was asked for a submission reference which is automatically issued once a customer logs onto the Online Services. Without this reference number HMRC cannot access Mr Cloete's online record. HMRC cannot retrieve this reference number as it is personal to Mr Cloete's account.

48. HMRC submission records can identify that Mr Cloete did log on to the system on 15 November 2018. However, as he did not complete the identity verification level, submission of the return was not completed until 16 September 2019. A return for the year 2017-2018 was not successfully submitted online until 16 September 2019.

49. Mr Cloete thought as he had paid 3 monthly instalments that his tax for 2017-2018 had been cleared. However, as he has been advised on several occasions, as he had not submitted his tax return the payments, could not be allocated to 2017-2018 until such time a return had been received. The Appellant did make calls to HMRC and the transcripts of the telephone conversations of 29 April 2019, 30 April 2019 and 22 July 2019 relating to the 2017- 2018 tax return confirms this position.

50. I could see the frustration of the Appellant in not getting through on the call after 15 minutes. Some taxpayers clearly have difficulties using the service.

51. Interest was charged under Section 101 FA 2009. HMRC have to charge interest when payment is late. This is the law. No one person in HMRC has the authority to ignore or override this law. HMRC charge interest automatically on all tax paid late, whatever the reason for the delay. An interest charge is not a penalty. The concept underlying this legislation is the recognition of which party, HMRC or customer, has benefited from the use of the money in the period beyond the due and payable date. Interest is not intended to be a penalty but compensates the Exchequer for late payment and prevents those who pay late having an unfair advantage over those who pay on time. Interest is a statutory charge and there is no right to appeal against it although customers can object to it. Interest can be reviewed once the charges have been paid and the interest has been finalised.

52. As Mr Cloete has agreed the penalties are due and payable there are no grounds for an appeal to the Tribunal. The appeal is dismissed and the penalties upheld.

SPECIAL REDUCTION

53. Under paragraph 16 of Schedule 55 and paragraph 9 of Schedule 56, Finance Act 2009 provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances.

54. Special circumstances is undefined save that, under paragraph 16(2) and paragraph 9 (2), it 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

55. The courts accept that for circumstances to be special they must '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).

56. To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation. At paragraph 86 of his decision in *David Collis v HMRC* (12011] UKFTT 588 (TC)), Judge Roger Berner said:

“in the context of a decision of HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it.”

57. At paragraph 86 in the Upper Tribunal case of *Barry Edwards v HMRC* [2019] UKUT 137 (TCC), it was confirmed that the Schedule 55 regime was proportionate and penalties are correctly due even in circumstances where there is no additional tax liability.

58. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

59. Mr Cloete has not made any statements about his circumstances to support his view that he should not have been charged penalties under Schedule 55 FA 2009 and Schedule 56 FA 2009 as he has accepted the penalties are legally due and payable.

60. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 and paragraph 15(2) and (3) of Schedule 56 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 schedule 55 FA2009 and paragraph 9 of schedule 56 FA 2009 (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'.

61. The decision not to reduce the penalties under paragraph 16 schedule 55 or paragraph 9 schedule 56 was not flawed, when considered in the light of all the circumstances.

CONCLUSION

62. The Tribunal finds as a fact that Mr Cloete did not have a reasonable excuse lasting throughout the period for the late submission of his individual return for the period ending 5 April 2018.

63. The Tribunal finds as a fact that Mr Cloete did not have a reasonable excuse for his failure to pay his tax on time, nor by the date the penalty arose. He has accepted the penalties.

64. There are no special circumstances which would allow the penalties to be reduced under Special Reduction.

65. The penalties imposed in the amount of £1322 were correctly charged in accordance with legislation and that the appeal be dismissed.

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.

DR KAMEEL KHAN

TRIBUNAL JUDGE

RELEASE DATE: 5 MAY 2020