



TC06162

Appeal number: TC/2017/02300

Income tax - fixed penalty for late filing of self-assessment return - Appellant delegated preparation and submission of return to agent - computer issue caused delay in filing return - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MALCOLM EVANS

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 26 July 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 received by the Tribunal service on 13 March 2017, and HMRC's Statement of Case received by the Tribunal on 9 May 2017. The Tribunal wrote to the Appellant on 11 May 2017 stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. The Appellant responded by letter dated 23 May 2017.

DECISION

1. This is an appeal by Malcolm Evans ('the Appellant') against a penalty of £100 imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2015.

2. The Appellant's return was due no later than 4 November 2016. The return was not filed until 7 November 2016.

3. 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.

4. The Appellant appeals the penalty on the basis that he has a reasonable excuse.

Filing date and Penalty date

5. The notice to file for the year ending 5 April 2015 was issued to the Appellant on 28 July 2016.

6. As the return was issued outside the normal cycle for the year, the Appellant was given 3 months and 7 days to complete and return it. The filing date was 4 November 2016 regardless of whether a paper or electronic return was filed.

7. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

8. The £100 penalty was issued on 8 November 2016.

Reasonable excuse

9. 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.

10. 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 to do anything, unless the person took reasonable care to avoid the failure.

11. 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).

12. 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 Tax 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.

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

The background facts

14. On 22 November 2016 the Appellant’s agent, Tax Shop Accountants, acknowledged receipt of the penalty notice dated 8 November 2016 and stated:

15. *“Our client advises that he was never sent a notice to complete a self-assessment return for 2015/16 and the reason that he did one was to voluntarily claim for business expenses. His HMRC account also shows no date of when the SA was issued. Please treat this letter as a formal appeal.”*

15. No reference was made by the agent to the year ending 5 April 2015, which was the year the penalty notice related to.

16. HMRC rejected the appeal on 10 January 2017 but offered a review.

17. On 25 January 2017 the Appellant requested a review of HMRC’s decision, saying:

25. *“The return was filed on the 4 November 2016. Due to a ‘computer glitch’ it did not arrive until the 7 November 2016 (the difference is a weekend in the dates). £100 is excessive for a delay of a weekend.”*

18. The outcome of the review was that HMRC’s decision should be upheld because:

- Notices to file SA returns for 2013-14 and 2014-15 were issued to collect a PAYE underpayment too large to collect through the Appellant’s code number. Both returns were due on 4 November 2016. The Appellant’s agent filed the 2013-14 return on 12 October 2016 but did not file the 2014-15 return until 7 November 2016. There is no clear reason why the 2014-15 return could not be filed at the same time as the 2013-14 return. Although the Appellant employed an agent to complete and file the returns the responsibility for ensuring it is received by the deadline remains with him.

- HMRC is unable to discharge or adjust a fixed penalty because the Appellant thinks it is unfair.
- Although the return was only filed a few days late, HMRC first wrote to the Appellant to pay the underpayment on 24 September 2015 and sent three further letters requesting payment. Although the Appellant contacted HMRC frequently around that time to claim an in-year repayment no action was taken regarding the underpayment.
- As no response was received to the requests to pay, a Notice to file the 2014-15 return was issued on 28 July 2016 which clearly stated a late filing penalty would be charged if the return was not received within 3 months.

19. The Appellant appealed to the Tribunal on 13 March 2017. His grounds of appeal are set out below.

Relevant statutory provisions

Taxes Management Act 1970

20. 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.]

5 (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 her share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

10 (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.

15 (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

20 (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—

25 (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 her knowledge correct and complete.

30 (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).

5 (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:

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

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

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

15 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.

20 (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
25 (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.

30 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.

35 (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.

40 (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.

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.

The Appellant's case

22. The Appellant's grounds of appeal as contained in his letter of 13 March 2017 are:

- He used a tax service to file the returns who said they had sent it in on Friday 4 November but HMRC state they received it on Monday 7 November.
- He is self-employed and every penny counts, feels it is not right as everything was done correctly it must have been a computer glitch at HMRC
- In future will file in June so will not happen again.

HMRC's case

23. 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 SA tax return for the year ending 5 April 2015 was filed by the legislative due date.

24. The Appellant paid tax under PAYE and was underpaid for the years ending 5 April 2014 and 5 April 2015. As the underpayment was in excess of £3,000 HMRC was unable to collect this through the Appellant's code number. HMRC issued requests for payment to the Appellant on 24 September 2015, 17 December 2015, 3 February 2016 and 27 April 2016.

25. As payment was not received the Appellant was transferred to the SA system and Notices to file returns for the years ending 5 April 2014 and 5 April 2015 were issued on 28 July 2016.

5 26. As the Notices to file the SA tax returns for the years ending 5 April 2014 and 5 April 2015 were issued outside the normal cycle, the Appellant was given 3 months to complete and return them, an additional 3 days was allowed for postage. The Notices to file were issued on 28 July 2016 and the returns were due to be filed on or before 4 November 2016. The Notice to file form issued to the Appellant on 28 July 2016 would have clearly shown the due filing dates for the online returns and the consequences if the return was filed late. The Notices to file are issued directly to the customer and copies of such are not held on the individual's records for HMRC to access.

27. The return for the year ending 5 April 2014 was submitted on 12 October 2016, well before the due filing date of 4 November 2016.

15 28. The Appellant states that his agent had sent his SA return for the year ending 5 April 2015 in on Friday 4 November and that due to a computer glitch at HMRC it was not received until 7 November 2016, but has not provided evidence of the successful submission of his return.

20 29. HMRC's records clearly show that the SA return for the year ending 5 April 2015 was filed by the Appellant's agent on 7 November 2016 along with his SA return for the year ending 5 April 2016. The agent, in their letter of 8 December 2016 stated that "an online form for 15-16 was filed on 7 November, within the filing deadline".

25 30. Although the Appellant employed an agent to complete and file his SA tax returns on his behalf, he remains responsible for ensuring that it is received by the relevant deadline and is liable to the automatic penalty if it is not. The self-assessment system places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that they submit their tax return at the correct time and pay any liability by the due date. It is the person's own responsibility to make sure they meet any deadlines. The Appellant has provided no evidence that he contacted his agent prior to 4 November 2016 to ensure his return was filed by the filing date.

35 31. The Appellant refers to the penalty being unfair/disproportionate in support of his appeal. The Upper Tribunal found that The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair. The decision of the Upper Tribunal creates a precedent and is binding on all cases where similar issues are raised.

Special Reduction

40 32. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a

potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

33. In other contexts “special” 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).

34. 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”.

35. HMRC have considered the Appellant’s grounds of appeal and the fact that he had delegated the task of preparation and submission of his tax return to his agent and that the delay in submitting the return was due to a computer issue. These circumstances do not amount to special circumstances which would merit a reduction of the penalties.

36. HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

37. 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.

38. 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.

39. Having considered the facts of the case and relevant legislation, for the reasons set out in HMRC’s case, the Tribunal has to conclude that no reasonable excuse has been shown for the Appellant’s failure to file his tax return for 2014-15 on time. The late filing penalty of £100 was charged in accordance with legislation.

40. The Tribunal also find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations

41. The appeal is therefore dismissed and the late filing penalty confirmed.

42. 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 12 OCTOBER 2017

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