



TC06155

Appeal number: TC/2013/03797

*INCOME TAX – self-assessment – penalty for failure to make returns –
reasonable excuse – daily penalty – whether notice given by HMRC –
Finance Act 2009, sch 55*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER MOORE

Appellant

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC

The Tribunal determined the appeal on 31 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 dated 30 May 2013, HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 February 2017 and the appellant's reply to HMRC's Statement of Case dated 17 February 2017.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 to 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 are as follows:
- (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012
 - (3) “daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012
 - (4) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 19 February 2013.
3. This appeal was stood over pending the outcome of *Donaldson v HMRC* [2016] EWCA Civ 761. Now that that case has been finally determined, this appeal falls to be decided.
4. For the reasons summarised below I find that the £100 penalty and the two £300 penalties are due but the daily penalty totalling £900 is not.
5. A notice to file a self-assessment return for the year ending 5 April 2011 was issued to Mr Moore on 6 April 2011. The applicable filing deadline was 31 October 2011 for a paper return or 31 January 2012 for an electronic return. As no return had been filed, on 14 February 2012 HMRC issued a penalty assessment notice for £100 under paragraph 3 of the schedule. On 7 August 2014 HMRC issued penalty assessment notices for £900 under paragraph 4 and £300 under paragraph 5 of the schedule. On 19 February 2013 HMRC issued a penalty assessment notice for £300 under paragraph 6 of the schedule. Mr Moore’s return was submitted on paper on 7 February 2013.
6. On 29 September 2012 Mr Moore appealed to HMRC against the penalties that had by then been imposed (the twelve month penalty was not imposed until later). His grounds for appeal were that both his parents had died, and he had got divorced, all within a short space of time. Around the time of his mother’s death, Mr Moore’s biological father had made contact with him after 30 years of no contact. Mr Moore had found all of this very difficult to deal with without any support, and his tax affairs had got into arrears. It appears from elsewhere in the papers that he submitted his returns for the year ending April 2012 and the two previous tax years together in February 2013.
7. On 8 January 2013 HMRC replied saying that they could not accept the appeal since the 2011 return was still outstanding. The letter offered a review. On 8 February 2013 Mr Moore asked for a review and a review decision was issued on 14 March. The reviewer concluded that Mr Moore had not had a reasonable excuse for the late filing. His parents had died in February 2006 and July 2007; the reviewer

accepted that that was a very difficult period in Mr Moore's life but, to amount to a reasonable excuse for the late filing, circumstances must be such as to prevent a taxpayer controlling his affairs in the period leading up to the filing deadline. The reviewer therefore concluded that Mr Moore had not had a reasonable excuse for the late filing. The review decision did not consider whether the penalties should be reduced on account of special circumstances.

8. Mr Moore appealed to the tribunal. The appeal is a few weeks late, but Mr Moore has explained that he works all over the country and there had been delay in the review decision reaching him. HMRC have not objected to the tribunal dealing with the appeal and I accordingly give permission for it to be brought late.

Decision

9. The relevant statutory provisions are included in an Appendix to this decision.

10. I have to decide, on the evidence before me, whether the legal preconditions for imposing the penalties were satisfied, whether Mr Moore had a reasonable excuse for not filing his tax return before 29 April 2015 and (HMRC not having considered the point) whether any of the penalties should be reduced on account of special circumstances.

11. The penalty of £100 and the two penalties of £300 were correctly assessed under paragraphs 3, 5 and 6 of schedule 55 to the Act. Under the legislation, in the absence of reasonable excuse or special circumstances, a penalty of £100 becomes due when a self-assessment tax return is not sent in by the due date, which in this case was 31 October 2011 for a paper return. If the return has still not been filed 6 months after the due date (i.e. by 30 April 2012) a penalty of at least £300 becomes due and, if it has still not been filed after 12 months a further penalty of at least £300 becomes due (HMRC are not arguing that there was any deliberate withholding of information so as to make a higher penalty chargeable).

12. But the evidence does not satisfy me that Mr Moore was liable for daily penalties under paragraph 4 of the schedule. Under paragraph 4 a person is only liable to daily penalties if HMRC (1) decide that daily penalties should be payable and (2) give the taxpayer notice of the date from which the penalties will be payable.

13. The first of those conditions was satisfied because HMRC took a decision in June 2010 that all taxpayers who were at least 3 months late in filing their returns should be liable to daily penalties under paragraph 4: see *Donaldson v HMRC* [2016] EWCA Civ 761. But HMRC have not supplied any evidence that they gave Mr Moore notice that the penalties would be chargeable from 1 May 2012. The burden of proof that the preconditions for an assessment are satisfied rests upon HMRC: see *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC). I am not prepared to speculate that the notice was given. I therefore cancel the daily penalties amounting to £900.

14. In relation to the other penalties that are within the scope of the appeal, I need to consider whether Mr Moore had a reasonable excuse for the late filing, or whether special circumstances existed. HMRC say in their statement of case that the deaths of

Mr Moore's parents occurred four years before the 2011 return needed to be filed (and the same must apply to the divorce and the making of contact by his biological father, all of which happened at much the same time) and he could be expected by then to have made arrangements to file it. HMRC point out that they have no record of Mr Moore making contact with them to discuss his difficulties.

15. In response, Mr Moore has pointed out that his circumstances were extreme ones: both parents had died of cancer and the loss of them had been compounded by the divorce and the approach from his biological father. He had undergone counselling. The problems of his divorce had continued through to 2012. He had spent periods sleeping on friends' sofas, getting through each day as best he could. He had incurred penalties in a number of the tax years, but had filed three years' worth of outstanding returns in February 2013 and all his returns since then have been up to date.

16. I am only concerned with the late filing of the 2011 return. I can see that Mr Moore faced a combination of adverse circumstances and that filing tax returns was not at the forefront of this mind. The build-up of overdue returns will have made the situation harder to face up to. But I have to agree with HMRC that the combination of circumstances dating back over four years did not amount to a reasonable excuse for more than a year's delay in the filing of that return. For similar reasons I do not consider that HMRC were legally wrong in not finding that any of the penalties should be reduced or not demanded because of special circumstances.

Conclusion

17. HMRC's decisions to charge the penalty of £100 and the six month penalty of £300 are confirmed. HMRC's decision to charge daily penalties totalling £900 is cancelled. The 12 month penalty is strictly outside the scope of this appeal but I cannot see any grounds upon which it should not be confirmed.

18. 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.

NICHOLAS PAINES QC
TRIBUNAL JUDGE

RELEASE DATE: 17 AUGUST 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)—

(a) may be earlier than the date on which the notice is given, but

20 (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—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

35 (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.

40 (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

5 (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

10 (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

15 (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

20 (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

25 (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse”:

23—

30 (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)—

35 (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

40 (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.

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

16—

- 5 (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.
- 10 (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.

7. Paragraph 20(1) of Schedule 55 gives a taxpayer a right of appeal to the Tribunal against a decision that a penalty is payable and paragraph 20(2) gives a right of appeal as to the amount of a penalty. 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”:

22—

- 20 (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.
- 25 (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.
- 30 (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.
- 35