



TC07953

Appeal number: TC/2019/08678

Application to make a late appeal - income tax – fixed and daily penalties for late filing of self-assessment return in 2010-11 - Appellant asserts that he received no self-employed income and had been advised by HMRC that he therefore had no need to register for self-assessment - substantial delay before submitting a paper return over four years later - whether reasonable excuse for delay in lodging appeal - no - application for permission to make a late appeal refused

FIRST-TIER TRIBUNAL

TAX

NIGEL HENRY PATRICK OWEN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 27 May 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 7 November 2019, and HMRC's Statement of Case received by the Tribunal on 30 December 2019.

DECISION

The appeal

1. This is an appeal by Nigel Henry Patrick Owen (“the appellant”) against penalties imposed by the Respondents (“HMRC”) which initially totaled £1,300 but are now reduced to £400, under Paragraphs 3 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment (“SA”) tax return for the tax year 2010-11.
2. HMRC object to the late appeal which is considerably out of time.

Penalties for late filing of self-assessment returns

3. 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 at £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 of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

Filing date

4. The filing date is determined by s 8(1D) TMA 1970 et seq. which states that for the year ended 5 April 2011 a non-electronic return must be filed by 31 October 2011 and an electronic return by 31 January 2012.
5. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

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 has ended.
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. 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.

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

The background facts

11. The appellant registered for SA on 1 April 2014 saying that he had set up his business Elektra Limited in 2010.

12. Elektra Limited Company number 07211218 was incorporated on 1 April 2010. Its trading activities is described at Companies House as “Public Houses and Bars” and show that the appellant and a Julie Margaret Friel were registered as directors of the Company. Ms Friel resigned on 25 April 2010.

13. Companies House records also show that the Company’s abbreviated accounts for the year ended 30 April 2011 were filed on 1 February 2012. The accounts indicate that the Company was trading but made a loss for that year.

14. Notices to file for the years 2010-11, 2011-12 and 2012-13 were issued to the appellant on 1 April 2014.

15. The filing date for the 2010-11 return was 8 July 2014 for a non-electronic return or electronic return.

16. HMRC records show that on 8 August 2014, the appellant spoke to HMRC saying that his agent was having difficulty filing form 64/8 but that he had been able to register on line and would file his SA as soon as he received his activation code.

17. The appellant’s 2010-11 return was not received by the filing date. HMRC therefore issued a notice of penalty assessment under paragraph 3 FA 2009 on 21 August 2014 in the amount of £100.

18. The appellant filed electronic SA returns for the years 2011-12 and 2012-13 on 10 December 2014.

19. As the 2010-11 return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on 19 February 2015 in the amount of £900, under paragraph 4 FA 2009, calculated at £10 per day for 90 days.

20. As the 2010-11 return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on 19 February 2015 in the amount of £300.

21. The appellant's electronic return for the year 2010-11 was received on 19 March 2019, being over four and a half years late.

22. The appellant's appeal was received by HMRC on 5 September 2019. The appeal did not include an application for an extension of time to be allowed to make a late appeal.

23. When an appeal is received by HMRC more than 30 days after the penalty has been issued, HMRC can consider the appeal if there is a reasonable excuse for the delay in appealing. The appellant's appeal was 1842 days late against the £100 penalty, 1660 days late in respect of the £900 penalty and 1660 days late in respect of the £300 penalty.

24. Having considered the late appeal under s 49 TMA 1970, HMRC refused the late appeal. The notice to file had been correctly sent to the appellant's last known address and there was no assertion by the appellant that he had not received a notice to file. HMRC therefore consider that the return was correctly served under s 115 TMA 1970 and s 7 Interpretation Act 1978.

25. The appellant lodged a notice of appeal with the Tribunal on 7 November 2019.

26. HMRC have agreed to waive the £900 daily penalties.

Relevant statutory provisions

Taxes Management Act 1970

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

(1AA) For the purposes of subsection (1) above-

- (a) the amounts in which a person is chargeable to income tax and

the amount in which he is chargeable to income tax and the aggregate amount of any income 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 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 this 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 this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this 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 this 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 this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

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

(4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this 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 this section and sections 8A, 9 and 12AA of this 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

27. The penalties at issue in this appeal are imposed by Schedule 55 Finance Act 2009. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a SA return is submitted late.

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

- (1) P is liable to a penalty under this paragraph if (and only if)--
 - (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
 - (b) HMRC decide that such a penalty should be payable, and
 - (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
- (3) The date specified in the notice under sub-paragraph (1)(c)--
 - (a) may be earlier than the date on which the notice is given, but
 - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

- (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
- (2) The penalty under this paragraph is the greater of--
 - (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.

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

- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)--
 - (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
 - (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
 - (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased

31. 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 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 overpayment 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.

32. 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

33. The appellant's grounds of appeal as set out in his appeal to HMRC and Notice of Appeal to the Tribunal are:

- i. "I set up my business in 2010. The Company was not trading in 2010-11 and I didn't make any money out of the business.
- ii. I spoke to HMRC regarding self-assessment and was informed that as the business was not trading and I didn't take any money out of the business, I didn't have to file for self-assessment. I was informed that I would only need to file for self-assessment once I started taking money out of the business.

For these reasons I am disputing of the late filing penalties".

34. The appellant's appeal did not include an application to appeal out of time but it is assumed that he wishes to do so.

HMRC's Case

35. Late filing penalties for the year ended 5 April 2011 are due 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.

36. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the 2010-11 notice to file issued to the appellant on 1 April 2014.

37. The appellant has been sent statements of account which clearly showed the penalties charged on numerous occasions, that is on 27 November 2014, 1 January 2015, 4 March 2015, 11 June 2015, 26 November 2015, 24 November 2016, 12 October 2017, 1 March 2018, 12 April 2018, 7 June 2018, 6 September 2010, 27 December 2018 and 8 January 2019. The appellant does not dispute receiving the statements.

38. The 2010-11 return was submitted on 19 March 2019, which was 1716 days late.
39. The onus of proof is on HMRC to show that the penalties have been correctly calculated. The burden then passes to the appellant to demonstrate that a reasonable excuse exists for the default. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.
40. When the appellant registered himself for SA on 1 April 2014, he should have familiarised himself with his SA procedures. There are a number of different routes by which a taxpayer can contact HMRC. Information about SA, the completion of returns, tax payment dates and penalties is well within the public domain and widely available via the Internet including HMRC's website.
41. There are different ways a director can take money out of the company, for example by way of remuneration, overdrawn loan account and dividends and these can change year by year. HMRC therefore require those registered for SA to complete an annual return.
42. Anyone receiving a notice to file must file a return by the specified date filing deadline or otherwise face penalties
43. The appellant's SA notes show that on 8 August 2014 he spoke to HMRC and said that he had been able to register for SA online and that he would file his return as soon as possible. It is clear that he was aware that his SA return was already late by that date. There was no conversation regarding the business not trading.
44. Quite apart from the fact that the appellant's appeal is inordinately out of time, in order for his appeal to succeed, he would have to show that he had a reasonable excuse which prevented him from complying with his income tax obligations and that excuse continued throughout the period of failure until the date his return was actually filed.
45. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every-day responsibilities of the appellant to ensure his 2010-11 tax return was filed by the legislative date.
46. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC received the correct amount of tax and National Insurance at the correct time. The tax guidance on HMRC's website gives plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.
47. The late filing penalties for 2010-11 onwards are no longer automatically reduced even if there is no tax to pay but remain fixed. To avoid penalties the tax return must be received by the appropriate deadline.
48. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.
49. 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

50. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances.

51. “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.

52. 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).

53. HMRC submit that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

54. 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”.

55. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, if the Tribunal disagrees, HMRC further submit that there are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

56. The appellant’s appeal is significantly out of time. The Upper Tribunal in *Martland v HMRC* 2018 UKUT 178 (TCC) said that when considering applications for permission to appeal out of time, the starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be granted. In considering the question, there is a three-stage process, first is to establish the length of delay, secondly to consider the reasons why the default occurred and thirdly an evaluation of all the circumstances of the case. Having considered the facts of this case, the appellant’s grounds of appeal, I conclude that he has not satisfied me that permission to appeal out of time should be granted.

57. In any event, when a person appeals against a penalty, they are required to have a reasonable excuse which has 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.

58. In considering whether the appellant has a reasonable excuse for the default it is necessary to consider his actions from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise would have been complied with. That is not the case here.

59. Even if the appellant had a reasonable excuse at the time of the initial failure, too much time has passed since then. Any reasonable excuse has to continue to the date when the failure is remedied, which it clearly has not in this case.

60. I concur entirely with HMRC's submissions as set out above. I find that the appellant's appeal is out of time and that in any event he has not shown a reasonable excuse for the late filing of his 2010-11 return.

61. The late filing penalties charged are in accordance with legislation and are confirmed.

62. 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: 27 NOVEMBER 2020