



TC07245

Appeal number: TC/2019/00067

INCOME TAX - penalties for failure to make returns - whether a reasonable excuse - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

KANE KYRIAKIDES

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE DR KAMEEL KHAN

The Tribunal determined the Appeal on 1 June 2109 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 4 January 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 22 February 2019.

DECISION

Background

The Appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an Individual Tax Return for the year ending 5 April 2017.

1. The penalties that have been charged can be summarised as follows:
 - i. a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018.
 - ii. a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018.
 - iii. “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018.
2. The Appellant’s grounds for appealing against the penalties can be summarised as follows:
 - i. He argues that there was a “reasonable excuse” for any failure to submit the return on time.
 - ii. He had numerous changes of address so did not receive return notices.
 - iii. He did not realise he had registered for self-assessment which caused confusion and delay.
 - iv. He did not have a UTR, but obtained one, and the activation code was sent to the wrong address hence his advisor could not file a 64-8 form.
3. The Appeal was made on 25 October 2018 and, in producing a Statement of Case, it is taken that HMRC have no objection to the late appeal.

Reasonable Excuse.

4. Paragraph 23 of Schedule 55, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal to a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

The law specifies two situations that are not reasonable excuse:

- i. An insufficiency of funds, unless attributable to events outside the Appellant’s control, and
 - ii. Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
5. 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).
6. 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 Taxes 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.

7. Relevant Statutory Provisions

Section 8(1D) TMA 1970 provides for the due dates of filing, whereby a paper return is due by 31 October, and an electronic return is due by 31 January in the following tax year. Failure to file a return on time results in a penalty. Repeated failure to file returns may result in further penalties.

The right to appeal against penalty determinations is provided under Section 100B of the Taxes Management Act ('TMA'), and the Tribunal is given jurisdiction to decide whether a 'penalty has been incurred', to set aside the determination, to confirm, to increase or to reduce the penalty to the correct amount.

Section 8 of the Taxes Management Act 1970 ('TMA'), places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date.

Findings of Fact

8. The notice to file for the year ending 5 April 2017 was issued to the Appellant on 6 April 2017. It was addressed to his address in Great Yarmouth and included information relating to deadlines for submitting the return and to late filing penalties. It also explained there would be more penalties if the return is three, six or twelve months late.

9. The filing date was 31 October 2017 for a non-electronic return or 31 January 2018 for an electronic return. The electronic return of the Appellant was received on 24 October 2018, which is nearly one year late.

10. As the return was not received by the filing date a penalty of £100 was applied. A three month and six month penalty was also applied as the returns were late.

11. The penalties were sent to the address which HMRC had for the Appellant.

12. The Appellant had registered for self-assessment and National Insurance Contributions on 1 August 2016 using the Online Tax Registration Service (OTRS). The records show that the Appellant commenced self-registration on the 15 July 2016 and gave his address as 165 High Street, Gorleston, Great Yarmouth NR31 6RG, which is the address used by HMRC. All notices were taken as delivered since not returned.

13. The Appellant's agent said that the Appellant contacted HMRC on 31 May 2018 to register for self-assessment and obtain his UTR.

14. The HMRC records show that the Appellant made no contact with HMRC until 16 June 2018. He called HMRC on 20 June to request a new UTR and confirmed his address. He called again on 28 June 2018 to and obtained a UTR. His returns were submitted in October 2018.

Grounds of Appeal

15. The Appellant's agents (Andrew Parker Associates) made the following points:
 - i. "While we accept the initial £100 penalty for late filing for 2016/17, my client not realising he was already registered for self-assessment, tried to register himself online in May 2018. However, he did not receive a UTR and made a second attempt.
 - ii. "Eventually, bearing in mind we did not have 64-8 authorisation, he called and established he was already registered, and was given a UTR, after a couple of attempts. However, even then we could not obtain 64-8 authorisation because the address held was incorrect so our authorisation code was sent to the wrong address".
 - iii. "We then filed promptly in October 2018."
 - iv. "We believe the Officer on the initial phone call had grasped the situation, and had the address been corrected then, we would have been in a position to file the tax return in June 2018, reducing the size of the penalties".

HMRC submissions

16. The Appellant was registered for self-assessment on 15 July 2016 and his address was an address in Great Yarmouth. His self-employment commenced on 6 April 2016. He received a notice to file at his address. The return would be due for the year ending 5 April 2017. The return was filed on the 24 October 2018 and being late attracted penalties. He had the appropriate warning of penalties and knew the date from which the penalties would be payable.

17. The Appellant should have made HMRC aware of any change of address and it is not their responsibility to check any change of address. They issued a UTR to assist the taxpayer with his filings.

18. The Appellant had a responsibility in law to file returns on time and he did not do so in a timely manner. He had adequate information on self-assessment, returns and penalties and had access to public information and HMRC website if he needed help.

HMRC submit that there is no reasonable excuse and that there are no special circumstances giving rise to a special reduction in the penalties.

Discussion

19. I have concluded that the tax return for the 2017 tax year was submitted on or around 24 October 2018. It should have been submitted by 31 October 2017 subject to considerations of "reasonable excuse" and "special circumstances" set out below. The penalties imposed are due and have been calculated correctly.

20. The Appellant's main argument is that HMRC should have taken steps to verify his address. They are under no legal obligations to do so. If a taxpayer moves home, it is their responsibility to inform HMRC of a change of address. It may not be a legal obligation but it would be the action of a reasonable and responsible person. Taxpayers must inform HMRC of a change in their circumstances.

21. The notice to file a return was sent as a paper document to his Great Yarmouth address and there is no record of it being returned to HMRC or being undelivered by Royal Mail. It is reasonable to assume it was served within the ordinary course of postal deliveries in line with S7 Interpretation Act 1978.

22. The Appellant completed a CWF1 for online which registered for self-assessment. This is an interactive service which allows a new or existing business to register and to give information about self-assessment and national insurance. Once processed, the Appellant's records would have been activated. The record shows that his self-employment was started on 15 July 2016. There is no paper form, it is only online. The Appellant would have known of this registration. This combined with the notice to file would provide a clear indication that returns were due at year end. It is very difficult to understand why the Appellant thinks he has a reasonable excuse for late filing.

23. The fact that his agent could not activate his 64-8 agency form is no fault of HMRC but due to the fact that the taxpayer did not provide correct information to HMRC.

24. The Appellant has not demonstrated that a reasonable excuse existed which prevented him from complying with his Income Tax obligations. Based on the evidence, there is no reasonable excuse and as a consequence the penalties were correctly charged in accordance with the legislation.

The finding that the Appellant did not have a reasonable excuse for the late filing of the self-assessment return is not, however, the only determination to be made by the Tribunal.

We need to consider whether there are any special circumstances that justify reducing the amount of any of the penalties.

Paragraph 16 of Sch. 55 allows HMRC to reduce the penalty below the statutory minimum, if they think it right to do so because of special circumstances. The power given to the tribunal differ if the appeal is an appeal as to the amount or if the tribunal thinks that the decision itself is flawed, when considered in the light of principles applicable to judicial review.

Those principles include, in making a decision, the decision-maker must have regard to matters that are material or relevant to the decision being made.

HMRC have confirmed that they did consider whether there were any special circumstances and concluded that there are none. The penalties of £1,300 are not disproportionate.

The Upper Tribunal, in a helpful decision in *Barry Edwards v HMRC [2019] UKUT 0131 (TCC)* 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. This Tribunal agrees with that decision and its application to the facts of this case.

There are no special or "wholly exceptional" circumstances which apply to the particular individual in this case.

Decision

For the reasons stated, the appeal is dismissed and the penalties charged upheld.

The penalties in the total sum of £1,300 in relation the late filing of the 2016-17 return are confirmed.

Appeal Rights

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 a Company a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**DR KAMEEL KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 25 June 2019

APPENDIX

RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

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).

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

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.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

- (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 12 months beginning with the penalty date.
- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

- (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of —
- a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - b) £300.

(3a) For the purposes of sub-paragraph (3) (a), the relevant percentage is—

- a) for the withholding of category 1 information, 100%,
- b) for the withholding of category 2 information, 150%, and
- c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of —

- a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- b) £300.

(4a) For the purposes of sub-paragraph (4) (a), the relevant percentage is —

- a) for the withholding of category 1 information, 70%,
- b) for the withholding of category 2 information, 105%, and
- c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (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.

(6) Paragraph 6A explains the 3 categories of information.

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

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.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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.

7. 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:

22—

- (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.