



TC06896

Appeal number: TC/2018/02738

*INCOME TAX – penalty for failure to make returns – depression – whether
reasonable excuse – no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RICHARD BAKER

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 24 August 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 15 March 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 29 May 2018 and the Appellant's Reply dated 21 June 2018.

DECISION

- 5 1. The appellant, Mr Baker, is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2015/16 tax year 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 7 February 2017;
 - 10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 11 August 2017;
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 11 August 2017.

Appellant’s case

- 15 3. Mr Baker’s case is that he has a reasonable excuse for the delay in filing his return because:
 4. In correspondence with HMRC he stated that:
 - (1) he had set up a small “one man band” courier/transport company and struggled to get enough work. Just as he started to break even, his van was
20 stolen. When the insurance company increased the premium on the replacement vehicle, his business was no longer viable;
 - (2) as a middle-aged man in his late fifties, he struggled to find employment and was unemployed for the majority of the year. This put a substantial strain on his finances.
 - 25 5. In a review request, his grounds of appeal and in a reply to HMRC’s statement of case Mr Baker explains that:
 - (1) throughout this period he was suffering with depression making it impossible to understand what is required, or to understand that help may have been available;
 - 30 (2) his depression was very debilitating and, although he was able to take on employment when he found a job in January 2017, it was a struggle both physically and mentally for the first six months:
 - (3) although he could function at work, particularly as it was a role he was familiar with, most other tasks were overwhelming, including filling in
35 complicated tax returns.
 6. Mr Baker further submits that the penalties are not fair as he did not owe any tax and should actually have received a rebate as he had overpaid. He is not in a

position to pay such an extortionate penalty and does not have the funds to pay an accountant to do the return;

HMRC's case

7. HMRC submitted, in summary:

5 (1) HMRC reactivated Mr Baker's self-assessment record on 25 September 2015 when Mr Baker advised them that he was self-employed. Mr Baker had been within self-assessment for a number of years since 2001 although he had not been required to complete returns for all years.

10 (2) Although Mr Baker states in his review request and grounds of appeal that he has a reasonable excuse for the delay in filing as a result of depression, he has provided no dates as to the period of depression nor any details of any treatment sought or medication taken. No letters from a doctor or hospital were provided.

15 (3) HMRC therefore had to draw their own conclusions from the evidence available to them in the form of employment records and Mr Baker's original appeal to HMRC, which did not mention depression as a reasonable excuse.

20 (4) HMRC consider that, when considering reasonable excuse, the actions of the taxpayer need to be considered against what a prudent person would have done in the same circumstances. Mr Baker did not contact HMRC until 7 December 2017, several months after the penalty notices were issued. HMRC contend that a prudent person would have contacted HMRC when the first penalty notice was received. Mr Baker has given no explanation as to why he did not contact HMRC sooner to explain his difficulties.

25 (5) HMRC have considered that Mr Baker had difficulties with his business, financial problems and depression but concluded that these are not special circumstances which would merit a reduction of the penalties below the statutory amount.

Discussion

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

30 9. Mr Baker did not dispute that his electronic tax for the 2015/16 tax year was submitted late. I find that it should have been submitted by 31 January 2017 and was in fact submitted more than six months late on 15 August 2017. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the initial £100 penalty, the six month penalty of £300 and the daily penalties of £900
35 imposed are due and have been calculated correctly.

40 10. Mr Baker has argued that the penalties charged are disproportionate. The 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 the Tribunal's power to reduce penalties because of the presence

of “special circumstances” and, elsewhere in this decision, I have considered the question of “special circumstances”. Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

5 11. There is no statutory definition of “reasonable excuse” but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

10 “a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

12. Mr Baker submitted that he had a reasonable excuse for the delay in filing his return as he was suffered from depression and unable to deal with his tax obligations as a result.

15 13. However, Mr Baker produced no medical evidence or any detail as to his medical condition including, for example, when it started and how long it continued. It appears that the depression may have been related to his business difficulties whilst self-employed, but that is not specifically stated nor is any time frame given for those. Without any evidence as to when Mr Baker’s depression started and how long it
20 continued, it is impossible to conclude that there is a reasonable excuse for the delay of over six months in filing the tax return.

25 14. Considering whether HMRC should have made a special reduction because of special circumstances within paragraph 16, I note that the Tribunal’s jurisdiction in this context is limited to circumstances where it considers HMRC’s decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC’s decision.

30 **Decision**

15. The appeal is dismissed and the penalty upheld.

35 16. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

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RELEASE DATE: 20 DECEMBER 2018

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.

- (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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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:

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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—

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(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—

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(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. 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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.