



Neutral Citation: [2024] UKFTT 790 (TC)

Case Number: TC09280

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2024/01802

INCOME TAX – late filing penalties charged under Schedule 55 of the Finance Act 2009 for the late filing of a self-assessment tax return – whether the Appellant was in default of an obligation imposed by Parliament in relation to the requirement to file a tax return by the statutory deadline – yes – tax return sent to the wrong address and penalties issued – tax return only received at the right address after all penalties were notified – whether a reasonable excuse was established for the default which has occurred – yes but only in relation to the initial late filing penalty – whether the default was remedied without unreasonably delay once the reasonable excuse ended – no as the tax return was not filed immediately once the initial late filing penalty was issued but after the daily penalties and the six-month late filing penalty were issued – Appeal allowed in part

Heard on: 2 July 2024

Judgment date: 2 September 2024

Before

**JUDGE NATSAI MANYARARA
SONIA GABLE JP**

Between

HAYLEY FARMER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Philip Evans, Accountant

For the Respondents: Mrs Nicola Shardlow, Litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant (Hayley Farmer) appeals against penalties that HMRC have charged under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for failure to submit an annual self-assessment return on time. The penalties charged on the Appellant arose as follows:

Tax Year	Date of Penalty	Legislation	Description	Amount
2021-22	14 February 2023	para. 3, Schedule 55	Late filing penalty	£100
2021-22	15 August 2023	para. 4, Schedule 55	Daily penalty	£900
2021-22	15 August 2023	para. 5, Schedule 55	6-month penalty	£300
			Total	£1,300

2. With the consent of the parties, the form of the hearing was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The documents to which we were referred to were: (i) the Document Bundle consisting of 92 pages (within which was the Notice of Appeal dated 19 February 2024); the Legislation and Authorities Bundle consisting of 117 pages; and (iii) the Statement of Reasons dated 18 April 2024.

3. The Appellant failed to attend the hearing but the Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing, and that it was in the interests of justice to proceed with the hearing. In any event, the Appellant was represented and Mr Evans submitted that he was not expecting the Appellant to attend the hearing.

ISSUES

4. The issues under appeal are:

- (1) Whether the penalties charged were correctly issued.
- (2) If so, whether the Appellant has established a reasonable excuse.

5. Two further questions arise in determining this appeal. They are: if the Appellant is in default of an obligation imposed by statute: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period?

6. The above matters are to be considered in light of all the circumstances of the case.

BURDEN AND STANDARD OF PROOF

7. HMRC bear the initial burden of demonstrating that the penalties were notified and are due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

8. The standard of proof is the civil standard; that of a balance of probabilities.

BACKGROUND FACTS

9. On 6 April 2022, the Appellant was issued with a notice to file for the year ending 5 April 2022. The notice to file was issued to the address held on file for the Appellant by HMRC (at 6 Owen Road). The filing date for the return was 31 October 2022 (for a paper return), or 31 January 2023 (for an electronic return).

10. On 27 April 2022, the Appellant’s tax return was sent to an address with the postcode L75 1ZY. That address was not, however, the valid address for sending correspondence to HMRC.
11. On 14 February 2023, HMRC issued a notice of penalty assessment under para. 3 of Schedule 55, in the amount of £100.
12. On 15 August 2023, HMRC issued a notice of penalty assessment under para. 4 of Schedule 55, in the amount of £900 (calculated at £10 per day for 90 days). On the same date, HMRC issued a notice of penalty assessment under para. 5 of Schedule 55 FA 2009, in the amount of £300.
13. On 14 September 2023, the Appellant’s paper return for the year ending 5 April 2022 was received by HMRC. The return was submitted 318 days late.
14. On 1 November 2023, an unauthorised representative of the Appellant made an initial appeal under para. 20 of Schedule 55, in respect of the penalties charged.
15. On 21 November 2023, HMRC issued an incorrect decision letter following the unauthorised appeal received. The letter was issued to the Appellant and upheld the decision to charge the penalties. Unfortunately, the letter was incorrectly issued against late payment penalties.
16. On 15 December 2023, a further appeal was received from the same unauthorised agent on behalf of the Appellant.
17. On the 8 January 2024, a letter was issued advising the agent that there was no authorisation to discuss the Appellant’s tax affairs.
18. On 20 February 2024, the Appellant lodged an appeal with the First-tier Tribunal (‘FtT’).
19. On 22 February 2024, a further appeal was received from the Appellant by HMRC.

APPLICABLE LAW

20. The relevant law, so far as is material to the issues in this appeal, is as follows:

“SCHEDULE 55

Penalty for failure to make returns etc

“1(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

...

(4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC ...;

“penalty date”, ..., means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

...

3 P is liable to a penalty under this paragraph of £100.

4(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).
- 5(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.”

...

Special reduction

- 16(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 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.

...

Assessment

- 18(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
- (a) assess the penalty,
 - (b) notify P, and
 - (c) state in the notice the period in respect of which the penalty is assessed.”

Reasonable excuse

23(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.”

APPEAL HEARING

21. We derived considerable benefit from hearing the submissions made by Mrs Shardlow and Mr Evans. As a result of the Appellant’s absence, no live evidence was called.

22. Mrs Shardlow’s submissions can be summarised as follows:

- (1) There is no indication as to what was sent to HMRC in relation to the proof of postage receipt provided by the Appellant.
- (2) The post code referred to in the proof of postage receipt is for a site that has been permanently closed. The correct address for sending things by post to HMRC is BX9 1AS. That is not the address shown on the proof of postage. The relevant department must also be included when sending correspondence to HMRC as the BX9 address is a sorting office. Even when documents cannot be scanned through due to illegibility, attempts will be made to scan the documents and the documents will be delivered to the correct department.
- (3) The Self-Assessment (‘SA’) notes show the actual date that the Appellant’s 2022 tax return was received by HMRC. The return was received on 14 September 2023 and fully captured on 27 September 2023. It was 318 days late.
- (4) The penalty notices issued to the Appellant should have made the Appellant aware that the notice to file had not been received by HMRC in 2022.

23. Mr Evans’ submissions can be summarised as follows:

- (1) The Appellant’s tax return was filed on 27 April 2022 and no tax was payable. The Appellant has submitted proof of postage. The address shown in the proof of postage receipt is the same address that was used, and to which other documents were sent to HMRC. In previous years, documents were sent to HMRC at the BX9 address but HMRC advised not to use that address.
- (2) The correspondence received from HMRC referring to an adviser known as “ENSIGN” was considered to be a scam as the Appellant and her family have had the same accountants for a number of years.

24. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

25. The following facts were either admitted, or proved:

(1) On 6 April 2022, a notice to file for the tax year ending on 5 April 2022 was issued to the Appellant and the filing date for the tax return was 31 October 2022 (for a paper return) and 31 January 2023 (for an electronic return). The notice to file was issued to the address that HMRC had on file for the Appellant ('the notified address')

(2) On 27 April 2022, the Appellant's tax return was sent to an address that was not the valid address for sending correspondence to HMRC.

(3) On 14 February 2023, a notice of penalty assessment was issued to the Appellant at the notified address for the late filing penalty as the Appellant's tax return had not been received by HMRC by the filing date.

(4) On 15 August 2023, the daily penalties and six-month late filing penalty were issued to the Appellant at the notified address.

(5) On 14 September 2023, the Appellant's tax return was received. It was captured on HMRC's systems on 27 September 2023. The return was 318 days late.

26. We, therefore, make these findings of fact.

CONSIDERATION

27. The Appellant appeals against penalties that HMRC have charged for the late filing of a self-assessment tax return. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute. In *Perrin v R & C Comrs* [2018] BTC 513 ('*Perrin*') (Judges Herrington and Poole), at [69], the Upper Tribunal ('UT') explained the shifting burden of proof as follows:

"Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

28. The factual prerequisite is therefore that HMRC have the initial burden of proof: see also *Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) (in the context of a discovery assessment).

Q. Is the Appellant in default of an obligation imposed by statute?

29. The Appellant was issued with a notice to file on 6 April 2022. A notice to file creates a legal obligation to file a tax return. The "filing date" for a self-assessment tax return is determined by s 8(1D) of the Taxes Management Act 1970 ('TMA'). For the year ending 5 April 2022, a paper return must be filed by 31 October 2022 and an electronic return must be filed by 31 January 2023. The notice to file clearly details the filing dates and the consequences of failing to meet them. Furthermore, both the filing date and the "penalty date" are defined at para. 1(4) of Schedule 55.

30. The Appellant's tax return was only successfully received by HMRC on 14 September 2023. The incontrovertible fact in this appeal is that the Appellant's tax return was received by HMRC 318 days late. We shall return to the issue of where the return had originally been sent to on 27 April 2022 later.

31. Schedule 55 makes provision for the imposition by HMRC of penalties on taxpayers for the late filing of tax returns. If a person fails to file an income tax return by the penalty date (i.e., the date by which a return is required to be made or delivered to HMRC (the filing date)), para. 3 of Schedule 55 provides that s/he is liable to a penalty of £100. Paragraph 4 of Schedule 55 provides that a person is liable to a penalty under this paragraph if the failure continues after the end of the period of three months, beginning with the penalty date. Paragraph 5 of Schedule 55 provides that a person is liable to a penalty under that paragraph if his failure continues after the end of the period of 6 months beginning with the penalty date.

32. It is clear that a person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable within 12 months. The provisions governing the assessment of the relevant penalties are set out in para. 18 of Schedule 55 (supra).

33. The Appellant does not argue that there were any defects in the penalty notices and in the procedure that HMRC followed when issuing them. In any event, such arguments were considered, and rejected, by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 (*'Donaldson'*). We are bound by that decision. Furthermore, we are satisfied that the penalties were correctly notified to the Appellant.

34. We have concluded that the Appellant's return for the 2022 tax year was successfully submitted on 14 September 2023. It should have been submitted by 31 October 2022 (paper) or 31 January 2023 (electronic). Subject to considerations of 'reasonable excuse' and 'special circumstances' set out below, the penalties imposed are due and have been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default?

35. 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 of the circumstances of the particular case: *Rowland v R & C Comrs* (2006) Sp C 548 (*'Rowland'*), at [18]. The test we adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 (*'Clean Car'*), in which Judge Medd QC said this:

"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?"

36. Although *Clean Car* was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

37. In *Perrin*, the UT set out a four-step process for the FtT to use when considering whether a person has a reasonable excuse, at [81], as follows:

"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.”

38. The UT explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The UT concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word ‘reasonable’ imports the concept of objectivity, whilst the words ‘the taxpayer’ recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer.

39. In *Harrison v R & C Comrs* [2022] BTC 525, the UT viewed the four-stage approach in *Perring* to be guidance, rather than a set of principles to be followed.

40. In *Barrett v HMRC* [2015] UKFTT 329 (TC), Judge Berner said this:

“The test of reasonable excuse involves the application of an impersonal, objective, legal standard to a particular set of facts and circumstances. 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.”

41. And:

“The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual’s conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as no unreasonable in the case of another whose circumstances are different.”

42. The standard by which a reasonable excuse falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question and having proper regard for their responsibilities under the Taxes Acts: *Collis v HMRC* [2011] UKFTT 588 (TC) (*‘Collis’*). The decision depends upon the particular circumstances in which the failure occurred.

43. We proceed by firstly determining whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, we have assessed whether the facts put forward and any belief held by the Appellant are sufficient to amount to a reasonable excuse.

The initial late filing penalty

44. It is submitted, on behalf of the Appellant, that the Appellant’s tax return had been sent to HMRC in April 2022 (by post). We accept Mr Evans’ submissions that he believed that the tax return had been sent to the right address and it is clear that the address shown in the proof of postage receipt was associated with HMRC. We, therefore, find that there has been no attempt to bolster the Appellant’s case, or to mislead. However, the address to which the tax return was sent was not, in fact, the correct address. We, nevertheless, accept that the address

to which the tax return was sent is an address which is associated with HMRC, but is no longer in use.

45. The first penalty was received on 14 February 2023 and this was after the filing date had already passed and before the Appellant was aware that the tax return had not been received. Up to that point, we are satisfied that the Appellant had a reasonable excuse as the tax return had been sent, but it was not sent to the right address.

The daily penalties and the six-month late filing penalty

46. Following the initial failure to file, the initial late filing penalty notice was sent to the Appellant on 14 February 2023. Although the Appellant's agent has indicated that the tax return had been sent to HMRC by post, we conclude that the initial late filing penalty notice should have prompted further action on the part of the Appellant, which would have avoided the second set of penalties on 15 August 2023. Consequently, therefore, the failure was not remedied without unreasonable delay following the initial late filing penalty.

47. We find that the notices of penalty assessment were sent to the address that HMRC had on file for the Appellant and there is no suggestion that they were returned undelivered. There is no suggestion on the evidence before us that there were any difficulties with the postal service at around the time of those deliveries. The Interpretation Act 1978, at s 7 (which relates to service by post), provides that:

“Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.

48. Whilst the default may not have been intentional, this does not amount to a reasonable excuse in the circumstances of this appeal. In *Garnmoss Ltd. T/A Parham Builders v HMRC* [2012] UKFTT 315 (TC), the tribunal held (in the context of a VAT appeal and the question of reasonable excuse) that:

“12. 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. We cannot say that this confusion was a reasonable excuse.”

49. We find that the reasonable excuse ended once the first notice of penalty assessment was received by the Appellant in February 2023, but the tax return was only received in September 2023, after the daily penalties and the six-month late filing penalty had been issued. We further find that whilst the Appellant may have honestly believed that the tax return had been validly submitted, having received the initial late filing penalty, in our judgment it was not objectively reasonable to have failed to consider the ramifications. It is clear that the penalty was applied because the tax return had not been received by HMRC. In those circumstances, the initial belief is not objectively reasonable.

Q. Do any special circumstances apply?

50. The amount of the penalties charged is set within the legislation. Even when a taxpayer is unable to establish that s/he has a reasonable excuse and remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate.

51. The Tribunal may rely on para. 16 (Special Reduction) but only if HMRC's decision was ‘flawed’ when considered in the light of the principles applicable in proceedings for judicial review’. That is a high test. It is in the context of that specific jurisdiction that the question of

proportionality must be considered. There are many appeals in the FtT where the question as to whether there are special circumstances justifying a reduction in the amount of a penalty has been considered. The special circumstances must apply to the individual and not be general circumstances that apply to many taxpayers: see *Collis*, at [40].

52. The Appellant had no outstanding tax liability. In *Edwards v R & C Comrs* [2019] BTC 516 (*Edwards*), the UT concluded that the penalty regime set out in Schedule 55 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. The UT considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were ‘special circumstances’ which justified a reduction in the penalties.

53. The UT determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty. It follows that we have concluded that the mere fact that the Appellant may not have had tax liability does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of ‘special circumstances’ in relation to the penalty scheme.

54. We have also considered the case of *R & C Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the Upper Tribunal held that the FtT did not have power to discharge penalties on the ground that their imposition was unfair. The UT held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Tribunal found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves.

55. The amount of the penalties charged is set within the legislation. Even when a taxpayer is unable to establish that s/he has a reasonable excuse and remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. HMRC have considered the Appellant’s grounds of appeal and found that her circumstances do not amount to special circumstances which would merit a reduction of all of the penalties. Accordingly, HMRC’s decision is not flawed.

56. For the reasons set out above, the appeal is allowed, in part. The initial late filing penalty is set aside and the remaining penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 02nd SEPTEMBER 2024