



TC04262

Appeal number: TC/2014/05233

INCOME TAX– penalty for late filing of self-assessment return- paragraph 3 Schedule 55 FA 2009 – whether reasonable excuse – no – whether special circumstances – no evidence that special circumstances considered on review – HMRC decision flawed – penalty reduced

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROSIE ARNFIELD

Appellant

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 5 January 2015 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 23 September 2014 (with enclosures), HMRC's Statement of Case submitted on 14 October 2014 (with enclosures).

© CROWN COPYRIGHT 2015

DECISION

5 1. This is an appeal against a £100 penalty imposed under paragraph 3 Schedule
55 Finance Act 2009 ("FA 2009") for the late filing of a self-assessment tax return for
the year ended 5 April 2013.

The facts

10 2. Based on the evidence of HMRC's computer records and other papers produced
to me, I make the following findings of fact:

(1) a notice to file a self-assessment tax return for the year ended 5 April 2013
was issued to the appellant by HMRC on 13 February 2014;

(2) the filing date for the appellant's self-assessment tax return was 20 May
2014;

15 (3) the appellant submitted her self-assessment tax return for the year ended 5
April 2013 on 24 July 2014; and

(4) HMRC issued a penalty notice on 27 May 2014 to the appellant in the
amount of £100.

20 3. The appellant's accountants, Chronicle Accountants, state that a Form 64 – 8
(the form authorising HMRC to deal with a taxpayer's agent) was sent to HMRC at
the same time as Form SA1 ("Registering for Self-Assessment and getting a tax
return") on 20 January 2014. In a letter to HMRC dated 1 July 2014, Chronicle
Accountants wrote as follows:

25 "Our client Rosie Arnfield [UTR provided] has been handed a £100
penalty for failing to submit a tax return on time which we would like
to appeal.

30 We filed with you a 64 – 8 and an SA1 form on 20th January 2014.
Mrs Arnfield however has still not been added to a list of clients online
and we were not sent a copy of the UTR. Without these we didn't know
a tax return had been issued and therefore were unaware that we had to
file one.

I've attached a copy of the 64 – 8 and SA1 for your kind attention."

35 4. Chronicle Accountants argue that HMRC failed to follow normal working
practices and, therefore, failed to notify them of the appellant's Unique Taxpayer
Reference ("UTR") and also that a tax return had been issued to the Appellant for the
year ended 5 April 2013.

5. HMRC's computer records indicate that HMRC received Form 64 – 8 on 8 July
2014. In my view, however, it is likely that this is a reference to the copy of the Form
64 – 8 sent under cover of Chronicle Accountants' letter dated 1 July 2014.

6. I see no reason to doubt Chronicle Accountants' statement that they sent Form 64 – 8 and Form SA1 to HMRC on 20 January 2014 and I therefore find that these forms were indeed sent on that date. It is, however, apparent from HMRC's computer records that they have no record of receiving these forms.

5 7. HMRC state, and I accept, that the notice to file a self-assessment tax return issued to the appellant on 13 February 2014 contained the appellant's UTR. The notice stated "please show this notice to your adviser if you have one."

8. Chronicle Accountants appealed on behalf of the appellant against the penalty notice. HMRC's decision letter dated 8 August 2014 stated:

10 "I have considered your appeal against a late filing penalty for the tax year ended 5 April 2013.

I do not agree that you have a reasonable excuse because our records show a Notice-to-File was sent to your home address on 13 February 2014. The Notice-to-File advises you of your UTR and the date you
15 need to complete your tax return by."

9. Chronicle Accountants then asked for a review of this decision by a letter to HMRC dated 12 August 2014. That letter stated:

"We strongly disagree with the penalty charged on the grounds that
20 you did not follow appropriate procedures were you should have informed us of our client's UTR, that it had been issued and that they should have appeared on our online client list sooner so we knew a tax return had been issued.

We sent you a letter with the appropriate 64 – 8 and you simply did not
25 inform us of our client's tax return issue until we rang you to complain and by then it was too late."

10. HMRC's review officer wrote to the appellant on 12 September 2014 notifying her that the review had been completed and that the conclusion was that the decision to charge the penalty was correct. The review letter stated:

30 "From the correspondence your agent has sent I can see that the main reason for your appeal is:

1. Your agent registered to act on behalf of your company by completing a 64 – 8. They did not receive a notification to say that your return was required for completion. When your agent rang HMRC it was too late.

35 I will address this point:

1. A notice to file letter was issued to you on 13 February 2014. A notice to file letter replaces the issue of a tax return. It advises you of your obligations, and that filing a return is necessary.

40 Once you have been issued with a notice to make a tax return, you are required to do so whatever your circumstances may be. The notice clearly states that you are required by law to make a return and neither

the notice nor the underlying legislation admits or implies exemptions or exceptions.

5 The Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that they submit their tax return at the correct time. It is a person's own responsibility to make sure that they meet any deadlines.

10 It was your choice to allow an agent to file your return on your behalf. HMRC does not consider reliance on third party as a reasonable excuse. HMRC contend that the legislation places responsibility for delivery of the completed Self-assessment Return form squarely on your shoulders as the taxpayer. HMRC have to be seen to be consistent in our approach to all customers, particularly to those who comply with the regulations. It was your responsibility to ensure that the regulations were followed.

15 As you have not provided a reasonable excuse for failing to submit your return on time, the penalty for late filing of your return has been correctly charged."

11. The letter then concluded by advising the appellant on what action she needed to take and what would happen if she took no action. The letter also advised the
20 appellant that interest would accrue on the penalties.

Decision

12. The penalties levied on the appellant in this case arise under paragraph 3 Schedule 55 FA 2009. The penalty arises in relation to the late submission of a self-assessment income tax return for the year ended 5 April 2013.

25 13. Paragraph 3 Schedule 55 FA 2009 imposes a £100 penalty if the return is not received by the filing date (in this case 20 May 2014).

14. Paragraph 23 (1) Schedule 55 FA 2009 provides a defence in respect of penalties if the taxpayer can show that there is a reasonable excuse for the late filing of his/her tax return. Paragraph 23 (2) (b) provides:

30 "... where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure...."

15. The burden of proof lies on HMRC to show that *prima facie* a penalty is due
35 (e.g. the return is late). The burden of proof in establishing that there was a reasonable excuse for the late submission lies upon the taxpayer. The standard of proof is the civil standard of the balance of probabilities.

16. The return was submitted on 24 July 2014. The return was, therefore, submitted late.

17. I therefore find that the Appellant was *prima facie* liable to the penalty imposed.

18. The next question to be considered is whether the appellant has established a reasonable excuse for the late submission of the return.

19. I have decided that the appellant does not have a reasonable excuse for the late submission of her return. It seems to me that the Appellant should have informed her accountants of her UTR, showed them her notice to file, and should have ensured that her return was filed on time. It is the individual's responsibility to ensure that her return is filed on time.

20. Although I have concluded that the appellant does not have a reasonable excuse, the question arises whether there were "special circumstances". Paragraph 16 Schedule 55 FA 2009 provides that:

"If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule."

21. While 'special circumstances' are not defined, the courts accept that for circumstances to be special they must be '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).

22. Paragraph 22 Schedule 55 FA 2009, however, provides that the Tribunal can only substitute its decision for that made by HMRC if it decides that HMRC's application of the "special circumstances" provision was "flawed when considered in the light of the principles applicable in proceedings for judicial review." Thus, I cannot substitute my own decision in relation to "special circumstances" unless I conclude that HMRC's decision was unreasonable in the public law sense.

23. I further note that the wording of paragraph 22 (2) (b) refers to the ability of the Tribunal to substitute its own decision for that of HMRC's if the tribunal thinks that HMRC's "decision in respect of the application of paragraph 16 was flawed." In my view, the decision referred to is either the decision to levy a penalty by issuing a penalty notice or the decision to affirm that penalty on review because this is a decision against which the appellant must appeal.

24. In their Statement of Case HMRC include the following statement:

"HMRC have considered special reduction but their view is that there are no special circumstances which would allow us to reduce the penalty."

25. This appears to be a standard form sentence inserted into HMRC Statements of Case. Indeed, in the batch of default paper cases before me the identical sentence appears in every Statement of Case even though some of the Statements of Case have been prepared by different HMRC officers. The problem with this assertion, for which no reasons are given (see *Barber White v Revenue & Customs* [2012] UKFTT 364 (TC)), is that it does not appear to be supported by the evidence in this case. There is simply no evidence, that this question has been considered by HMRC. The assertion in the Statement of Case is not evidence. Neither of HMRC's letters dated 8 August 2014 or 12 September 2014 – the two letters which considered the Appellant's appeal

– contains any reference to "special circumstances" having been considered. Those letters deal only with the issue of reasonable excuse.

26. The statement in the Statement of Case gives no indication of when HMRC considered the issue of special circumstances, what factors were taken into account, what criteria were applied in reaching the decision in relation to special circumstances and why that decision was reached. Plainly, there will be some cases where there is nothing special or unusual about a taxpayer's circumstances which would justify anything beyond a statement in the review letter along the lines of that contained in the Statement of Case in this appeal. Where, however, the particular circumstances of an appeal, such as those of the present appeal, present potentially mitigating factors, albeit ones falling short of a reasonable excuse, it is necessary for HMRC to make it clear in their review letters that they have considered those factors and to explain why and on what basis they have concluded that they do not constitute special circumstances.

27. The review letter of 12 September 2014 appears to have been the last step in HMRC's consideration of the appellant's appeal, until HMRC's preparation of its Statement of Case. The letter advises the appellant either to accept the review letter's conclusion or, if the appellant does not agree with the conclusion, to appeal to the tribunal within 30 days. It effectively invites the appellant to pay up or litigate. I infer from that that no further consideration was to be given by HMRC of the quantum of the penalty payable by the appellant. Certainly, that would be the natural inference for the appellant to draw. I further note that in the appellant's computerised Self-Assessment notes reproduced by HMRC there is no reference to any consideration being given to whether there were "special circumstances". The notes referred to the review decision being taken on 11 September 2014 and then to the fact that the papers were placed in the "ARU [Appeals & Review Unit] rejected folder w/e 12/9/14...."

28. A failure by HMRC to consider the question whether to exercise their discretion under paragraph 16 Schedule 55 FA 2009 to take account of "special circumstances" is a flawed decision (see *Algarve Granite v HMRC* [2012] UKFTT 463 (TC) and, in relation to the failure to exercise discretion on review, *Christine Perrin v HMRC* [2014] UKFTT 488 (TC)).

29. Accordingly, the apparent failure by HMRC to consider in the decision against which the appellant appeals whether there were "special circumstances" means that this Tribunal is entitled to vary a penalty because of "special circumstances".

30. In this case, I consider that the failure by HMRC to act on Forms 64 – 8 and SA1 sent to them by Chronicle Accountants on 20 January 2014 was a contributory factor in the Appellant's failure to file his tax return on time. Although this did not, in my view, amount to a reasonable excuse, it is something that should be taken into account when considering whether there were "special circumstances". It seems to me that this failure takes this case "out of the ordinary run of events". Taking all the circumstances into account, I therefore reduce the penalty to £60.

31. Accordingly, this appeal is, in part, allowed.

32. 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.

10

**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 3 February 2015

15