



TC06933

Appeal number: TC/2018/00306

INCOME TAX – penalties - late filing of self-assessment return – whether reasonable excuse – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LORETA DMITRIJEVIENE

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 17 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 9 December 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 17 April 2018 and the Appellant's Reply acknowledged by the Tribunal on 4 July 2018.

DECISION

1. The appellant 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 2011/12 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 12 February 2013
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 20 August 2013
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 23 July 2013
3. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC initially refused consent under s49(2)(a) of TMA 1970. However, HMRC have now prepared a full Statement of Case which deals with the substantive appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a).

Appellant’s case

4. The appellant’s grounds of appeal are, in summary:
 - (1) The appellant registered for self-assessment on 3 November 2011 but, as she subsequently obtained employment, attended her local Citizens Advice on 30 December 2011 for their assistance in closing her self-assessment record with HMRC. In the telephone conversation with HMRC she was given confirmation that her self-assessment record would be closed and was advised that she did not need to do anything further until she received a notice from HMRC confirming whether or not she needed to complete a tax return for 2011/12. She did not receive any correspondence to confirm this and has not received any notice from HMRC since that date.
 - (2) Some time later the appellant was passed a letter by a friend that had been sent to her old address, although she had notified HMRC via Citizens Advice that her address had changed when she asked for her self-assessment record to be closed. That letter was the penalty notice for late filing of the 2011/12 tax year. It was posted on 12 February 2013. The appellant telephoned HMRC and explained again that she was not in self-assessment and advised HMRC that the letter was sent to her previous address. The appellant paid the £100 late filing penalty.
 - (3) Two further penalties were also sent to the appellant, one to her old address and one to her correct address at the time. The letters displayed two

different penalties with different reasons. The appellant went to Citizens Advice for assistance again. Citizens Advice spoke to HMRC and confirmed her current address. She was advised that she would receive forms that needed to be completed, but no forms were received.

(4) Throughout the period from registering for self-assessment to closing her self-assessment record, the appellant was working as an employed individual and her taxes were paid by her employer.

(5) In July 2013, a larger fine of £900 was received. The appellant approached an HMRC officer for assistance. The officer helped her to complete some forms although the appellant was not sure what they were for. She subsequently received a letter from HMRC on 23 August 2013 concluding that HMRC had not accepted her appeal.

(6) A further penalty of £300 was received on 26 September 2013, which the appellant has paid.

(7) The appellant went back to Citizens Advice and was told that everything was sorted out. She was told the same by HMRC officers and was even told that she should shortly receive correspondence regarding the refund of the penalties which she had paid.

(8) The appellant considers that she was strongly mistreated and incorrectly guided several times.

5. In correspondence, the appellant also submitted that:

(1) She does not speak English well and does not understand the UK tax system and so obtained help from Citizens Advice and Colchester Inland Revenue;

(2) The only correspondence she received from HMRC in March 2012 was a letter about outstanding liability periods.

(3) In May 2012, HMRC officers helped her complete forms and answer other HMRC queries. The appellant believed everything was sorted out and nothing further needed to be done. If anything was sent late, perhaps it was because the HMRC office is only open for limited hours and it takes 2-4 weeks to get an appointment;

(4) The appellant had problems with online filing because she had no access to the internet. She tried to use the computers in the local library but did not receive any activation PIN, user ID or password.

(5) Her new employment was difficult as she was working night shifts and found the work, as a carer for the elderly, to be stressful.

(6) From 30 December 2012 to May 2012 the appellant had family pressures as well: her mother was taken to hospital in February 2012, and she had to pay her children's university fees in Lithuania in January 2012, together with their accommodation fees.

- (7) The appellant had asthma at the time and that must have prevented her from dealing with tax affairs.
 - (8) The appellant was advised by Citizens Advice and Colchester HMRC that everything was sorted and that she should ignore the correspondence from HMRC received in July 2013 and August 2013.
 - (9) The appellant considers that the penalties are unfair or unjust in her particular circumstances.
6. In further correspondence with HMRC, the appellant stated that:
- (1) She telephoned HMRC asking if she should have received some confirmation of the cancellation of her self-assessment, and advising HMRC of her new address in Crouch Street.
 - (2) She did not receive any notification from HMRC; if the correspondence was sent to her old address, it should have been returned to sender.
7. In her reply to HMRC's statement of case, the appellant added that:
- (1) She had no income from self-assessment for 2011/12;
 - (2) She had received correspondence regarding National Insurance to her correct address but no other correspondence from HMRC;
 - (3) The appellant acted promptly once she started getting higher penalties and would have acted similarly if she had received any correspondence earlier.
 - (4) None of the HMRC advisers notified the appellant that she was required to complete a self-assessment return even if it was a nil return.

HMRC's case

8. HMRC submitted as follows, in summary:
- (1) The appellant registered for self-assessment online on 31 October 2011.
 - (2) A notice to file was issued to the appellant on 6 April 2012 to the address held by HMRC for the appellant at the time, in Bromley.
 - (3) The filing date was 31 October 2012 for paper returns and 31 January 2013 for online returns. The appellant's paper return was received on 17 July 2013, approximately nine months late.
 - (4) A late filing penalty was sent on 12 February 2013 to the address held by HMRC for the appellant at that time, in Bromley.
 - (5) As the return was not filed within three months of the penalty date, HMRC issued a notice of daily penalty assessment. This was sent to the appellant's address on HMRC's records at the time, in Colchester.
 - (6) As the return was not filed within six months of the penalty date, HMRC issued a notice of penalty to the appellant's address on HMRC's records at the time, in Colchester.

- (7) HMRC has no record of the appellant contacting HMRC rescinding her self-employment status on 30 December 2011.
- (8) The appellant notified HMRC of her address in Crouch Street on 28 February 2013.
- (9) The appellant received the £100 penalty notice passed to her by a friend in February 2013 and contacted HMRC on 28 February 2013 in response, but did not submit her return until almost five months later.
- (10) Notification of current address at any given time is the responsibility of the taxpayer. All correspondence has been sent to the address notified by the appellant at that time. No correspondence has been returned as undelivered from any address notified to HMRC and so is deemed served under s7 Interpretation Act 1978.
- (11) Even if the appellant did not receive a notice to file, it was because she failed to keep HMRC updated with her latest address.
- (12) The penalties are neither unfair nor disproportionate, as established in case law.
- (13) HMRC considered whether special circumstances exist but concluded that there were no circumstances which would merit a reduction in the penalty.

Discussion

9. Relevant law is included in the Appendix to this decision.
10. It is not disputed that the return was filed approximately nine months late and so, subject to consideration of whether there is a reasonable excuse or special circumstances, the penalties imposed are due and correctly calculated.
11. The test of whether something is a “reasonable excuse” for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:
- “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. In addition, a reasonable excuse must exist throughout the period of default, with the return being filed as soon as reasonably possible once the reasonable excuse has ceased.
13. The appellant’s lack of knowledge of English has clearly been of some difficulty in this matter and it appears that much of the communication between her and HMRC has taken place through third parties, particularly Citizens Advice. The

communication problems appear to have led to the appellant having a mistaken belief as to the status of her tax affairs for a while.

14. On the basis of the evidence put to me, I find that HMRC issued the appellant with a notice to file for the 2011/12 tax year and that it was sent to the address held by HMRC for the appellant on that date. The letter was not returned undelivered and so is deemed to have been served in the ordinary course of post.

15. The appellant appears to argue that she was not aware that she needed to complete a tax return for 2011/12 but she also provides reasons for her inability to comply with her tax affairs between December 2011 and May 2012. This suggests that she was aware that she needed to complete a tax return during 2012, although the filing deadline for the 2011/12 tax return was (for a paper return) 31 October 2012 and therefore some months after the period for which she gives reasons for being unable to comply.

16. However, whilst there may have been some confusion as to the state of appellant's tax affairs between December 2011 and February 2013, I find that the appellant was aware in late February 2013 that her self-assessment tax return was late as she stated that she was passed the penalty notice from her old address by a friend and she contacted HMRC by telephone to query the penalty on 28 February 2013 and was advised that her 2011/12 tax return had not been filed.

17. Nevertheless, the appellant's self-assessment tax return was not filed until July 2013.

18. The appellant states that she received no correspondence from HMRC between February 2013 and July 2013 but does not explain why she did not complete her tax return until July 2013, although she was advised by HMRC on 28 February 2013 that she had received the penalty because her 2011/12 tax return had not been submitted.

19. Regardless of whether the appellant had a reasonable excuse for her failure to file her tax return before receiving the penalty notice in late February 2013, I find that any such reasonable excuse ceased when the penalty notice was received and that no reasonable excuse has been established for the delay to July 2013.

20. I find, therefore, that the appellant does not have a reasonable excuse for the late filing of her 2011/12 tax return.

21. With regard to the question of whether there are any special circumstances meriting a reduction in penalty, 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.

22. The appellant 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.

23. 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**

RELEASE DATE: 15 JANUARY 2019

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.

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)—
 - (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 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).

3. Paragraph 5 of Schedule 55 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.

4. Paragraph 6 of Schedule 55 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.

(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.

(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.

(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.

(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.

6. Paragraph 16 of Schedule 55 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.

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:

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.