



**TC07014**

**Appeal number: TC/2017/07440**

*Income tax - fixed and daily penalties for late filing of self-assessment return - appellant filed a paper return late which was followed by her agent filing an electronic return also late - whether reasonable excuse - no - daily penalties calculated by reference to the filing of the first return - whether daily penalties can be reduced by reference to date of filing of electronic return - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**ELLIE KENNEDY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 8 February 2019 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 5 October 2017, and HMRC's Statement of Case received by the Tribunal and Appellant on 16 November August 2017 with enclosures. The Tribunal wrote to the Appellant on 30 November 2017 stating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days of receiving a copy from HMRC. The Appellant did not respond.**

## DECISION

1. This is an appeal by Ms Ellie Kennedy ('the appellant') against penalties totaling £430 imposed by the Respondents ('HMRC') under Paragraph 4 of Schedule 55 Finance Act 2009 for the late filing of her 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:
  - 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.
  - ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties at £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
  - 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.
  - iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
3. Penalties of £100 and £430 were imposed, under (i) on 7 February 2017, and under (ii) on 4 April 2017.
4. The appellant's appeal is only against the penalty £430 penalty.

### *Filing date and Penalty date*

5. Under s 8(1D) TMA 1970 et seq. a non-electronic return must be filed by 31 October following the end of the relevant tax year or an electronic return by 31 January of the following year. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
6. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

### *The background facts*

7. The notice to file for the year ending 5 April 2016 was issued to the appellant on 6 April 2016.
8. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. [The appellant's non-electronic return for the year

ending 5 April 2016 was received by HMRC on 15 March 2017 and processed on 29 March 2017.]

9. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 7 February 2017 in the amount of £100.

10. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 4 April 2017 in the amount of £430, calculated at £10 per day for 43 days.

11. On 26 April 2017, the appellant's agent OJK Ltd, appealed against the daily penalty, on the grounds that a return was "electronically filed on 3 April 2017 as shown on the attached online submission report".

12. HMRC sent the appellant a decision letter on 5 June 2017 rejecting her appeal and offering a review.

13. On 20 June 2017, OJK Ltd requested a review of HMRC's decision, saying the client:

"inadvertently submitted her paper return whereas, as is the normal practice of this firm we submitted it electronically on 3 April 2017. It is unfair to penalise our client for filing a paper return in error bearing in mind we, as her accountant, always submit her return electronically".

14. HMRC carried out a review and issued their review conclusion on 5 September 2017. The outcome of the review was that HMRC's decision should be upheld.

15. On 5 October 2017, OJK Ltd notified their appeal to the Tribunal, giving their grounds as,

"I believe in all fairness that the daily penalties imposed should be on the basis that the electronically filed return was late (so the penalty should be £10 x 3 = £30) and not that the paper return was late as this filing method was not the usual method of filing a return for our client".

#### *Relevant statutory provisions*

#### **Taxes Management Act 1970**

Section 8 - Personal return- provides as follows:

(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

- 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

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

- (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.]

(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.

(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-

- (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-

- (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).

(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.

(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.

(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).

(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:**

16. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

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

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

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,
  - (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).

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

- (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.

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)--
  - (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

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

- (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
  - (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.

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:

- (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.

*The Appellant's case*

17. The appellant's grounds of appeal are as set out above.

*HMRC's Case*

18. The appellant has not disputed that her return was filed late nor has she appealed the £100 late filing penalty.

19. 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 her 2015-16 tax return was filed by the legislative date and payment made on time.

20. The appellant has been required to complete a SA return for several years now and HMRC expect her to be aware of her obligations under SA. Filing the tax return and paying any tax due by the deadline forms part of her responsibility to meet these obligations.

21. The return was due in paper format by 31 October 2016 and electronically by 31 January 2017. As the paper return was received on 15 March 2017, penalties have been charged in accordance with legislation and commenced on 1 February 2017.

22. The notice to file a 2016 return was issued to the appellant on 6 April 2016 to the address held on record at the time, which is also her current address. As no correspondence to that address has been return undelivered to HMRC by their returned mail service with the Royal Mail, that document is therefore deemed to have been served within the ordinary course of postal delivery in line with s 7 of the Interpretation Act 1978.

23. As the return was not received by 31 January 2017, HMRC issued a penalty notice of £100 to the appellant on or around 7 February 2017. The penalty notice also warned that daily penalties can be charged for a maximum of 90 days starting from 1 February for papers returns or 1 May for online returns.

24. Again the penalty notice was issued to the address held on HMRC's record at the time and was not returned undelivered to them by their returned mail service with the Royal Mail; that document is therefore deemed to have been served

within the ordinary course of postal delivery in line with s 7 of the Interpretation Act 1978.

25. OJK Ltd has not given a reason why the return was filed late in the first place. Their argument is that their client submitted a paper return in error on 15 March 2017 when it is their practice to file the return electronically, which they did 2 months after the deadline on 3 April 2017.

26. The first return to be registered on HMRC's SA computer system is treated as the tax return for the year. If a paper tax return is filed late, it is not possible to avoid a penalty by filing a further tax return online afterwards. The fact that the agent filed an electronic return after the appellant filed a paper return makes no difference. The paper return was filed first and treated as the return for the year.

27. The appellant may have made a mistake in filing the paper return herself, but this is not a reasonable excuse. We all make mistakes; this was not a blameworthy one. But the law does not provide shelter for mistakes, only for reasonable excuses. HMRC cannot say that this confusion was a reasonable excuse.

28. These penalties did not occur as a result of something which was entirely out of the appellant's control. 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.

29. In order for the appellant's appeal to succeed, she must demonstrate that a reasonable excuse existed which prevented her from complying with her Income Tax obligations. HMRC have concluded, based on the evidence held, that no reasonable excuse exists and as a consequence the penalties were correctly charged in accordance with legislation.

#### *Special Reduction*

30. 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.

31. 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).



32. HMRC have considered the appellant's submissions and assert that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

33. 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'.

34. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed, but in any event there are no special circumstances which would require the Tribunal to reduce the penalties.

### *Conclusion*

35. 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. That is, if there is a reasonable excuse it must exist throughout the failure period.

36. 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).

37. 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.

38. The due filing date for the online return is clearly shown on the notice to file form SA316 issued to the appellant on 6 April 2016. In addition, the due filing dates and the consequences of late filing are clearly shown on the HMRC website and were therefore available to the appellant.

39. A taxpayer can choose to file a paper return or submit the return online. If a taxpayer chooses to file a return online, it must reach HMRC by midnight on 31 January in the year following the relevant tax year. 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 form SA316 Notice to File issued to the appellant on 6 April 2016.

40. To support taxpayers with their responsibility HMRC publishes information and advice about their obligations and how they can adhere to them. This information about SA, the completion of returns, tax payment dates, penalties and so on, is well within the public domain and widely available via the internet including HMRC's website. An individual acting in a responsible manner to ensure that they adhered to their legal obligations would make themselves aware of such information and act accordingly.

41. The return was due in paper format by 31 October 2016 or electronically by 31 January 2017. HMRC sent a late filing penalty to the appellant on 7 February 2017 for £100. This should have acted as an alert that she had not filed her return. The appellant was informed of the penalties at the time they were issued. Any excuse the appellant may have had for the delay in filing her non electronic return did not subsist throughout the entire period of delay as it was not filed until 15 March 2017, and therefore does not amount to a reasonable excuse.

42. The Appellant may have made an honest mistake in filing the paper return herself, but this is not a reasonable excuse. As HMRC say, the first return to be registered on HMRC's SA computer system is treated as the tax return for the year. If a paper tax return is filed late, it is not possible to avoid a penalty by filing a further tax return online afterwards.

43. OJK Ltd have not given a reason why either return was filed late. Their assertion that their client submitted a paper return in error on 15 March 2017 when it is their practice to file the return electronically, which they did 2 months after the deadline on 3 April 2017, does not amount to a reasonable excuse.

44. As the return for the tax year 2015-16 was received late, the penalties have been charged in accordance with legislation. 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. 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.

45. Late filing penalties are raised solely because the SA tax return is filed late. They are no longer linked to liability and remain fixed even if there is a repayment or no tax due. The effect the penalties may have on the appellant financially is not a reasonable excuse to reduce or cancel the penalties.

46. I accept HMRC's submissions that the penalties were correctly issued and that the appellant has not shown a reasonable excuse for the failures which led to the penalties.

47. The late filing penalties have therefore been charged in accordance with legislation and there is no reasonable excuse for the appellant's failure to file her tax return on time, nor by the date the penalties arose.

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

49. The appeal is therefore dismissed and the late filing penalties totalling £530 are confirmed.

50. 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.

**MICHAEL CONNELL**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 28 February 2019**