



Neutral Citation: [2024] UKFTT 00412 (TC)

Case Number: TC09172

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public in Bristol

Appeal reference: TC/2023/08185

INCOME TAX – penalties for late filing – appeal late – application to make a late appeal – application rejected – substantive appeal considered – appeal dismissed

Heard on: 26 March 2024

Judgment date: 15 May 2024

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS JANE SHILLAKER**

Between

MR JIT PANESAR

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: In person

For the Respondents: Madeline French litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This decision deals with two matters. The appellant appeals against late filing penalties which have been visited on him for the late filing of his 2013 income tax return. A notice to file was issued to the appellant on 6 April 2013 but his paper return for that tax year was not received by HMRC until 31 October 2022.

2. Accordingly, HMRC assessed the appellant to late filing penalties amounting in total to £1,600. The penalty notices were issued in August 2014 and February 2015. The appellant did not appeal against these until 11 July 2022. Accordingly, his appeal is very late. HMRC object to this late appeal and the appellant applies to us for permission to bring a late appeal.

THE LAW

3. There was no dispute about the law relating either to the late filing penalties or to the exercise of our discretion as to whether to admit a late appeal. The relevant law is set out below:

Late filing penalties

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970 (“TMA”), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by HMRC to submit a tax return, must submit that return by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed online).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 (and references below to paragraphs are to paragraphs in that Schedule).

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for 3 months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6-month penalty) – 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(d) failure to file for 12 months (i.e. the 12-month penalty) – 5% of payment due or £300 (whichever is the greater) (paragraph 6).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to the tribunal under paragraph 20, the tribunal can either give effect to the same percentage reduction as HMRC have given for special circumstances. The tribunal can only change that reduction if it thinks HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Late appeal

4. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("**Martland**") in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to

refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal”.

THE EVIDENCE AND FINDINGS OF FACT

5. We were provided with a bundle of documents. At the hearing the appellant handed up further documents. After due consideration Miss French did not object to the late introduction of these documents. The appellant gave oral evidence. From this evidence we find as follows:

(1) On the evening of 31 January 2014, the appellant sat down in front of his computer intending to complete and submit two self-assessment tax returns for 2012/2013. One for himself and one for his wife. He had been issued with a notice to file his return for that tax year on 6 April 2013. He started by completing and submitting his wife's return. There was no liability for his wife to pay tax. However, although the appellant thought that he had successfully submitted his wife's return, that was not the case. It was not successfully submitted to HMRC. However, HMRC, having originally assessed his wife for late filing penalties, subsequently agreed that those penalties need not be paid.

(2) The appellant then completed his online tax return and submitted it to HMRC. In fact, like his wife's return, it was not successfully submitted. The appellant's evidence was that he thought it had been.

(3) It was the appellant's largely unchallenged evidence that during the evening of 31 January 2014 when he was attempting to submit the tax returns, there were multiple crashes of HMRC's website. It is his assertion (to which we return later) that he filed his return on time but that return was lost in HMRC's system.

(4) We find as a fact that during that evening there were indeed multiple crashes of HMRC's website. And we also find as a fact that the appellant did not complete the submission of the return as a successful submission would have generated an online receipt which would have confirmed successful submission and provided the appellant with a submission receipt reference number. No such receipt was generated by HMRC's system and provided, electronically, to the appellant. The appellant did not provide a copy of any such receipt. He had however provided us with copies of other electronic documents. We infer from the fact that no such receipt was given to us that the appellant did not receive one.

(5) The appellant had a modest tax liability of some £596 which was paid to HMRC on 3 February 2014.

(6) Shortly after 31 January 2014, the appellant, who owns a house in Cyprus, left the UK for Cyprus where he spent the next three years. During that time, he did not return to England. He left no forwarding address for his post. His evidence was that the post simply piled up in the house and awaited his return.

(7) HMRC had no record of a successful return made by the appellant in respect of his 2012/2013 tax return. Accordingly, they issued late filing penalties, and sent to the appellant's address notices of those penalties. The appellant has not seriously challenged HMRC's evidence that they sent those notices to the correct address, and we find as a fact that HMRC did so send them. We also find as a fact that they were not returned as undelivered and that they arrived at the appellant's correct UK address.

(8) The penalties were issued on 18 February 2014 (£100), 18 August 2014 (£300) and (£900) and 24 February 2015 (£300). HMRC could not produce copies of the notices themselves but asked us to infer from the pro forma document that the notices sent to the appellant would have included the appellant's appeal rights. We find as a fact that they did.

(9) HMRC provided us with a copy of a document setting out the appellant's self-assessment statements dated 10 March 2014, 19 June 2014, 8 September 2014, 3 December 2014, 9 March 2015, 18 June 2015, 6 March 2016, 2 March 2017 and 14 June 2017. They have asked us to infer from this document that this reflects statements which were physically sent to the appellant's address on or around those dates, and from which the appellant could readily see the penalties which have been charged. The appellant did not seriously challenge HMRC's submission and evidence, and did not deny receiving these.

(10) The appellant returned to the UK in 2017. We are not sure of the precise date. It is clear from correspondence which we have been shown that during January 2018 he was engaged in correspondence with a firm of accountants/bookkeepers (who turned out to be wholly unsatisfactory) with a view to getting that firm to submit his tax return for 2016/2017.

(11) As a matter of fact, both his 2016/2017 and 2019/2020 tax returns were submitted late. He appears to have been assessed to late filing penalties for these two years. The appellant appealed against late filing penalties for all three tax years on 11 July 2022. On 24 October 2022, HMRC accepted his appeals against late filing penalties for the late filing of his 2016/2017 and 2019/2020 tax returns. HMRC did not, however, accept his late appeal against the penalties for the late filing of his 2012/2013 tax return.

(12) The appellant's evidence was that in early 2022 he noticed that his tax debt had escalated and asked his agent to look into the reason for this. It was then that he reviewed his online tax account and saw that penalties had been charged for the tax years in question. His evidence is that this was the first time that it came to his knowledge that penalties had been charged for the 2012/2013 tax year.

(13) He spoke to HMRC in May 2022. It was then that he was told that he had failed to file his 2012/2013 tax return. It was too late to submit an electronic return and the appellant was told he had to apply for a paper return which he did. However, the paper return that he was sent some 12 days later, was not for the correct year. It was for 2020/2021. In order to expedite matters he amended the return so that it read 2012/2013 and submitted the completed form. In a letter dated 24 October 2022, HMRC indicated they could not accept that paper return for it was the wrong year. They advised the appellant to go to HMRC's website and go to the archive where he would be able to download the relevant form for completion.

(14) HMRC's records show that the appellant's return for the year ended 2012/2013 was received by them on 31 October 2022.

(15) In a letter dated 13 April 2023 to the appellant, HMRC indicated that they were not prepared to accept his late appeal against the late filing penalties for the 2012/2013 tax year. On 20 May 2023 the appellant appealed to the tribunal against the penalties which included his application that his appeal be heard out of time.

(16) The appellant has been in the self-assessment regime since 18 August 1998. Apart from the issues with the returns mentioned above, there appear to have been no other instances of late filing. The appellant's evidence was that he filed his 2014/2015 tax return, online, from Cyprus. There is no evidence that this was not properly submitted on a timely basis.

DISCUSSION

The late appeal application

6. It is for the appellant to persuade us that we should exercise our judicial discretion to allow him to bring a late appeal.

7. We approach this in light of the three criteria set out in *Martland*, and which are set out in more detail at [4] above.

The length of the delay

8. The first issue is whether the appeal is late in the first place and if it is, the length of that delay and whether it is serious and significant. In fact, at this stage we simply need to assess the length of the delay and whether it is serious or significant is a matter which weighs in the balance at the final evaluation stage. *Martland* simply says that if we were to decide that the delay was not serious or significant, there may be no need to go on to consider the other two criteria.

9. The appealable decisions i.e. the penalty assessments, were dated 18 February 2014, 18 August 2014 and 24 February 2015 and sent to the appellant's home address on or around those dates. The appellant's appeal against these penalties was not made to HMRC until 11 July 2022. That is more than 8 years after the date of the first notice.

10. We therefore agree with HMRC that the appeal against these assessments was submitted to them very late. And so, we now go on to consider the remaining *Martland* criteria.

The reasons for the delay

11. The appellant submits (as regards both the application for permission to appeal late, and as a reasonable excuse for his late filing) in summary, as follows:

(1) He had successfully submitted his 2012/2013 tax return to HMRC. It was filed on time and lost in HMRC's system.

(2) He paid the tax due under that return at the same time.

(3) He has a copy of the online return submitted on 31 October 2022 which has a reference number on it.

(4) A screenshot taken from his computer shows the return saved on 31/01/2014 in his folder.

(5) He only became aware of the fact that the return had not been submitted on time in May 2022 when he was reviewing matters with his accountant. Thereafter he engaged fully with HMRC to rectify the position.

(6) He applied for a paper return. He received one for the wrong year which he altered in an attempt to make sure that his return was submitted on a timely basis. That return was rejected following which he downloaded a copy of the correct version of the return which he ultimately submitted, in paper form, on 31 October 2022.

(7) HMRC have waived penalties in respect of the return filed for his wife for the 2012/2013 tax year.

(8) HMRC have based their decision on a four-year submission rule enacted in 2016 and should have made him aware of this sooner than they actually did.

(9) The penalty notices and reminder letters did not come to his attention as he was in Cyprus between 2014 and 2017. He had left no forwarding address.

12. It is HMRC's position that these do not comprise either good reasons for failing to make a timely appeal, or a reasonable excuse for having failed to submit his tax return on a timely basis.

13. As regards the latter, they point out that the appellant has been in the self-assessment regime for a number of years and has successfully completed returns on a timely basis. He would therefore have known that in order for his return to have been successfully completed, he would have received an electronic receipt. The fact that he did not do so for the 2012/2013 tax return should have put him on notice that the return had not been successfully filed. He may have mistakenly believed that he had filed the return but that is not a reasonable excuse.

The failure to respond to the penalty notices indicates a general disregard for his filing obligations.

14. As regards the former, HMRC submit that the appellant had received the penalty notices which were sent to the correct address. These penalties were also apparent from his online records. He would therefore have been aware of the penalties, and his right to appeal against them, in 2014, and then again in 2015, 2016 and 2017, and should have appealed earlier. There is no evidence that the penalty notices or the statements of account, were returned to HMRC undelivered. The appellant's underlying case, namely that he has a reasonable excuse for having failed to submit his return on time, has no obvious strengths.

The final evaluation

15. We can now consider at the third, final evaluation, stage of the *Martland* test.

16. At this stage we need to conduct a balancing exercise assessing the merits of the reasons for the delay, taking into account its seriousness and significance, with the prejudice which would be caused by granting or refusing permission. And we remind ourselves that when conducting this balancing exercise, litigation must be conducted efficiently and at proportionate cost, and statutory time limits should be respected.

17. We must take into account all relevant factors, and one of these is any obvious strength or weakness of the appellant's case.

18. The delay in bringing the appeal against the penalty assessments is clearly serious and significant. The penalty notices were issued in February 2014, August 2014, and February 2015, yet the appeals were not submitted until July 2022.

19. The reason provided by the appellant for this delay is pretty straightforward. Having left the UK for Cyprus in early February 2014, and having thought that he had successfully submitted his tax return, he was not aware of the penalty notices until he was reviewing the situation with his accountant in May 2022. He then sought to rectify the position with alacrity, and appealed on 7 July 2022.

20. We would have considerable sympathy with the appellant's position were it not for two things. Firstly, when he arrived back in the UK in 2017, his evidence is that he was faced with a mound of paperwork. It seems to us that it was incumbent on him to have gone through their paperwork. We have found as a fact that waiting for him would have been the penalty notices and the statements of account referred to above. Whether the appellant did this and simply overlooked them, or (less likely given his conscientious attitude towards the penalties when he actually found out about them in May 2022) he saw them and deliberately took no action, we cannot say.

21. We think it is inconceivable that none of the correspondence sent by HMRC to the appellant's address, including the penalty notices and statements of account, arrived there, nor that they were awaiting the appellant on his return from Cyprus. There is no record of any of those documents having been returned undelivered.

22. We suspect that faced with all the paperwork, the appellant may well have not scrutinised it as diligently as he should and simply overlooked the penalty notices and statements of account.

23. Secondly, (and this goes to the point as regards any obvious strengths and weaknesses in the appellant's underlying case) for the reasons given in [34-40] below, we do not think that the appellant has an objectively reasonable excuse for having failed to submit his return on a timely basis.

24. The reason given by the appellant for failing to appeal in time, namely that the notices did not come to his attention until May 2022, does not outweigh the length of the delay, and its serious and significance, given that (1) the penalty notices and statement of account were awaiting him on his return from Cyprus and (2) there is an obvious weakness in the appellant's underlying case.

25. Litigation must be conducted efficiently and at proportionate cost. We accept that if we reject the appellant's application, he will be prejudiced in that he will not be able to run an appeal against the penalties. However, that is simply a consequence of the appellant's failure to bring his appeal in time.

26. We therefore reject the appellant's application to make his appeal against the penalties, out of time.

27. However, because it was fully argued, we have considered whether the appellant has a reasonable excuse and/or, whether there are special circumstances which might relieve him from the penalties for failing to submit his 2012/2013 tax return on time.

Failure to file the 2012/2013 return on time

28. If the appellant can establish that he had a reasonable excuse for not filing his return on time then he can be excused from his liability to the penalties.

29. The onus is on the appellant to show that, on the balance of probabilities, the facts show that he had a reasonable excuse.

30. The legal principles which we must consider when an appellant submits that he has a reasonable excuse are set out in the the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("**Perrin**"). The relevant extract is set out below:

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

(1) 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).

(2) Second, decide which of those facts are proven.

(3) 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?"

(4) 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.

82. 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. The Clean Car Co itself provides an example of such a situation”.

31. The test we adopt in determining whether the appellant has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

“The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

32. The reasonable excuse must also have subsisted throughout the whole period of default.

33. So now consider the appellant’s evidence and submissions regarding reasonable excuse.

34. In simple terms it is his case that, as far as he was concerned, the return was submitted on time and was accepted by HMRC as having been submitted. It was simply lost in HMRC’s system following that successful submission. He also submits that evidence of successful filing is the fact that the tax was paid at the same time.

35. We accept his evidence that during the evening of 31 January 2014, HMRC’s computer kept crashing. But this should have put the appellant on notice that, given that he had not received an online receipt, it was likely that his return had not been successfully submitted. And given that he had successfully submitted online tax returns in the past (and we infer that because there had been no issues with those, he had received an online receipt in respect of those returns) he should have realised this. In our view the objectively reasonable taxpayer in the appellant’s position would have realised that the return had not been successfully submitted.

36. He should, therefore, have checked the position after 31 January 2014, perhaps on his arrival in Cyprus, to review whether there had been a successful submission. The appellant is clearly computer literate and capable of accessing his online account. A simple online check would have made clear to him that the return had not been successfully filed. He could have then rectified the position in February 2014, and although he would have received a £100 late filing penalty, that would have been his only penalty liability.

37. It is the fact that the appellant was aware of the problems with HMRC’s computer at the time of filing his return, in light of successful filings earlier (and indeed his successful filing of the 2014/2015 return from Cyprus) yet carried out no verification exercise to check that the return had been properly submitted, which has led us to conclude that he had no reasonable excuse for the late filing of his 2012/2013 return.

38. We set no store by the fact that the appellant paid tax at the same time (his words) as evidenced by his bank statement. This simply shows that the appellant paid the tax which he considered due. It was he who initiated the payment. It was not as though HMRC had some form of direct debit/standing order and simply extracted the payment from his account. The text against the debit on his account states that it is a “Card Transaction”.

39. Furthermore, the document which we think that the appellant submits is a hard copy of his 2012/2013 return which contains a specific reference number, is not a document that he talked us through at the hearing, and we have simply no idea of its provenance, nor when he ran it off. Nor indeed the relevance of the reference number which is printed at the bottom of page 1. All we can say, however, is that even if this is a copy of the return, that itself does not evidence the fact that it was filed successfully on or before 31 January 2014.

40. Finally we can see no probative value in the screenshot which has been produced to us. It appears to be a screenshot from the appellant's computer which records that PDF files comprising the tax returns for himself and his wife were created at 21:29 and 20:59 on 31 January 2014. That is not evidence of successful filing. It is simply a record that at those times, the appellant created PDF files of the returns on his machine.

41. So, for these reasons we do not consider that the appellant has an objectively reasonable excuse for having failed to submit his 2012/2013 tax return on time.

42. We have also considered whether there are special circumstances which might warrant a special reduction. We do not consider that there are. The appellant simply failed to check whether he had successfully submitted his return against the background of HMRC's website crashing. This is not a special circumstance.

DECISION

43. For the foregoing reasons we have decided that the appellant should not be given permission to bring his appeal out of time.

44. We have also decided that even if we had given the appellant permission, we would have dismissed his appeal against the penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 15th MAY 2024