



TC07942

Appeal number: TC/2020/01562

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for late filing of self-assessment return - income received from car park investment scheme - Appellant resident in Malaysia - unaware of need to file return - informed by scheme promoter that income not taxable because within UK annual personal allowance - whether reasonable excuse - yes - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIM FEI LING

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 24 August 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 1 March 2020, received by the Tribunal on 30 March 2020 and HMRC's Statement of Case dated 8 June 2020.

DECISION

1. This is an appeal by Ms Lim Fei Ling (“the Appellant”) against penalties totalling £820 imposed by the Respondents (“HMRC”) under Paragraphs 3 and 4 of Schedule 55 Finance Act 2009, for the late filing by the Appellant of her self-assessment (“SA”) tax return for the tax year ending 5 April 2016.
2. A taxpayer’s return, if filed electronically, is due no later than 31 January in the year following the end of the financial year to which it relates. The appellant’s return was due by 31 January 2017 but was not filed until the 13 April 2017.
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. Penalties of £100 and £720 were imposed, under (i) and (ii) above.
5. The appellant’s appeal is against both penalties.

Filing date and Penalty date

6. Under s 8(1D) TMA 1970 a non-electronic return must be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The ‘penalty date’ is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

7. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

8. 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.

9. 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).

10. HMRC’s view is that 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.

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

The background facts

12. The appellant is resident in Malaysia. She has never been to the UK.

13. On 23 January 2015, she agreed to purchase a car park lot at Glasgow airport for £20,000 from Park First Group. The lot was advertised as returning 8% yield rising to 10% in years 3 and 4, and 12% in years 5 and 6, with the first two years guaranteed by the seller and a buyer’s option to sell back to the seller. She was advised by the seller’s agents in both the UK and Malaysia that she would not be liable for UK income tax as the rent she would receive was below the personal allowance threshold (£10,500 at that time). She could claim relief from tax being deducted at source by the payer, by submitting a non-resident landlord (NRL1) form to HMRC.

14. Completion of the purchase was fixed for 22 May 2015. Income from the scheme was payable to the appellant from that date.

15. The appellant received £1,600 in year 2015-16 (and year 2016-17). She received nothing after that.

16. On 3 February 2015 the appellant (in the belief that completion of her purchase of the parking lot had occurred on 23 January 2015 and that no UK tax was payable) submitted form NRL1 for the year 2015-16, to HMRC.

17. This appears to have prompted HMRC to write to the appellant advising that a return would be in fact be needed unless she completed an ‘Application to receive UK income without deduction of tax’ [Form RR].

18. The appellant completed the RR form and ticked the box which asked whether she was claiming relief from UK tax on the basis that the UK has a double taxation relief agreement with Malaysia. The form was received and processed by HMRC in April 2015
19. On 5 August 2015, following receipt of the NRL1 form, a Self-Assessment record was created for the appellant and a Notice to file a return for 2014-15 was issued to the appellant addressed to 89 Jalan Pesona 13, Malaysia, being the address given by the appellant in her correspondence to HMRC.
20. The appeal bundle (prepared by HMRC) does not contain any record of HMRC responding to form RR, and in particular the application for relief under the double taxation provisions.
21. On 17 February 2016 a late filing penalty of £100 was issued for the late filing of the appellant's return for 2014-15. However, the penalty had been issued in error as the appellant had not received any income in year 2014-15.
22. On or around 6 April 2016, the appellant was issued a notice to file for the year 2015-16.
23. On 5 July 2016 HMRC erroneously issued a 60 day daily penalty reminder letter to the appellant for 2014-15.
24. On 30 July 2016, no doubt prompted by the penalties, the appellant wrote to HMRC by registered post saying that she was not familiar with UK taxation but she had been advised by the seller's agents that as her UK income was below the personal allowance threshold no UK tax was payable and asking HMRC to confirm by email that this was correct.
25. On 18 September 2016, a six month late filing penalty of £300 and daily penalties of £900 were erroneously issued for the late filing of the appellant's return for 2014-15.
26. On 6 October 2016, HMRC responded by letter to the appellant and advised her that all of her UK income was taxable. A person who is not a European Union national was not entitled to an Annual Personal Allowance. HMRC advised her that a 2015-16 notice to file a return had been sent to her and that the deadlines for submitting this return were 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. The letter also made reference to the 2014-15 notice to file and penalties that had been issued.
27. On 18 November 2016, the erroneous penalties of £100, £300 and £900 for late filing of the appellant's 2014-15 return were all cancelled.
28. On or around 7 February 2017, HMRC issued a notice of penalty assessment under paragraph 3, Schedule 55 FA 2009 in the amount of £100 for the late filing of the appellant's 2015-16 return.

29. On the 23 February 2017 the appellant sent in a Residence, remittance Self-Assessment page (SA109 2016). She confirmed that she had received the penalty notice and asked for the penalty to be waived, believing it to be a mistake.
30. On the 24 February 2017 HMRC wrote to the appellant advising her she had only completed part of the form and that she needed to complete the main Self-Assessment tax return (SA100). The letter also advised the appellant the deadline for sending a 2015-16 tax return had passed [31 January 2017], and if she wished to do so, to appeal again after she had filed the return.
31. By a letter dated 25 March 2017 the appellant appealed the penalty under paragraph 20 Schedule 55 FA 2009 and filed her paper 2015-16 Self-Assessment tax return, received by HMRC on 13 April 2017.
32. On or around 19 September 2017, HMRC issued a notice of a daily penalty assessment under paragraph 4, Schedule 55 FA 2009 in the amount of £720, calculated at £10 per day for 72 days (31 January 2017 to 13 April 2017).
33. The appellant's return was not processed until 19 September 2017 and her appeal was not recognised as such until then.
34. HMRC undertook a review of the decision but upheld the penalties.
35. In February 2018, having received no rent for 2017-18, she tried to enforce the sell back option. She says that the developer initially said that the rent she had already been paid was considered part of and deductible from the capital she would receive. She says she was offered £1,023.65, but in fact eventually received nothing. The Parkfirst Scheme was eventually withdrawn after an investigation by the FCA in 2019. Many investors lost money from the scheme, which was described as a scam.
36. The appellant's 2016-17 return was filed on time.
37. On or around 6 April 2018, the appellant was issued a notice to file for the year 2017-18.
38. HMRC received the appellant's paper (nil) return for 2017-18 on 7 December 2018. Because it was a paper return, it was late.
39. In February 2019 a late filing penalty of £100 was issued for the late filing of the appellant's return for 2017-18.
40. The appellant requested a review on 20 March 2019, but paid the £100 penalty on 24 March 2019.
41. The penalty was upheld on review on 24 January 2020, but waived.
42. With regard to the 2015-16 penalties totalling £820, the review officer decided that the appeal was out of time as appeals should have been made within 30 days of

the penalty dates. The appellant was advised that she could appeal the review decision to the Tribunal.

43. As the appellant no longer had a UK income after 2017-18, HMRC confirmed that her Self-Assessment record had been closed by HMRC.

44. In July 2019 Parkfirst went into administration and Court proceedings were commenced against the directors.

45. On 30 March 2020, the appellant lodged an appeal before the First-tier Tribunal against the 2015-16 penalties. Her grounds of appeal are that she:

- Is a resident of Malaysia and has never been to the UK. She was not familiar with the UK tax system and its due dates for tax return submission. Also, that she is a first time property investor in the UK.
- Had been informed by the seller's agents that they would deal with all tax related issues and help her to manage the property.
- Was informed that she was tax exempted and thus had no need to file a tax return.

Relevant statutory provisions

46. If a person, who has not received a notice to deliver a tax return from HMRC under s 8 of the Taxes Management Act 1970 ("TMA") but is otherwise chargeable to income tax, he has an obligation under s 7(1) of TMA to notify HMRC that he is chargeable to income tax. The taxpayer has six months after the end of the tax year to notify HMRC i.e. before 5 October following the tax year.

Sections 7(3) to (7) of TMA excepts a taxpayer from this obligation if he has no net liability to income tax for the year, or has had all the tax deducted at source to meet the net income tax liability for the year.

Section 8 of TMA - 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.

Schedule 55 Finance Act 2009:

47. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.
48. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.
49. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.
50. 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 the 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 the 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).

51. 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 the 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 the 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.

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

- (1) Liability to a penalty under any paragraph of the 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.

53. 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 paragraph of the 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.

54. 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:

- (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.

The Appellant's case

55. The appellant's grounds of appeal are set out in paragraph 44 above.

HMRC's Case

56. A notice to file for the year ending 5 April 2015 was issued to the appellant on 6 April 2016. Under s 8(1) TMA, once the appellant was issued with a notice to file her personal tax return, she became legally obliged to ensure that return is filed on or before the filing date.

57. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. A non-electronic return was received on 13 April 2017, 165 days late. However, HMRC imposed a penalty of £10 per day for 72 days calculated from 31 January 2017. The penalty was imposed on 7 February 2017.

58. On 25 March 2017, the appellant made an appeal under paragraph 20 Schedule 55 FA 2009 in respect of the £100 penalty charged. The appeal was out of time being more than 30 days after the penalty date. No formal appeal has been received by HMRC in respect of the £720 penalty except for the out of time request for a review.

59. For an appeal to be successful the appellant must have a reasonable excuse as to why the 2015-16 return was not filed by the deadline and the reasonable excuse must exist throughout the period from the deadline to the day before HMRC receive the return.

60. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond the person's control which prevents them from complying with an obligation which they would otherwise have complied with.

61. In the appellant's appeal to the Tribunal she states that she is a resident of Malaysia and has never been to the UK. Also, that she is not familiar with the UK tax system and its due dates for tax return submission.

62. It is the respondent's view that the appellant's decision to choose to invest in the UK carried with it an obligation to comply with UK laws. It was for the appellant to familiarise herself with UK law. The NRL1 gives information about how to contact HMRC if she needed help. The appellant's appeal correspondence demonstrates she

has a good command of the English language. It is HMRC's view that she has not demonstrated the due level of prudence and diligence necessary to adhere to her filing obligation.

63. In the appellant's appeal to the Tribunal she states that she thought all tax related issues would be taken care of by the company who helped her manage the property.

64. Although the appellant employed a company to manage her property and to deal with all tax related issues, the law provides that reliance on another person to do anything is not a reasonable excuse, unless the person took reasonable care to avoid the failure. Paragraph 23(2)(b) of Schedule 55 FA 2009 specifically precludes reliance on a third party unless the appellant took reasonable care to avoid the failure.

65. The responsibility to submit a Self-Assessment tax return by the due date remains with the appellant regardless of whether they have delegated that task to another person.

66. Entrusting the agent with responsibility to file the return does not absolve the appellant of their responsibility to make any necessary checks that the submission has been made. In the absence of evidence to demonstrate that the appellant took reasonable steps to ensure that their agent actually filed the return, HMRC submit that this does not amount to a reasonable excuse.

67. The appellant remains responsible for ensuring that the tax return is received by the relevant deadline and is liable to the automatic penalty if it is not. The Self-Assessment system places responsibility on customers for their own tax affairs. This includes ensuring that they submit their tax return at the correct time and pay any liability by the due date.

68. In the appellant's appeal to the Tribunal she states that she was told that she was exempt from tax and did not need to complete a return.

69. The appellant appears to take the view that because she was told that she was tax exempt, she does not need to complete a return. The appellant is responsible for meeting the deadlines for filing her tax returns irrespective of whether she considers any tax is due.

70. To support taxpayers with their responsibility, HMRC publishes information and advice about their obligations and how they can adhere to them. This information about Self-Assessment, the completion of returns, tax payment dates, penalties and so on, is well within the public domain and widely available via the internet including HMRC's website. Anyone from abroad can also access this information. An individual acting in a responsible way would have availed themselves of this information.

71. A reasonable excuse is something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. As Judge Medd QC in *The Clean Car Co Ltd* explained:

‘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 not 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?’

72. The Tribunal is required to approach the question of a reasonable excuse in line with the Upper Tribunal principles set out in *Perrin v HMRC* at paragraph 81:

“81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

Second, decide which of those facts are proven.

Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

73. Whether a person has a reasonable excuse will depend on the particular circumstances in which the failure occurred 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.

74. The appellant has not demonstrated on the balance of probabilities that she made an attempt to file her 2015-16 Self-Assessment tax return prior to the filing date of 31 January 2017. HMRC’s letter dated 6 October 2016, advised that a 2015-16 Self-Assessment tax return had been sent to her and she was advised of the deadlines for the return. A prudent customer would have made herself familiar with the UK tax laws before investing in the UK.

75. Even if the facts asserted by the appellant are true, they do not objectively constitute a reasonable excuse.

76. In *Perrin v HMRC*, Judge Herrington addressed the question whether ignorance of the law can provide a reasonable excuse at paragraph 82 of his decision, he concluded:

“One situation that can sometimes cause difficulties is when the taxpayer’s asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that ‘ignorance of the law is no excuse’, and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long.”

77. It was not objectively reasonable in the circumstances of this particular case for the appellant to have been ignorant of her obligation to file a 2015-16 Self-Assessment tax return. When the appellant chose to invest in the UK and completed the form NRL1 on 3 February 2015, she had a legal obligation to make herself aware of the UK tax laws and the filing dates of any Self-Assessment tax returns issued to her. HMRC’s letter issued on 6 October 2016 advised her that a 2015-16 Self-Assessment tax return had been issued and the deadlines for submission. When viewed objectively it is not reasonable for the appellant to be unaware of her filing obligations. She could have checked online or contacted HMRC.

78. The penalties charged are proportionate and the penalty regime is proportionate to its aim. The penalty regime at Schedule 55 FA 2009 is an administrative means of securing the production of timely returns. Its aim is to encourage compliance, not punish defaults.

79. In *Barry Edwards v HMRC*, the Upper Tribunal confirmed at paragraph 85 that the Schedule 55 regime was proportionate and penalties are due even in circumstances where there is no additional tax liability:

“In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

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 Sch 55 FA2009 cannot be regarded as disproportionate in circumstance where no tax is ultimately found to be due...”

80. The penalty regime includes provisions for reasonable excuses and special circumstance which allow mitigation in appropriate cases.

81. Each case however is taken on its own merits. The Upper Tribunal found in *Hok Ltd v HMRC* that the First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair (at paras 36-58). The decision of the Upper Tribunal creates a precedent and is binding on the First-tier Tribunal in all cases where similar issues are raised.

82. Interest is automatically charged under s 101 FA 2009, whatever the reason for the delay. 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 of appeal against it although customers can object to it. It is therefore outside the scope of the Tribunal's jurisdiction.

83. Based on the evidence held, no reasonable excuse exists for the late submission of the Individual tax return and the penalties were correctly charged in accordance with legislation.

Special Reduction

84. Paragraph 16 of Schedule 55 FA 2009 provides HMRC with discretion to reduce any penalty charged under this Schedule if they think it right to do so because of "special circumstances".

85. Special circumstances are 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 over-payment by another.

86. The purpose of Schedule 55 FA 2009 is to encourage timely compliance with filing obligations such as the Self-Assessment return for income tax. In the absence of the penalty regime to encourage that compliance, it would be much more difficult to administer the tax system.

87. Paragraph 16 Schedule 55 FA 2009 may be applied where, in HMRC's opinion, the taxpayer's circumstances are such that the application of a penalty at the statutory level would not be appropriate. This may include circumstances where imposing the penalty would be contrary to the clear compliance intention of the penalty law

88. In *Barry Edwards v HMRC*, the Upper Tribunal decided at paragraphs 68-74 that the meaning of special circumstances should not be given a restrictive interpretation. Special circumstances may include any factor which means that a decision to charge a penalty at the level determined by statute would be contrary to Parliament's intent when the penalty regime was introduced.

89. To be special, any particular circumstance may or may not be specific to the individual taxpayer, but it must be relevant to the issue under consideration. If relevant, the circumstance must be sufficiently special such that HMRC considers it right to reduce a penalty under paragraph 16 Schedule 55 FA 2009.

90. At paragraph 86 in *Barry Edwards*, it was confirmed that the Schedule 55 regime was proportionate, and penalties are therefore correctly due even in circumstances where there is no additional tax liability:

“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.”

91. HMRC have considered the appellant’s circumstances and consider that a special reduction is not appropriate. The appellant’s appeal correspondence demonstrates she has a good command of the English language. It is the HMRC’s view, that the appellant has not demonstrated the due level of prudence and diligence necessary to adhere to her filing obligation.

92. HMRC have considered the circumstances described by the appellant in her appeal and consider that a penalty of the type charged in this case is directly appropriate in order to encourage future compliance with their filing obligations.

93. 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’. LAB, Page 10]

94. The principles referred to as applicable in proceedings for judicial review include ensuring:

- That the decision maker has taken into account all relevant factors.
- That the decision maker has not taken into account any irrelevant factors.
- That the decision is one that a reasonable decision maker having regard to the available evidence could make.

95. HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed but, if the Tribunal disagrees, there are in any event no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

96. 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.

97. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or his from complying with an obligation which otherwise they would have complied with.

98. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse"

"...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 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".

99. The notice to file dated 6 April 2015 was issued in error as the appellant had no income arising in the UK in the year 2014-15. She was not during that period "*a person chargeable to income tax and capital gains tax*" according to s 7 TMA 1970.

100. The appellant had made the mistake of believing that income would arise from 23 January 2015 when she entered into the agreement to purchase the parking lot. In fact, income did not arise or become payable to her until 23 May 2015. In the meantime she had however submitted form NRL1 to HMRC, which prompted the creation of a self-assessment record and notice to file for 2014-15. Following that penalties of £100, £300, £900 and £300 were erroneously issued.

101. Prompted by the penalties, the appellant wrote to HMRC in July 2016 to say she was not familiar with UK tax law and had been advised that as her UK income was below the personal allowance threshold no UK tax was payable. After that, but before HMRC replied on 6 October 2016, penalties of £300 and £900 were issued in September 2016.

102. In their letter of 6 October 2016, advising the appellant of her UK tax liability and obligations, HMRC erroneously made reference to the appellant's 2014-15 income tax liability and the penalties that had been imposed for failure to file her return.

103. In November 2016 the 2014-15 penalties were all withdrawn. It is quite possible at that stage that the appellant thought they had been withdrawn, because a UK income was not taxable after all. No explanation for cancellation of those penalties appears to have been given.

104. A £100 fixed penalty was issued on 7 February 2017 for the late filing of the 2015-16 return. The appellant responded promptly submitting a residence remittance (SA109 2016) self-assessment page but no self-assessment return. Clearly she was trying to comply with her UK tax obligations but confused as to what was required.

105. After HMRC clarified the position on 24 February 2017, by letter (and not by email), on 25 March 2017, the appellant filed her self-assessment return. She was clearly unfamiliar with the process of filing a tax return by electronic means.

106. It appears that post to and from the UK and Malaysia was taking approximately 2 to 3 weeks. On that basis, it is obvious that the appellant was taking her obligations seriously and responding to HMRC's correspondence relatively quickly.

107. HMRC's tax Charter states "*We want to give you a service that is fair, accurate and based on mutual trust and respect. We also want to make it as easy as we can for you to get things right..... We'll help you understand what you have to do and when you have to do it.*"

108. Following the initial erroneous imposition and then cancellation of the 2014-15 penalties without adequate explanation as to why that had happened, and contradicted somewhat by the contents of HMRC's letter of October 2016, coupled with the incorrect advice given to her by the seller's agent, it is unsurprising that the appellant was confused and uncertain of her UK tax filing obligations

109. The Tribunal has some sympathy with the appellant.

110. Whilst a taxpayer's misunderstanding of their obligation to file a return may be a genuine error, it does not always amount to reasonable excuse. This is supported in a judgement by Judge Hellier in the [VAT] case of *Garnmoss Ltd v HMRC* – TC2001 where he said "what is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses."

111. As stated by Judge Herrington in *Christine Perrin*:

"...some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long".

112. Although HMRC are not obliged to give advice to taxpayers, it is reasonable to expect some assistance, when a taxpayer, particularly one from abroad who whilst endeavouring to comply with relevant regulations has so obviously misunderstood their position. This is not a case where the appellant was ignoring or not trying to comply with her obligations. She instigated correspondence with HMRC. The facts that gave rise to the appellant's failure to file her 2015-16 return amount to an objectively reasonable excuse which she remedied without unreasonable delay.

113. Given all the circumstances of this case, although no criticism of HMRC is intended, it is difficult to understand why the appellant's grounds of appeal have not been accepted as providing a reasonable excuse. In my view they do.

114. The appeal is allowed and the late filing penalties discharged.

115. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 13 NOVEMBER 2020