



TC05836

Appeal number: TC/2013/00983

INCOME TAX – penalty for failure to make returns – Whether reasonable excuse for late submission of self- assessment tax return - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VICTOR A. LINTON

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA AIT**

The Tribunal determined the appeal on 23 April 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 3 February 2013, with enclosures, and HMRC's Statement of Case with enclosures, acknowledged by the Tribunal on 30 January 2017. The appellant died in February 2016 so the Tribunal wrote to the appellant's personal representative on 16 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

5 1. The appellant has appealed against penalties that HMRC imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit his annual self-assessment return for the year ending 5 April 2011 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 or around 14 February 2012.

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 7 August 2012.

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 7 August 2012

15 3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) He argues that he was totally unaware that his previous accountant had not filed the return.

(2) He argues that there was a “reasonable excuse” for any failure to submit the return on time].

20 (3) He argues that the penalty is totally disproportionate to his means.

4. The appellant’s appeal was notified to the Tribunal late. For the following reasons, I have decided to give permission for the appeal to be notified late:

25 It is clear that the appellant attempted to appeal against the conclusion of HMRC’s review given in their letter of 12 November 2012. Unfortunately in error he sent that appeal to HMRC whereas he should have sent it to the Tax Tribunal. HMRC wrote to the appellant pointing out his error so he appealed to the Tribunal on 3 February 2013. HMRC’s statement of case makes no comment on the lateness of the appeal, so there is an absence of any objection.

Findings of fact

30 5. The appellant died in February 2016. The Tribunal has been advised that his personal representative is Mr.P.Linton.

6. The appellant was a pensioner, but continued to work until age 73 because he needed the money

35 7. On 6 April 2011 a self-assessment tax return for the year ending 5 April 2011 was sent to the appellant. at the address shown on HMRC records at that date. The filing date for the return was 31 October 2011 for a non-electronic return or 31

January 2012 for an electronic return. HMRC did not receive the appellant's electronic return until 15 December 2012.

Appellant's submissions

5 The appellant's new accountant wrote to HMRC on 25 September 2012 appealing against the penalties. Her submissions include

10 "Despite numerous attempts to contact Mr. Linton's previous accountant, I have not received any confirmation as to what (if anything) was outstanding. So both Mr. Linton and I were not aware that the self-assessment tax return for 2010/11 had not been filed. Indeed, we are now shocked and surprised to see that tax returns for 2008/9 and 2009/10 are overdue.

Mr. Linton is busy gathering all necessary information so that I can prepare and submit the returns for 2008/9, 2009/10, and 2010/11. I currently expect the returns to be filed within the next week

15 Please note that Mr. Linton is a pensioner and is only continuing to work because he needs the income He has paid his taxes on time (despite returns being overdue) and I strongly expect that he has overpaid so that he will be due a refund when the returns have been filed."

HMRC submissions

20 8. HMRC say that the appellant has been in self-assessment for a considerable number of years. Whether he used the services of an agent or completed the tax returns himself he should have been aware that a tax calculation requesting payment or showing a repayment due is issued by HMRC following the receipt and process of each return.

25 The fact that the appellant would not have received notification of either tax over or underpaid should have led him to query this either with his agent or directly with HMRC

9. It is HMRC's view that if a taxpayer employs an agent to complete and file the tax return on his behalf they remain responsible for ensuring it is received by the relevant deadline and are liable to the automatic penalty if it is not.

30 The self-assessment system places a greater degree of responsibility on customers for their own affairs. This includes ensuring that they submit their tax return at the correct time and pay any liability by the due date. It is the person's own responsibility to make sure they meet any deadlines. Taxpayers should not wait for a prompt or reminder from HMRC.

35 10. HMRC submit that if an appellant feels his accountant has failed in their professional capacity or not followed specific instructions then the appellant should seek redress from the accountant.

11. In respect of the penalty being unfair HMRC say for a penalty to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

5 12. In respect of reasonable excuse HMRC say Paragraph 23 of Schedule 55 of the Finance Act 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 reasonable delay after the excuse has ended.

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

10 (a) An insufficiency of funds, unless attributable to events outside the appellant’s control.

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

15 There is no statutory definition of “reasonable excuse”. Whether or not a person has 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.

20 HMRC’s view is that the actions of a 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 on 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.

30 14. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC say the special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

Discussion

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

16. The return was due to be filed by 31 January 2012. An electronic return was submitted by the appellant’s agent on 15 December 2012 and was therefore late. The letter from the appellant’s new accountant seems to accept this.

17. As I have concluded that the tax return for the tax year ended 5 April 2011 was submitted late then it follows that subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

5 18. The appellant has argued that the penalties charged are disproportionate. Following HMRC v Anthony Boshier [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

10 19. In respect of reasonable excuse it is clear that the appellant had relied heavily on his previous agent. The fact that the appellant was surprised and shocked to learn that the returns for the two previous years 2008/9 and 2009/10 remained outstanding shows that the appellant had had little or no contact with the previous accountant and had not monitored progress of the submission of his tax returns.

15 20. Taxpayer is ultimately responsible for the submission of his tax return by the due date. The legislation provides that “Reliance on another person to do anything, unless the person took reasonable care to avoid the failure” cannot establish a reasonable excuse for a failure to submit a return by the due date. In this case there is no evidence that the appellant took reasonable care to avoid the failure. He exercised little or no supervision of the submission of his return

20 21. Therefore the Tribunal finds that the appellant had no reasonable excuse for the failure. If the appellant’s representative feels that the appellant’s previous accountant has failed in his/her professional capacity then the representative should take that up with the previous accountant.

25 22. On 6 April 2011 a self-assessment tax return for the year ending 5 April 2011 was sent to the appellant at the address shown on HMRC records at that date. The filing date for the return was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. HMRC did not receive the appellant’s electronic return until 15 December 2012.

30 23. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. HMRC consider that there are no special circumstances which would allow them to reduce the penalty. The Tribunal sees no reason to disagree.

24. **Conclusion**

35 The appellant failed to submit his self-assessment return for the period 2010-2011 by the due date of 31 January 2012 and has not established that he had a reasonable excuse for it being late. HMRC has decided there are no special circumstances that would allow them to reduce the penalty and the Tribunal does not consider that their decision is flawed. Therefore the appeal against the penalties totalling £1,300 is dismissed

36. Application for permission to appeal

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 for 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.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

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RELEASE DATE: 28 APRIL 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)—

- 20 (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—

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—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

4. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

35 (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.

5. 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.

6. 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.

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