



[2019] UKFTT 334 (TC)

TC07162

INCOME TAX – Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return on time – Appellant unable to complete online filing - whether taxpayer had a reasonable excuse for her default – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/07070

BETWEEN

GILLIAN MASON

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 20 May 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 22 October 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 28 February 2019 and the Appellant's reply (with enclosures).

DECISION

Introduction

1. This is an appeal by Mrs Gillian Mason ('the Appellant') against penalties totalling £750 imposed by the Respondents ('HMRC') under Paragraph 4 of Schedule 55 Finance Act 2009, for her failure to file self-assessment ('SA') tax returns on time for the tax year ending 5 April 2017.

Background

2. The Appellant's return for 2016-17, was due if filed electronically no later than 31 January 2018.

3. 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 of £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 £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

4. The Appellant's return for 2016-17 was filed late and penalties of £100 and £750 were imposed, under (i) and (ii) above.

Filing date and Penalty date

5. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

Reasonable excuse

6. 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.

7. The law specifies two situations that are not reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

8. 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).

9. 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.

The background facts

10. The Appellant had been within the SA regime since 2012.

11. The Appellant's 2016-17 return was issued on 6 April 2017 and so was due to be returned in paper form by 31 October 2017 or online by 31 January 2018. The Notice to file a return was sent by HMRC to the Appellant at her home address in the UK.

12. The Appellant says that she attempted to file her SA return online on 26 January 2018 and then checked that it was properly submitted on 31 January 2018. During those attempts she believed the appeal to be completed but in fact accepts that she had failed to submit the return.

13. On 14 July 2018 the Appellant's electronic return was received by HMRC. The return, being an online return, should have been filed by 31 January 2018 and was therefore over three months late.

14. HMRC imposed a fixed penalty of £100 together with daily penalties [75 days at £10 for each day] totalling £750.

15. The Appellant appealed to the Tribunal on 22 October 2018. It is not clear that she is appealing against the fixed penalty in addition to the daily penalties, as her notice of appeal refers only to the latter. For completeness, and given the excuse proffered, I have treated the appeal against both penalties.

16. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. 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) TMA 1970.

The Appellant's case

17. The Appellant's grounds of appeal are that she had tried to file the return online on 26 January 2018 and wrongly believed that the form had been submitted. She checked further on 31 January 2018 and did not realise that the return had not been submitted. The Appellant considers that her dyslexia had a significant impact on her failure to submit the return online. Accordingly, she had a reasonable excuse for the delay in filing an online return.

HMRC's Case

18. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

19. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

20. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that she has a reasonable excuse for the late filing of her SA tax return.

Reasonable Excuse

21. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

22. ‘Reasonable excuse’ was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

“It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?” [Page 142 3rd line et seq.].

23. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

24. If there is a reasonable excuse it must exist throughout the failure period.

25. The Appellant has not provided a reasonable excuse for her failure to file her tax return for the year 2016-17 on time and accordingly the penalties have been correctly charged in accordance with the legislation.

26. 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.

Special Reduction

27. 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.

28. 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).

29. 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’.

30. HMRC have considered the Appellant's grounds of appeal but her circumstances do not amount to special circumstances which would merit a reduction of the penalties.

31. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

32. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event which prevents him or her from complying with an obligation which otherwise they would have complied with.

33. Mrs Mason submitted online SA returns for the tax years ending 2013, 2014, 2015, 2016 and 2017. A year passed in between each submission without causing her an inability to file in the following tax year. She is extremely experienced in navigating the HMRC website.

34. The notice to file was issued to Mrs Mason at her home address on 6 April 2017. Similarly a penalty notice was issued to her home address on or around 13 February 2018. Mrs Mason does not suggest that she did not receive that documentation, and indeed there is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries. In those circumstances, I find that she did receive those communications.

35. It is agreed that the return was in fact submitted electronically on 14 July 2018. The HMRC computer system does not allow a customer to submit a tax return for the same tax year twice. Therefore, the return having been submitted on 14 July 2018 effectively, it must not have been submitted effectively prior to that. I accept that the return was not properly submitted on or around 31 January 2018.

DISCUSSION

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

37. I have concluded that the tax return for the 2016-17 tax year was not submitted until 14 July 2018. It should have been submitted by 31 March 2018. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

38. Although it is not disputed that Mrs Mason has dyslexia she is fully aware of her limitations and the need for additional care to be taken. She states that she finds it easier to be guided by graphic clues, but such clues are available and clear on the website in the form of the pictorial depiction of completion of the submission. In my judgment a reasonable person, who wanted to comply with their tax obligations, would have taken particular care to ensure that the form was properly submitted.

39. In her notice of appeal Mrs Mason states that her dyslexia causes her difficulties in understanding letters and remembering dates. However, it is Mrs Mason's assertion that she was aware of the deadline, and that she had no difficulty understanding what date her return was to be submitted by. She does not suggest that she had any difficulty completing the form in that she states that she completed the entire document and reached the final direction, and therefore the impact of her dyslexia does not appear to have been relevant in the circumstances, whether or not it was amplified by depression.

40. Notwithstanding her assertion that she has not had difficulties using the HMRC website in the past, Mrs Mason filed her SA return late in 2012, 2013, 2014 and 2015 and accrued penalties for those failures. She was therefore fully aware of the importance of ensuring that her SA return was filed on time. Having received a fixed penalty on or around 13 February 2018 it would have been clear, particularly to an Appellant with Mrs Mason's experience of late filing penalties, that the online return had not been properly submitted. Although she is dyslexic, I do not accept that her dyslexia would result in her being unable to understand the clear message of a penalty notice – that a penalty was being imposed. Notwithstanding that, it then took a further five months for the Appellant to file her return.

41. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. Mrs Mason was particularly knowledgeable and experienced in using this online system.

42. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. Mrs Mason's account is that she honestly believed that she had submitted the return. Given her experience with the HMRC computer system, and the lack of confirmation of submission received the initial belief would not be objectively reasonable. If she went on to the online system to check the submission as she asserts, then she would have been doing so specifically to confirm that the return had been properly submitted. It had not, and the online system must have shown that. Following that initial failure to file, the subsequent issuing of penalty notices to her home address should have provoked the Appellant to file the late return rather than continue to ignore the request. The Appellant acknowledges in her appeal to HMRC dated 15 August 2018 that she ignored those requests because she believed that she had not earned anything for the year, rather than because she believed that she had submitted the return. On the information before me, and in particular the lateness of her eventual submission, I am not satisfied that Mrs Mason had an honest belief that she had submitted her online return. Even if I were, I am not satisfied that any reasonable excuse could have continued for the duration of the delay. I conclude that Mrs Mason does not have a reasonable excuse for the late filing of her return for 2016-17.

43. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

44. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mrs Mason.

45. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Mrs Mason relied upon was her dyslexia. I have explained above why I do not consider that the same can provide Mrs Mason with a reasonable excuse for her late filing. I conclude that there are no special circumstances which would make it right for me to reduce the penalty which has been imposed.

CONCLUSION

46. I therefore confirm the fixed penalty of £100 and the daily penalties of £750.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

RELEASE DATE: 29 MAY 2019

APPENDIX RELEVANT STATUTORY PROVISIONS

Finance Act 2009

48. 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.

49. 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).

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

Taxes Management Act 1970

55. 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 the 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 the 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 the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the 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 the 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 the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the 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 the section and sections 8A, 9 and 12AA of the 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.