



**TC07021**

**Appeal number: TC/2016/01844**

*Income Tax – failure to file returns – late filing penalties – late payment penalties – not knowing how to deal with a bad debt – family health issues – no reasonable excuse*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HARVEY GARDINER**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ALASTAIR J RANKIN  
MR NOEL BARRETT**

**Sitting in public at Centre City Tower, 5-7 Hill Street, Birmingham, B5 4UU on  
Friday 15 February 2019 at 10:00 AM**

**The Appellant in person**

**Miss Gemma Truelove, Presenting Officer, HM Revenue and Customs, for the  
Respondents**

## DECISION

1. The Tribunal decided the appeal should be dismissed.

### **Background**

2. This is an appeal against the following penalties issued under schedule 55 of the Finance Act 2009:

- 2.1 For the tax year 2011/12:

- 2.1.1 a late filing penalty of £100.00 issued on 12 February 2013

- 2.1.2 daily penalties totalling £900.00 issued on 14 August 2013

- 2.1.3 a six month late filing penalty of £300.00 issued on 14 August 2013 and

- 2.1.4 a twelve month late filing penalty of £300.00 issued on 25 February 2014.

- 2.2 For the tax year 2012/13:

- 2.2.1 a late filing penalty of £100.00 issued on 18 February 2014

- 2.2.2 daily penalties totalling £900.00 issued on 18 August 2014

- 2.2.3 a six month late filing penalty of £300.00 issued on 18 August 2014

- 2.2.4 a twelve month late filing penalty of £300.00 issued on 24 February 2015

- 2.2.5 a 30 days late payment penalty of £190.00 issued on 21 July 2015

- 2.2.6 a six months late payment penalty of £190.00 issued on 21 July 2015 and

- 2.2.7 a 12 months late payment penalty of £190.00 issued on 21 July 2015.

- 2.3 For the tax year 2013/14:

- 2.3.1 a late filing penalty of £100.00 issued on 18 February 2015

- 2.3.2 daily penalties of £610.00 issued on 21 July 2015

- 2.3.3 30 days late payment penalty of £79.00 issued on 21 July 2015

- 2.3.4 a six months late payment penalty of £79.00 issued on 14 August 2015 and

- 2.3.5 a 12 months late payment penalty of £79.00 issued on 23 February 2016.

3. HMRC had issued full returns to the Appellant as follows:

- 3.1 for the tax year 2011/12 on 6 April 2012

- 3.2 for the tax year 2012/13 on 6 April 2013 and

- 3.3 for the tax year 2013/14 on 6 April 2014.

4. The Appellant filed all three paper returns on 2 April 2015.

5. By letter dated 24 September 2015 the Appellant wrote to HMRC stating that he had a genuine reason for the delay. In the year 2011/12 he had been working on projects in Dubai from his office at home designing museums. Although these projects had been signed off as complete the client did not pay which resulted in bad debts and lack of earnings for this period.

6. HMRC responded with six letters all dated 24 December 2015 as follows:
  - 6.1 Appeal against late filing penalties for 2011/12 was rejected as being out of time with no reasonable excuse
  - 6.2 Appeals against late filing and late payment penalties for 2012/13 were rejected as being out of time
  - 6.3 Appeals against late filing and 30 days late payment penalties for 2013/14 were rejected as being out of time
  - 6.4 Appeal against the six months late payment penalty for 2013/14 on the grounds of hardship was rejected as not being a reasonable excuse.
7. The Appellant requested a review on 12 January 2016 supplying details of his financial position. HMRC's Review Officer replied by letter dated 1 March 2016 stating that the Appellant did not have a reasonable excuse nor could HMRC consider there were circumstances which could give rise to a Special Reduction. The letter ended by advising the Appellant of his right to appeal to this Tribunal within 30 days
8. The Appellant submitted a Notice of Appeal to this Tribunal dated 27 March 2016 which was received by the Tribunal on 30 March 2016. As well as filling the available room in the boxes on the Notice the Appellant attached four hand written pages. HM Courts & Tribunals Service wrote to the Appellant on 11 April 2016 acknowledging receipt of his Notice of Appeal and advising that it intended to hold the appeal until the decision in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761 had been delivered.
9. On 28 January 2018 HM Courts & Tribunals Service wrote to both parties to advise the appeal had been listed for hearing on 27 February 2018. The Appellant by email dated 9 February 2018 asked for the hearing to be postponed as he would be working in Dubai until 6 April 2018. The appeal was re-listed for hearing on 20 June 2018.
10. The Appellant requested information from the Ministry of Justice on 7 April 2018 and in the absence of a satisfactory response requested a postponement of the 20 June 2018 hearing to which HMRC consented.
11. HM Courts & Tribunals Service by letters dated 6 July 2018 advised the parties that the appeal was being re-listed for hearing on 17 September 2018. On 16 September 2018 the Appellant sent by email a five page letter to HMRC giving 'a more detailed defence for this case of appeal'. The covering email also stated that the Appellant would be unable to attend on 17 September 2018 due to an illness which he had picked up in New Delhi.
12. On 17 September 2018 Judge Kevin Poole heard Ms Truelove on behalf of HMRC, dismissed the appeal and issued a summary decision, the email dated 17 September 2018 not having been forwarded to the Tribunal before the hearing. Subsequently Judge Poole set aside the decision and issued Directions.

13. Although the Notice of Appeal to this Tribunal states that the amount of tax or penalty under appeal is £10,549.09 with the fines within this figure in dispute, nowhere in his written submissions has the Appellant referred to the actual tax liability as assessed by HMRC upon receipt of the three tax returns. HMRC assessed his tax liability for 2011/12 at nil, at £3,813.55 for 2012/13 and at £1,597.30 for 2013/14. In box 8 of the Notice under the heading 'Result' the Appellant stated that 'the fines should be dropped post 2011/12 as there was genuine confusion over where a bad debt should have been shown'. The whole thrust of the arguments by both parties at the hearing was geared towards the penalties.

### **Written arguments on behalf of the Appellant**

14. In his Notice of Appeal the Appellant states that the grounds of this dispute revolve around an incurred bad debt of £50,000.00 which due to confusion on how this was to be accounted for in his tax return resulted in him incurring personal borrowings and subsequent illness in the form of a breakdown which further resulted in an inability to earn for a period of time. This expensive hardship and the devastation it caused resulted in the appointment of a debt management company to manage the debt.

15. The Appellant claimed he repeatedly asked HMRC for advice about how this debt should be accounted for and received no support, online advice being unclear. He did not want to submit an inaccurate self-assessment return and as such the position remained in flux and resulted in further delays for submission. The Appellant had never been in this position before but accepted the original submission was late though there was a reason for this – ill health and total confusion. He claims that not until recently was he advised to get his returns in and work from there in regard to the position of fines.

16. When he eventually submitted the tax returns the Appellant noted the bad debt on each return and asked for further advice which had not been forthcoming. In particular he asked if his note in this regard had been taken into account in HMRC's calculations.

17. When the Appellant submitted his 2014/15 tax return he noted that his penalties amounted to more than his tax liability.

18. The Appellant feels the penalties should have been suspended when he first made HMRC aware of the issue in 2011/12. He contends that it is farcical to suggest, given the volumes of phone calls and correspondence on file, that he has not made every effort, under extremely difficult circumstances, to seek help and resolve the confusion caused by the unusual circumstances.

19. In his letter dated 16 September 2018 the Appellant starts by stating that he believed there was no tax due in the period of the delayed tax returns and that the fines are totally disproportionate to the tax due. He then details his health issues. On 10 February 2010 he had severe chest pains and high blood pressure. In June 2011 he was found by his wife sitting on the ground crying uncontrollably. His medical records show that on 8 December 2011 his blood pressure had risen to 182/116. On 30 December 2011 his acute chest pains appeared again. 999 was called and he was

admitted to hospital. The position stabilised until June 2012 when his mother suffered a severe stroke as a result of which his father broke down completely. The Appellant was in complete shock and found himself unable to speak.

20. Stress symptoms were reported again on 15 September 2012 and on 24 March 2014 he was diagnosed with pain radiating down the arm. In 2015 he suffered severe hypertension. His father continued to deteriorate and subsequently passed away. As a result of all these health issues the Appellant claimed he was unable to focus on his tax returns and did not consider them to be a priority.

21. In conclusion the Appellant claimed that he was clearly in no fit state to concentrate, focus or think about anything properly throughout the period of late 2010 to late 2014.

22. In his letter dated 16 September 2018 the Appellant then referred to his phone calls to the tax office. On 22 January 2009 he claims to have telephoned to ask for advice about how to account for the bad debt but received no advice whatsoever. He telephoned again on 23 March 2009 in a blind panic asking what to do. He telephoned again on 8 April 2011 and in December 2011 and received no advice. The Appellant claimed to have telephoned again on 1 August 2012 and continued to be proactive in trying to resolve the situation and spoke to a Mrs Mahmood on 10 April 2015. The Appellant believes that he should have been put through to an inspector each time he telephoned to HMRC.

23. The Appellant then claims to have a problem with HMRC's comments that note all three years returns are lumped together. As this aspect was not pursued at the hearing this Tribunal does not propose elaborating further.

24. The Appellant then claims that the apportionment of his bad debt is still causing him difficulty. Again as his appeal is against the penalties and not his tax liability this Tribunal does not propose elaborating further.

25. The Appellant then submitted a further letter dated 20 October 2018 in which he reiterated the information about the bad debt having been incurred in 2009 which resulted in chest pains on 12 February 2009, hypertension being recorded on 14 July 2009 and prominent veins appearing in February 2010 followed by further medical issues already supported in his letter dated 16 September 2018. The letter then went into some detail about the telephone calls which he made to HMRC and which had already been detailed in his letter dated 16 September 2016. The original hearing had been delayed as the Appellant was asking HMRC through a freedom of information request for recordings of the telephone calls which he had made to the Bradford tax office.

### **Arguments on behalf of HMRC at the hearing**

26. Ms Truelove rehearsed the history of the three paper returns being issued, the reminders to file issued in December after the end of each tax year and details of the various penalties issued.

27. Ms Truelove pointed out that the Appellant's mother's stroke was in May 2012 but the paper return for 2011/12 was not due to be filed until 31 October 2012 or, if the Appellant chose to file electronically, 31 January 2013. She stated the Appellant had experienced high blood pressure since 2009 but there was no evidence as to how this affected his ability to file his tax returns.

28. When the Appellant eventually filed his three tax returns all dated 30 March 2015 they showed turnover of £30,000.00 in 2011/12, £60,000.00 in 2012/13 and £48,000.00 in 2013/14.

29. The guidance notes which HMRC issued with each paper tax return included the following under the heading 'Losses, Class 2 and Class 4 NICs and CIS deductions' and 'Boxes 32 to 34 Losses':

“You may wish to ask for professional advice, or to ask us for Helpsheet 227 Losses, which has more information and a Working Sheet to help you keep track of your losses.”

30. HMRC has no record of the Appellant asking for the Helpsheet or contacting HMRC for guidance apart from telephone conversations on 11 August 2011 and 22 March 2016.

31. Miss Truelove advised the Tribunal that it would have been possible for the Appellant to submit provisional figures and that he had been in the self-assessment regime since 1996. He had incurred late filing penalties on previous occasions.

32. In HMRC's opinion there were no circumstances which gave rise to a Special Reduction under paragraph 16 of Schedule 55 being granted.

33. Ms Truelove did accept that the Appellant had made telephone calls but argued that no good reason had been put forward as to why the returns could not be submitted on time.

### **Arguments on behalf of the Appellant at the hearing**

34. The Appellant stated that he was furious at the amount of lies put forward by HMRC. He did not owe any tax, only the fines.

35. The Appellant had been engaged to design a Falcon Centre for the ruling family of Dubai. His business is to create something out of nothing. He had worked on the project for over one year when the plug was pulled and he had been unable to obtain payment. He had been telephoning to HMRC three or four times per year and did not want to put in a wrong return. All his attention was on his parents and creating a living for his family – his wife and two children. As a result of the bad debt he was just trying to survive.

36. The Appellant stated that the underlying problem was what he should do with the bad debt. He had taken legal advice on how to recover the bad debt but he could not

afford to pay an accountant for advice as to how to deal with the bad debt in his tax returns. As soon as HMRC advised him to submit the returns he did so.

## Legislation

37. The penalties at issue in this appeal are imposed by Schedule 55 of the Finance Act 2009. A penalty is payable by a person (“P”) where P fails to make or deliver a return, The starting point is paragraph 3 which imposes a fixed £100.00 penalty if a self-assessment return is submitted late.

38. Paragraph 4 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 £10.00 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).

39. Paragraph 5 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) £300.00.

40. Paragraph 6 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) £300.00.
- (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) £300.00.
- (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) £300.00.

41. Paragraph 16 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.

42. Paragraph 20 gives a taxpayer a right of appeal to this Tribunal and paragraph 22 sets out the scope of this Tribunal’s jurisdiction on such an appeal. In particular, this 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.

43. Paragraph 23 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.

44. Schedule 56 of the Finance Act 2009 contains provisions concerning the late payment of tax. Paragraph 1 states that a penalty is payable where P fails to pay an amount of tax on or before the date specified. Paragraph 3 states P is then liable to a penalty of 5% of the unpaid tax.

45. Paragraph 4(3) provides that if any amount of the tax is unpaid after the end of the period of 3 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

46. Paragraph 4(4) provides that if any amount of the tax is unpaid after the end of the period of 9 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

## **Decision**

47. HMRC issued a paper return to the Appellant on 6 April 2012 in respect of the tax year 2011/12. During this tax year the Appellant incurred a bad debt of £50,000.00. He did not know how to deal with this bad debt in his tax return. The guidance notes issued

with the tax return under the heading ‘Losses’ states ‘You may want to ask for professional advice, or to ask us for Helpsheet 227 Losses’. The Appellant did neither.

48. The Appellant’s mother took ill in May 2012 but the tax return did not need to be filed in paper form until 31 October 2012. While the Tribunal sympathises with the Appellant over his mother’s health and death in October 2018 this does not amount to a reasonable excuse for failing to file his 2011/12 tax return until March 2015 as the reasonable excuse must exist throughout the period.

49. The Appellant claims to have telephoned to HMRC on many occasions. Although HMRC has no record of most of these calls, Ms Truelove accepted that he had made many calls. He claims that he was only able to file his tax returns when he spoke to a lady at HMRC in March 2015 who told him to file a nil return. This advice enabled him to file his returns though none of the three returns filed were in fact nil returns.

50. The Appellant has not produced any expert evidence to link his personal health issues, with which the Tribunal has sympathy, with his failure to submit all three tax returns until 30 March 2015. During this time he was able to undertake his business activities which according to his tax returns had a turnover of £30,000.00 in the 2011/12 tax year, £60,000.00 in the 2012/13 tax year and £48,000 in the 2013/14 tax year. HMRC appears to have assessed him to tax based on the figures in his returns without questioning any of the figures.

51. In view of the lack of expert evidence linking his health issues to any inability to file his tax returns but during the same period he was able to run his business affairs we do not find that his health itself amounts to a reasonable excuse for not filing his tax returns on time, nor do we accept that his inability to determine how to account for the bad debt amounts to a reasonable excuse for late filing as we believe that he should have taken appropriate accountancy advice in this regard. The Appellant spent money on legal advice but regrettably felt he could not afford to take accountancy advice which would have avoided incurring the penalties.

52. The Appellant has argued that the penalties charged are disproportionate. This Tribunal’s powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited our power to reduce penalties because of the presence of “special circumstances” and, elsewhere in this decision, we have considered the question of “special circumstances”. Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), we do not consider that we have a separate power to consider the proportionality or otherwise of the penalties.

53. The Tribunal is satisfied that HMRC considered whether there were any Special Circumstances which would warrant a reduction in the penalties. We are satisfied that no Special Circumstances existed.

54. The Tribunal is satisfied that HMRC was correct to issue the various penalties detailed in paragraph 2 above and that they were all correctly calculated. Accordingly the appeal is dismissed.

55. 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.

**ALASTAIR J RANKIN  
TRIBUNAL JUDGE**

**RELEASE DATE: 04 MARCH 2019**