



TC06837

Appeal number: TC/2017/09311

Income tax - fixed and daily penalties for late filing of self-assessment return - Appellant claimed that he had not received the Notice to file - whether reasonable excuse - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

CIARAN DUNLEAVY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 18 November 2018 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 November 2017, and HMRC's Statement of Case received by the Tribunal on 2 February 2018 with enclosures. The Tribunal wrote to the Appellant on 6 February 2018 stating 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. This is an appeal by Ciaran Dunleavy ('the Appellant') against penalties totalling £930 imposed by the Respondents ('HMRC') under Paragraphs 3 and 4 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 2016.

2. The penalties for late filing of a return can be summarised as follows:

10 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 for the year ending 5 April 2016.

15 ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009 for the year ending 5 April 2016.

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 for the year ending 5 April 2016.

20 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 for the year ending 5 April 2016.

3. Penalties of £100 and £830 were imposed under (i) and (ii) above.

4. The Appellant's appeal is against both of the penalties.

25 *Filing date and Penalty date*

5. Under s 8(1D) TMA 1970 a non-electronic return must be filed by 31 October 2015 and an electronic return by 31 January 2016. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

30 6. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

35 7. 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.

8. 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.

9. 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).

10. 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 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.

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

The background facts

12. The notice to file for the year ending 5 April 2016 was issued to the Appellant on 6 April 2016. HMRC's automated system would use the address current at that time. HMRC's computer records show Mr Dunleavy's address as 116 Vancouver Road, Broxbourne EN10 6FF.

13. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return.

14. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 14 February 2016 in the amount of £100.

15. The Appellant's electronic return for the year 2016 was received on 22 July 2017 and was processed on 24 July 2017.

16. As the return had not been received three months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 25 July 2017 in the amount of £830, calculated at £10 per day for 83 days.

17. On 3 October 2017 the Appellant's agent, Buttar & Co, appealed against the daily penalties, enclosing a copy of their client's appeal dated 21 August 2017, stating:

“Per the enclosed copies of articles from BBC and the Telegraph, HMRC’s policy to charge penalties is to be applied to serious defaulters. Our client has always filed his tax returns on time.”

5 18. On 2 November 2017 HMRC rejected the appeal stating the deadline had passed for appealing against the late filing and daily penalties.

19. On 22 November 2017 Buttar & Co replied to HMRC’s letter dated 2 November 2017 stating that their appeal was not late. The penalty notice was issued on 25 July 2017 and the appeal was made on 21 August 2017.

10 20. HMRC sent Mr Dunleavy and his agent a decision letter on 18 December 2017 rejecting their appeal and offering a review.

21. On 23 November 2017 the Appellant’s agent notified their appeal to the Tribunal, giving their grounds as:

“HMRC had said my appeal was late. The penalty notice was issued on 25 July 2017. I appealed on 21 August 2017.”

15 *Relevant statutory provisions*

Taxes Management Act 1970

Section 8 - Personal return- provides as follows:

20 (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

25 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

30 (b) where the notice under this section is given after the 31st October next following the year, the last j 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-

35 (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 this 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.

10 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

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

15 (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-

20 (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).

25 (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.

30 (2) Every return under this 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 this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

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

(4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this 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 this section and sections 8A, 9 and 12AA of this 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 22. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

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

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

15 25. 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 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,

20 (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)--

25 (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).

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

30 (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

35 (b) £300.

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

(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)--

- 5 (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
10 (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.

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

15 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any para-graph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include--

- (a) ability to pay, or
20 (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
25 (b) agreeing a compromise in relation to proceedings for a penalty.

29. 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:

30 (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
35 (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
40 (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.

45 30. The Appellant's grounds of appeal are as set out in his Notice of Appeal to the Tribunal.

HMRC's Case

31. In November 2012 HMRC set up a SA record for the Appellant as he had commenced self-employment as a general builder.

5 32. There is no record of HMRC having received Mr Dunleavy's appeal dated 21 August 2017. The Appellant appealed against the daily penalty on the grounds that he had moved from 116 Vancouver Road, Broxbourne and did not receive any letters asking him to send the tax return.

10 33. HMRC received the Appellant's completed 2016 return on 22 July 2017. On this return, he had completed the box headed 'your address (if changed)' and given his new address of 8 Newham Parade, Cheshunt EN8 9NU. He showed the date he changed to this address as 5 January 2017.

15 34. The Appellant works in the construction industry. He works for contractors and is registered for HMRC's Construction Industry Scheme ('CIS'). Under CIS, the contractor will normally make tax deductions at 20%. When an individual registers under the CIS scheme, they are responsible for paying the correct tax and National Insurance for their business and need to submit annual SA returns.

20 35. At the end of the tax year, the subcontractor is required to submit their SA return to get credit for the tax deducted by the contractor, to claim any allowable business expenses and to have the benefit of their personal tax allowance set against taxable income. This normally results in a refund being due to the subcontractor.

36. The Appellant is aware of the need to submit an annual return without the need for prompts or reminders from HMRC. Since registering under CIS, he has received annual repayments via his SA returns for 2013, 2014 and 2015.

25 37. Late filing penalties for the year ended 5 April 2016 are due 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.

30 38. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the 2015-16 Notice to File issued to the Appellant on 6 April 2016. The address the Notice was sent to the Appellant's address at the time.

35 39. 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 and payment made on time.

40. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment

deadlines. It is the customer's responsibility to make sure they meet the deadlines.

41. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

42. 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.

Special Reduction

43. 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.

44. 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).

45. 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'.

46. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, if the Tribunal disagrees, HMRC further submit that there are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

47. 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.

48. In considering whether the Appellant has a reasonable excuse for the default it is necessary to consider his actions from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for

their responsibilities provided by legislation. 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 would have been complied with.

5 49. The Appellant had successfully filed previous tax returns and should have been aware of the filing procedures and deadlines.

50. The late filing penalties have been charged in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file his tax return on time.

10 51. I find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations

52. The appeal is therefore dismissed and the late filing penalties totalling £930 are confirmed

15 53. 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**

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RELEASE DATE: 23 November 2018