



[2019] UKFTT 540 (TC)

TC07334

INCOME TAX – penalty for failure to make returns - Schedule 55 of the Finance Act 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03688

BETWEEN

MARK GREEN

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE MALEK

The Tribunal determined the appeal on 2 August 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 21 May 2019 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 17 June 2019.

DECISION

INTRODUCTION

1. 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 annual self-assessment return on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 7 February 2017;
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 10 September 2017; and
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 10 September 2017.
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:
 - (1) He argues that there was a “reasonable excuse” for any failure to submit the return on time.

FINDINGS OF FACT

4. I am satisfied, on the evidence before me, that:
 - (1) The notice to file a return for the year ending 5 April 2016 was sent to Mr. Green on or around 6 April 2016. This is evidenced by an extract from HMRC computer records and was not challenged by the Appellant.
 - (2) Therefore, the Appellant was required to submit a return for the tax year 2015/2016 on or before 31 January 2017.
 - (3) Mr. Green posted his paperwork to his previous accountant in January 2017 in order for his return to be processed and that this was not done resulting in his decision to change his accountant.
 - (4) The abovementioned return was received by the Respondents on 15 September 2017.
 - (5) Notice of the £100 late filing penalty was sent to the Appellant at his last known address on around 7 February 2017. Although the evidence provided by the Respondents in this regard is weak, it is not challenged by the Appellant and accordingly I must accept it.
 - (6) Notice of the “daily” penalties was sent to the Appellant at his last known address on around 11 August 2017. Again the evidence provided by the Respondents in this regard is weak, it is not challenged by the Appellant and accordingly I must accept it.
 - (7) Notice of the 6 month late filing penalty was sent to the Appellant at his last known address on around 11 August 2017. Once again, the evidence provided by the Respondents in this regard is weak, it is not challenged by the Appellant and accordingly I must accept it.
 - (8) The Appellant appealed against the penalties imposed upon him on or around 20 September 2017. I find this to be the case because the Respondents have produced in evidence a letter and enclosures setting out the substance of the Appellant’s appeal received by them bearing the above date. There is no “date received” stamp which would tend to show the date upon which the Respondents actually received the appeal.

DISCUSSION

5. Relevant statutory provisions are included as an Appendix to this decision.

£100 late filing penalty -late appeal

6. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline in relation to the £100 penalty. HMRC have refused consent under s49(2)(a) of TMA 1970. Accordingly, it becomes a matter for the exercise of this Tribunal's discretion as to whether or not the appeal should be considered.

7. In coming to a decision as to whether or not I should exercise my discretion to give permission I am not confined to the matters set out in s.49 of the TMA 1970 (i.e. whether or not there was a reasonable excuse for the delay) and my discretion is at large [see *O'Flaherty v Revenue and Customs Commissioners - [2013] STC 1946*]. My discretion must be exercised in light of the overriding objective as set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and the principles established in *Denton v White [2014] EWCA Civ 906* [see paragraph 44 of Tribunal Judge Berner's decision in the Upper Tribunal in *William Martland v The Commissioners for HM Revenue and Customs:[2018] UKUT 0178 (TCC)*].

8. Stage 1 of the Denton procedure requires that I look at the seriousness and significance of the breach. In this instance there has been delay in the appeal being notified of over 7 months. This delay is, in my judgment, serious and significant. It is clearly not a case where there has been a small slip which is more form than substance.

9. Stage 2 requires me to examine the reasons for the delay. None have been provided by the Appellant. The grounds of appeal deal with the delay in submitting the return (i.e. explain why the return was late), but do not address why there was a delay in appealing the penalty. There is, accordingly, no good reason for the delay.

10. The last stage of the Denton process is to look at all the circumstances including the need to deal with cases fairly and justly and particularly the factors set out at CPR 3.9 (1) (a) and (b). It is appropriate under this heading to consider the relative prejudice to the parties. The prejudice to the Appellant is obvious: he will be denied the right to argue the merits of his substantive appeal in the event permission is refused. Whilst this is not the forum to embark upon a forensic examination of the merits of the substantive appeal I am, in my judgment, entitled to form a preliminary view of those merits. In my view there is little substantive merit in the appeal. The prejudice to the Respondent is equally obvious. Parties to litigation generally, and in these proceedings, should be entitled to rely upon time limits (subject to appropriate safeguards and oversight by the courts and tribunals) as a means of giving finality. There are no other relevant factors for consideration.

11. Taking into account all the circumstances of the case I am led to the inevitable conclusion that permission for the Appellant to pursue his appeal in relation to the £100 penalty out of time should be refused.

Daily and six month penalties

12. These penalties were notified to Mr. Green on or around 11 August 2017 and should have been appealed before 12 September 2017 (in accordance with s31A TMA 1970). I have found that in fact appeals against these penalties were not notified to HMRC until 20 September 2017 (some 8 days late).

13. After applying the law as set out at paragraph 7 above I conclude that this delay (of some 8 days) is neither serious nor significant. Accordingly, I will consider the appeals out of time under this head and do so below.

14. I have concluded that the tax return for the tax year 2015/16 was submitted on or around 15 September 2017. It should have been submitted by 31 January 2017. Subject to considerations of “reasonable excuse” set out below, the penalties imposed are not challenged, are due and have been calculated correctly.

15. The Appellant argues he posted his paperwork to his previous accountant in January 2017 in order for her to process his return. This was never done and he changed his accountant and was advised that the return for 2015/16 was not filed.

16. Paragraph 23(2)(b) of Schedule 55 provides that:

“where P relies on any person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure..”

17. In this instance Mr. Green appears to assert that he relied upon his former accountant to submit his return on his behalf. In order to benefit from the “reasonable excuse” “defence” Mr. Green must show that he himself took reasonable care to avoid the failure. It is for Mr. Green to make this out on the balance of probabilities. Unfortunately, Mr. Green has failed to provide any evidence as to the “reasonable care” that he took. At the very least he should have checked with his accountant that she had received his paperwork and asked what further steps he needed to take (for example approving the final accounts / return).

CONCLUSION

18. The appeal against the £100 penalty was filed late and for the reasons set out above I do not give permission for this appeal to be pursued before me out of time. Accordingly, this appeal was not considered by me.

19. The appeals against the daily and six month penalties were filed late, but I exercised my discretion to consider them. These penalties are due and calculated corrected. Mr. Green challenged them on the basis that he had a “reasonable excuse”. However he failed to make this out on the evidence.

20. For the reasons set out above I dismiss the appeals before me and affirm the Respondent’s decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

21. 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.

**ASIF MALEK
TRIBUNAL JUDGE**

RELEASE DATE: 19 AUGUST 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

22. 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.

23. 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).

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.