



TC07249

Appeal number: TC/2018/00654

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment return – agent awaiting CIS information from contractor - new agent appointed but had to await clearance - requested information from HMRC - further delay in HMRC providing information - whether reasonable excuse - yes - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN WHEELER

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 29 May 2019 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 January 2018, and HMRC's Statement of Case received by the Tribunal on 16 March 2018 with enclosures. The Tribunal wrote to the Appellant stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. The appellant's agent responded on 28 March 2018.

DECISION

1. This is an appeal by Mr Kevin Wheeler ('the appellant') against penalties totalling £1,200 imposed by the respondents ('HMRC') under Paragraphs 4 and 5, of Schedule 55 Finance Act 2009, for his failure to file his self-assessment ('SA') individual tax return for the tax year ending 5 April 2016, on time.

Background

2. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 Finance Act 2009 and is the date after the filing date.

3. The appellant's return for 2015-16 was, if filed electronically, due no later than 31 January 2017, but was filed late on 21 September 2017.

4. A late filing penalty is chargeable where a taxpayer is late in filing their Tax return. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
- ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

5. Penalties of £100, £900, and £300 were imposed, under (i), (ii) and (iii) above. The appellant does not appeal the £100 penalty.

Reasonable excuse

6. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

The background facts

7. The notice to file a return for the year ending 5 April 2016 was issued to the appellant on 6 April 2016.
8. HMRC's automated system would use the address current at that time. HMRC's computer records showed the appellant's address as 12 Hern Road, Brierley Hill, DY5 2PW.
9. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return.
10. The appellant's electronic return for the year 2015-16 was received on 21 September 2017.
11. As the return had not been received by the filing date, HMRC issued a notice of penalty assessment (SA326D) on 7 February 2017 in the amount of £100. The SA326D contains the notice accepted in *Donaldson* as meeting 4(1)(c) Sch 55 requirements.
12. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment (SA372-30) on or around 11 August 2017 in the amount of £900, calculated at £10 per day for 90 days.
13. As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment (SA372-60) on or around 11 August 2017 in the amount of £300.
14. All the penalty notices were issued to the appellant at the address held, 12 Hern Road, Brierley Hill, DY5 2PW.
15. On 2 October 2017 the appellant's agent, Cutter & Co, appealed against the penalties, on the grounds that as the appellant's tax liability for 2015-16 was £808.89 the penalties charged were disproportionate.
16. The appellant's tax liability of £808.89 was paid late on 10 October 2017.
17. HMRC sent the appellant a decision letter on 7 November 2017 rejecting his appeal and offering a review.
18. On 14 November 2017 the appellant's agent requested a review of HMRC's decision, saying that the absence of useful input by the appellant's previous accountant had led to the appellant appointing Cutter & Co in May 2017, and it then took them some time to gather the information required to complete the appellant's return.
19. HMRC carried out a review and issued their review conclusion on 4 January 2018. The outcome of the review was that HMRC's decision should be upheld.
20. On 23 January 2018 the appellant's agent notified their appeal to the Tribunal.

The appellant's case

21. The agent who had initially been acting for the appellant had been unable to file the appellant's return because he had no supporting records for the appellant's CIS sub-contract work, despite requesting them at the point of payment from the contractor in question, and numerous times afterwards.
22. The appellant's previous accountant had not advised the appellant that he could obtain the CIS income and tax information he needed from HMRC, so the appellant and the agent just continued in vain trying to obtain the information needed from the contractor.
23. Having received the £100 penalty and persevered for three months with his requests for information from the contractor (on the advice of his previous accountant) the appellant finally appointed Cutter & Co in May 2017.
24. It then took 2 months for Cutter & Co to take over the appellant's affairs. The delay was primarily due to protocol between the old and new accountant (the new accountant in accordance with the convention of their professional body, had waited two months for confirmation of "professional clearance" from the previous accountant. As a practice the accountants were regulated by the ICAEW and as a member of the Institute had to follow its guidance). This was entirely out of the appellant's control.
25. Cutter & Co's initial advice was once again for the appellant to contact the contractor in question and request all outstanding paperwork. He was unsuccessful, and upon further investigation it transpired that the contractor in question had repeatedly formed and dissolved several trading entities during the tax year in question without the appropriate paperwork trail having been completed. The appellant was totally oblivious to this.
26. Once Cutter & Co received clearance from the previous accountant, in July 2017, they then had to wait until 11 September 2017 to receive the information they had requested from HMRC in mid July 2017. They could not contact HMRC until they had clearance to act so July was the earliest that could be done.
27. If the information had been provided by HMRC immediately, Cutter & Co would have had the information in time to avoid the six month penalty issued in August 2017.
28. The penalties charged are disproportionate to the tax due.

HMRC's case

29. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every-day responsibilities of the appellant to ensure his 2015-16 tax return was filed by the legislative date.

30. Under self-assessment individuals have to complete a return each year on which income is declared. This places a degree of responsibility on that individual to submit returns to HMRC by the filing date. This includes ensuring that HMRC get payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

31. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

32. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

33. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the appellant to show that he has a reasonable excuse for the late filing of his SA.

34. HMRC set up an SA record for the appellant on 13 October 1996. Therefore HMRC consider that he had experience of the SA cycle of submitting returns by the due filing dates.

35. Prior to the 90 day and 6 month penalties, the appellant was charged a late filing penalty of £100 and two late payment penalties of £40 each, due to his failure to pay the tax due for 2015-16 by the due date of 31 January 2017. These penalties have not been appealed.

36. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations. Full details of when penalties are charged and the amounts can be found at www.gov.uk/hmrc.

37. The appellant's 2015-16 electronic return was due to be returned to HMRC by 31 January 2017. The first penalty notice showing a £100 late filing penalty had been charged was issued to the appellant on 7 February 2017. Cutter & Co say they were first approached by the appellant to act for him "in May 2017". This was over three months after the first penalty notice had been issued. HMRC contend that someone concerned at receiving a penalty notice would have contacted a new agent in March rather than May 2017.

38. In their appeal to the Tribunal the appellant's agent say that his former agent did not advise the appellant that he could request CIS earnings information from HMRC.

39. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

40. The law specifies two situations that are not reasonable excuse:

- (a) an insufficiency of funds, unless attributable to events outside the appellant's control and
- (b) reliance on another person, such as an agent, to do anything, unless the person took reasonable care to avoid the failure.

In this case the appellant's former agent failed to give the appellant advice on how he could contact HMRC to gather information needed to complete his return.

41. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"It has been said before in cases arising from default surcharges that 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?" [Page 142 3rd line et seq.].

42. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

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

44. HMRC contend that it is not unreasonable to expect the appellant to contact HMRC himself, without reference to his agent, to ask if HMRC could supply him with the missing CIS information. There is no record of the appellant or his accountant contacting HMRC until 25 May 2017 when the appellant's new agent sent in a 64-8 'Authorising an Agent' form.

45. The appellant's new agent says they were not fully appointed until July 2017, as they had waited two months for professional clearance from the previous agent. HMRC contend that this is merely courtesy protocol between agents and not something that is included in HMRC processes or recognised in Tax Legislation.

46. While Cutter & Co may have felt bound by convention, the appellant was free to act as he wished, for example the new agent could advise the appellant to contact HMRC himself. As it was, the new agent says they contacted HMRC in July 2017 once they were fully acting and received the information in September 2017, which led to the six month late filing penalty being charged. Had the new agent advised the appellant

to contact HMRC himself regarding the missing information in May 2017, this would have been received during July 2017 and the six month penalty would have been avoided. Alternatively, the appellant's new agent could have submitted a provisional return and amended it to the correct figures once all of the appellant's income required for the 2015-16 return was known.

Special Reduction

47. Paragraph 16(1) allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined but has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

48. HMRC have considered the failure of the appellant's previous accountant and the delay caused by the new agent needing professional clearance before they could fully act for the appellant, along with the penalties charged being disproportionate to the tax due, and submit that they are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

49. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

50. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, in any event there are no special circumstances which would require the Tribunal to reduce the penalties.

51. HMRC asserts that the late filing penalties charged are in accordance with legislation and there is no reasonable excuse for the appellant's failure to file his tax return on time, nor by the date the penalty arose. HMRC also consider that there are no special circumstances which would allow the penalty to be reduced under the Special Reduction regulations.

Relevant statutory provisions

Taxes Management Act 1970

52. Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by

him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

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

- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
- (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or 397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
- (b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

- (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

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

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

53. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

54. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

55. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

(1) P is liable to a penalty under the 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 the 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).

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

- (1) P is liable to a penalty under the 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 the 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.

58. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

- (1) Liability to a penalty under any paragraph of the 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.

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

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.

60. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on

such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may-
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16-
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

Conclusion

61. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

62. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

63. The penalties levied are not disproportionate. They are in accordance with legislation. They are fixed penalties and not geared to the amount of tax payable.

64. The £100 penalty notice issued on or around 7 February 2017 acted as a prompt to the appellant that his return had not been submitted and was overdue. It would have informed the appellant that if his return was more than three months late HMRC would begin charging him a penalty of £10.00 for each day it remained outstanding for a maximum of 90 days.

65. The appellant's first agent caused part of the delay. It was not unreasonable for the appellant to trust his first agent to persevere in his attempts to obtain the CIS information. Neither he nor the agent could have known that the contractor would not provide the CIS information the appellant needed, which must have been readily available to the contractor, or the reasons behind the contractor's failure to provide the information.

66. The appellant appointed Cutter & Co in May 2017, but continued to contact the contractor himself for the information whilst waiting for Cutter & Co to get professional clearance. Not knowing the reason why the contractor was not responding to repeated requests for the CIS information, a further 2 months went by without any progress. His new agent could not contact HMRC until they had clearance to act. 17 July 2017 was the earliest they could act.

67. HMRC issued the 90 day penalty notice and the six-month late filing penalty on 11 August 2017. The delays continued until HMRC provided the information on 11 September 2017. If the information had been provided immediately they would have had the information in time to avoid the penalty issued in August 2017.

68. The appellant's return was filed 10 days later on 21 September 2017.

69. I accept that Cutter & Co could have filed a provisional return in the interim, but they would not have expected HMRC to take more than 2 months to provide information, which again one would have expected to be readily available.

70. Although a taxpayer must bear responsibility for his agent's delay, it was in circumstances where the real culpability lay with the erstwhile contractor. The first agent can be forgiven for trying to get a response from the contractor at least for a reasonable period. The appellant then took care to avoid further delay by appointing a new agent but encountered more delay apparently caused by professional protocol between accountants. There was then a further 2 month delay before HMRC provided the missing CIS information.

71. The appellant does not appear to have been late filing previous SA returns. The events which gave rise to the late filing of his SA return were clearly exceptional and unusual. He appears to have been let down at every turn, despite his best efforts. Taking all the circumstances into account, he exercised reasonable foresight and due diligence, having proper regard to his responsibilities and obligation to file his SA return. He did what a reasonable taxpayer, in the position in which he found himself, would have done in those circumstances.

72. In my view, taking all the circumstances into account, the appellant has a reasonable excuse for the late filing of his 2015-16 return.

73. The appellant does not appeal the £100 penalty. The appeal is allowed in respect of the late daily and six month penalties which are therefore discharged.

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 02 JULY 2019