



TC05835

Appeal number: TC/2013/06394

*INCOME TAX – penalty for failure to make returns - Whether reasonable
excuse for late submission of self- assessment tax return-No*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK ANTHONY POOLE

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA AIT**

The Tribunal determined the appeal on 23 April 2017 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 3 August 2013, and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2017. The Tribunal wrote to the appellant on 13 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

5 1. The appellant is appealing against penalties totalling £1,600 that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit his annual self-assessment return for the year ending 5 April 2011 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 or around 14 February 2012

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 7 August 2012

(3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on or around 29 January 2013

15 (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 7 August 2012.

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 his failure to submit the return on time.

20 (2) There were “special circumstances”, so the amount of the penalty should be reduced.

The appellant’s appeal was notified to the Tribunal late. For the following reasons, I have decided to give permission for the appeal to be notified late:

25 The appellant appealed twice to HMRC but as those appeals were out of time they suggested the appellant should seek permission for his appeal to be heard by the Tribunal. As HMRC suggested that the appellant should lodge the appeal late they can have no objection to the Tribunal giving permission for the appeal to be notified late. If the Tribunal had refused to allow the appeal then the grounds of appeal would not have been considered at all. Therefore in the interests of justice and fairness the
30 Tribunal has given permission for the appeal to be notified late.

4. Findings of fact

35 On 6 April 2011 a self-assessment tax return for the year ending 5 April 2011 was sent to the appellant by HMRC. The filing date for the return was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. The appellant submitted a non-electronic return which was received by HMRC on 18 January 2013 and was therefore over 12 months late. The appellant has apologised for sending the return in late which indicates he agrees that fact.

The appellant has been in self-assessment since 1996-97 due to self-employment and then as the sole director of BMC Midlands Ltd. from 9 August 2002 until it was dissolved on 2 July 2013.

Appellant's submissions

5 On 11 February 2013 the appellant appealed to HMRC against the penalties, on the grounds

“I had been a director of BHC Midlands for a number of years until 21 July 2011. The accountants for the company took care of the records so I thought everything was correct. Any letters from HMRC were automatically re-directed to the accountants.
10 When the company ceased all the creditors including the accountants could not be paid. I personally still owe about £20,000. I have since been trying to sort all the affairs out and have sent the returns in and hope for leniency.

On 18 July 2013 the appellant requested a review of HMRC's decision not to accept a late appeal. He wrote

15 “During the times these tax returns were due I personally was suffering from a nervous breakdown. My accountants who always dealt with tax returns were not speaking to me or passing any information. We were also having problems with our post.

Added to that my wife had left me – who also did paperwork for me.

20 My wages are currently being taxed at the higher rate so cannot common sense prevail and use some of the tax I am paying against this penalty.

I have started working again after being unemployed for 18 months and due to other debts am unable to pay the penalties.”

25 The Tribunal notes that the appellant's wife was company secretary of BMC Midlands Ltd.

In the Notice of Appeal the appellant with some brevity sets out the following reasons for his appeal

“Paperwork (tax returns) not received

Accountants not filing tax returns

30 Wife leaving – ill health – stress

Post not being delivered

Business ceasing trading

If you check back previous 10 years never a problem, I am asking for help because my financial situation is dire.”

HMRC submissions

5. HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the appellant to ensure his 2010- 2011 tax return was filed by the due date.
- 5 6. HMRC say the appellant's tax returns for 2007-2008 to 2009-2010 were also late but ultimately all the penalties, which at the time were linked to tax liability, were reduced to nil.
7. In respect of the appellant's submission that his accountant did not file his tax return HMRC say that it is a person's own responsibility to make sure they meet any
10 deadlines.
8. HMRC say that on 5 June 2012 and 3 July 2012 they did issue penalty notices and reminders to the appellant that the return remained outstanding and penalties were accruing. They issued statements on 28 February 2012, 26 June 2012, 9 September 2012 and 6 December 2012.
- 15 9. HMRC say they have no record of any mail being returned as undelivered from his address before September 2014.
10. HMRC say that if the appellant suffered serious illness he had from 6 April 2011 to 31 January 2012 to make arrangements for the completion of his return. HMRC say that they consider this gives sufficient time in most circumstances.
- 20 11. In respect of reasonable excuse HMRC say that they consider the actions of a 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 Tax Acts. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who
25 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.
- 30 HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.
- HMRC point out that Paragraph 23 (2) (c) of Schedule 55 of the Finance Act 2009 provides that where a person had a reasonable excuse for a failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
- 35 12. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe*) or "something out of the ordinary run of events" (*Clarks of Hove Ltd. v Bakers' Union*). HMRC say the special circumstances must apply to the particular individual and not be general circumstances that apply to many

taxpayers (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

13. Discussion

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

5 14. I have concluded that the appellant's non-electronic tax return for the 2010/2011 tax year was submitted on or around 18 January 2013. It should have been submitted by 31 October 2011. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

10 15. The tribunal considers that many of the points made by the appellant are potentially capable of establishing a reasonable excuse. However the appellant has failed to provide detailed information to support his claims.

15 For example the appellant says he had a nervous breakdown. That could establish a reasonable excuse for him. However the appellant has provided no medical evidence to support his submission and therefore the Tribunal has no information on how long the appellant was so incapacitated and therefore how long any reasonable excuse lasted.

20 The appellant points to his business ceasing on 21 July 2011. The Tribunal can well understand that this caused immediate difficulty for the appellant, however it was another 6 months until the deadline for submission of the appellant's tax return for the year ended 5 April 2011. The appellant has not explained why in that period of time he did not notify HMRC of his difficulty.

25 The appellant submits that his accountants did not file his returns. It is clear that the appellant relied heavily on his accountant. A taxpayer is ultimately responsible for the submission of his tax return by the due date. The legislation provides that "Reliance on another person to do anything, unless the person took reasonable care to avoid the failure" cannot establish a reasonable excuse for a failure to submit a return by the due date. In this case there is no evidence that the appellant took reasonable care to avoid the failure. He exercised little or no supervision of the submission of his tax returns by his accountant.

35 The appellant states that the tax returns were not received. HMRC say that they have not had any correspondence addressed to the appellant returned as undelivered. The appellant has stated "Any letters from HMRC were automatically re-directed to the accountants." The Tribunal notes that the tax return was sent by HMRC on 6 April 2011 and is therefore likely to have reached the appellant shortly thereafter. The company was still trading at that time so it seems to the Tribunal on the balance of probabilities that the return was automatically re-directed to the accountants.

40 Following the failure of the company the Tribunal would have expected some communication between the accountant and the appellant, even if that was only the accountant returning the tax return notice to file to the appellant. It appears that the

appellant was the sole director of the company so there were no other directors for the accountant to deal with. However it was the appellant's responsibility to ensure that his return was submitted.

5 If the appellant feels that his accountant has failed in his/her professional capacity then the representative should take that up with the accountant.

The Tribunal notes that over the period July 2011 to January 2012 a number of unfortunate events occurred which might individually or collectively have established for the appellant a reasonable excuse. However the appellant has failed to supply details or any evidence to support his submissions. He has also not provided any evidence that he took any steps to advise HMRC of his difficulties before the deadline for submission of his return nor has he provided any evidence to show that he took any steps to arrange for his tax return to be submitted by the deadline either by another agent or by himself.

15 In addition the Tribunal has not been provided with any information to explain why after the deadline for submission had passed and the appellant was accruing and being notified of penalties it was not until 18 January 2013 that the appellant submitted a non-electronic tax return for the period ended 5 April 2011.

16. In the circumstances the Tribunal has no alternative but to find that the appellant has failed to establish that he had any reasonable excuse for the late submission of his self-assessment tax return for the year ending 5 April 2011.

17. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. HMRC consider that there are no special circumstances which would allow them to reduce the penalty. The Tribunal sees no reason to disagree.

18. In respect of the appellant's request for leniency the Tribunal is aware that the level of the penalties has been laid down by parliament and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it.

Conclusion

19. On 6 April 2011 a self-assessment tax return for the year ending 5 April 2011 was sent to the appellant. The return was not returned undelivered. The filing date for the return was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. HMRC did not receive the appellant's electronic return until 15 December 2012.

20. The appellant failed to submit his self-assessment return for the period 2010-2011 by the due date of 31 January 2012 and has not established that he had a reasonable excuse for it being late. HMRC has decided there are no special circumstances that would allow them to reduce the penalty and the Tribunal does not consider that their decision is flawed. Therefore the appeal against the penalties totalling £1,600 is dismissed.

Application for permission to appeal

21. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

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**PETR R. SHEPPARD
TRIBUNAL JUDGE**

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RELEASE DATE: 28 APRIL 2017

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.

- 5 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)—

- 10 (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.

15 (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)—

- 20 (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—

25 (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—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

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

23—

35 (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.

5. 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.

6. 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.

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(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.