



TC05848

Appeal number: TC/2013/06470

INCOME TAX – penalty for failure to make returns- Whether reasonable excuse for late submission of self-assessment tax return-yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THEODORE DAVID PATRICK LAVERTY

Appellant

- and -

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

Respondents

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

The Tribunal determined the appeal on 24 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 13 August 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2017. The Tribunal wrote to the appellant on 13 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 is appealing against penalties totalling £1,700 that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns on time.

2. The penalties that have been charged can be summarised as follows:

10 (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 14 February 2012 for the late filing of the appellants self-assessment return for the year ending 5 April 2011

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

(3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on or around 19 April 2013

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

(5) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 12 February 2013 for the late filing of the appellants self-assessment return for the year ending 5 April 2012.

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

(1) The appellant’s agent argues that the relevant returns were not received by them or the appellant.

25 (2) He argues that HMRC failed to respond to 64-8 notices, failed to supply the agent with a Unique Taxpayer Reference, and failed to advise the agent that a self-assessment return had been set-up.

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

4. Findings of fact

30 In 2010 the appellant moved to Ho Chi Minh, Vietnam for employment reasons. He appointed his accountants T. Murphy & Co. Ltd. of Belfast to act as his agent for tax purposes and completed and signed a form 64-8 to give effect to this.

35 5. A self-assessment return form for the tax year ended 5 April 2011 was sent by HMRC to the appellant on 6 May 2011. The filing date was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return. The electronic return was received by HMRC on 7 March 2013.

6. A self-assessment return form for the tax year ended 5 April 2012 was sent by HMRC to the appellant on 6 April 2012. The filing date was 31 October 2012 for a

non-electronic return or 31 January 2013 for an electronic return. The electronic return was received by HMRC on 7 March 2013.

7. Neither the appellant nor the appellant's agent received a copy of the returns and therefore it is accepted that the returns received by HMRC on 7 March 2013 were submitted late.

8. HMRC imposed penalties for the late submissions, these are described above in paragraph 2.

9. Appellant's submissions

On 11 March 2013 the appellant's agent wrote to HMRC. The letter included

10 "Mr. Lavery was not in receipt of any returns for the outstanding years and as such was unaware they should be returned. Mr. Lavery returned the information for his return by way of letter as the rental business did not make a profit."

10. On 2 July 2013 the appellant's agent wrote to HMRC requesting a review. The letter includes;

15 11. "We submitted a form 64-8, duly signed, to Longbenton in October 2010 advising that Mr. Lavery moved to Vietnam for employment reasons and he had rented his main residence in Glasgow from 1 February 2010.

We forwarded a tax return for the year ended 5 April 2010 to the Inland Revenue in Stockton on Tees on 5 April 2011 by post under Mr. Lavery's national insurance number because we had not received any notification of a reference number. There was a rental loss of £64 for 2009/10. We also enclosed a copy of the 64-8 already submitted.

We received a copy of the tax calculation issued from Newcastle Upon Tyne for 2009/10 on 29 September 2011 but there was no indication that a self-assessment record had been set up.

Mr. Lavery returned to the UK for a short break in January 2013 and he contacted us with regard to the rental as he had not received any communication from ourselves or from the Inland Revenue. We sent the details of the rental income and expenses in letter form for 2010/2011 and 2011/2012 on 29 January 2013.

30 We received a letter from Cardiff dated 1 March 2013 acknowledging our letter and informing us of the UTR and advising that tax returns for 2010/11 and 2011/12 were outstanding.

Mr. Lavery advises us that there is no residential post where he lives in Vietnam. He works for a large organisation and unless he was expecting post it is likely he wouldn't receive it. He understood that we would have received sufficient information from the Inland Revenue to keep his tax affairs up to date.

We did not think it unusual that a self-assessment record had not been set up because there have been rental losses each tax year and this was the only source of UK income.

5 We believe that the Inland Revenue should have advised us of Mr. Lavery's UTR when the record was set up because we had submitted the 64-8 and advised that the property was being rented."

12. The appellant's agent wrote to HMRC on 27 August 2013 advising that they did not accept the decision in the review' The letter states:

10 "We have been involved in a working together programme with the Inland Revenue over the past few years where we have attended seminars and talks regarding various issues that create problems between the Inland Revenue and agents. The processing of 64-8's has always been a popular topic. We are aware that if a 64-8 is submitted to Longbenton without any attachments (eg CWF1) that it is most likely it will never be dealt with if there is no UTR or national insurance number on the form. As you are probably aware the whole process involving 64-8's is being reviewed and the submission of manual forms will be replaced next year. We have been advised that this is because of the large number of forms submitted and the minimal number of staff available to deal with them.

20 You state in your letter that the 64-8 submitted in October 2010 was not received. You also state that the 2009/10 tax return submitted in April 2011 was received but the copy 64-8 attached was not received. It was quite clear that Mr. Lavery had appointed us agents as we had stated he had moved to Vietnam and we are at a loss as to why the Inland Revenue did not respond and advise that the 64-8 was not attached. We do not accept that the forms that were sent on two separate occasions were never received. We are of the opinion, in light of our knowledge from "working together" meetings, that the forms were received but never actioned by the Inland Revenue.

We will be appealing to the Tribunal on the above grounds"

13. In the appellant's notice of appeal dated 13 August 2013 the appellant's agent repeats what is said in the earlier letters.

30 14. **HMRC's submissions**

HMRC's response to both the appellant's Appeal and request for a review was that the penalties were correct.

15. HMRC say that a self-assessment return for Mr. Lavery for the year 2009/2010 was received on 12 April 2011 and Mr. Lavery's agent has confirmed they submitted it on his behalf. HMRC contend that this return would have been submitted on Mr. Lavery's instructions and he would have been aware from this point of his obligations to submit in a timely manner.

16. HMRC say that the returns and penalty notices referred to were issued by post to the appellant's correspondence address in Ho Chi Minh City, Vietnam. Undelivered correspondence is recorded by HMRC and there are no records to show that any mail

was returned undelivered. Therefore these documents are deemed to have been served within the ordinary course of postal delivery in accordance with the Interpretation Act 1978.

5 17. HMRC say that the appellant made a conscious decision to use a correspondence address with a consequent risk of non-receipt and failed to take adequate steps to ensure receipt of any correspondence.

10 18. 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.

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

- (a) An insufficiency of funds, unless attributable to events outside the appellant's control.
- 15 (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

20 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.

25 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 20. 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
35 circumstances which would allow them to reduce the penalty.

Discussion

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

22. I have concluded that the tax returns for the 2010-2011 and 2011-2012 tax years were both received by HMRC on or around 7 March 2013. The return for the year ended 5 April 2011 should have been submitted non-electronically by 31 October 2011 or electronically by 31 January 2012. The return for the year ended 5 April 2012 should have been submitted non-electronically by 31 October 2012 or electronically by 31 January 2013. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

23. The Tribunal considers that the problems in this case all go back to the alleged non-receipt by HMRC of the form 64-8 and copy thereof.

If one item of post goes astray that is unfortunate but if a second item of post is received but the attachment to it being a copy of the first item is also not received that borders on the unbelievable.

The appellant’s agent’s letter of 27 August 2013 makes a number of points about HMRC’s systems for dealing with forms 64-8. In the bundle of papers provided to the Tribunal there is no reply to that letter from HMRC. In addition HMRC’s statement of case is silent on the subject.

The Tribunal finds that silence deafening.

24. The appellant’s agent assumed that the lack of contact from HMRC, including no advice of a self-assessment record, was because the 2009/10 return they had sent to HMRC on 5 April 2011 showed that the property letting business was operating at a loss, and no tax was due. Contrary to HMRC saying in their statement of case that the appellant’s agent had not received an acknowledgement on 29 September 2011 HMRC had sent a tax calculation for the appellant for the year 2009-2010 it was addressed to the appellant’s agent.

25. It is understandable that this led the appellant’s agent to conclude that the form 64-8 had been received and processed. If they had not received the 64-8 HMRC would have been acting illegally in submitting the appellants tax calculation to T. Murphy and Co. Ltd. HMRC say this calculation must have been given to the accountant by the appellant but the calculation is clearly addressed to the accountant in Belfast.

26. In the light of the above the Tribunal finds that by April 2011 HMRC had received from the appellant’s agent at least one form 64-8 but had failed to process it/them.

27. It was only on the appellant’s return to the UK in January 2013 and his meeting with his accountant that he realised there was a problem. A further form 64-8 was sent

28. The result of HMRC’s failure was that the appellant’s agent was not sent a unique taxpayer reference, was not sent a copy of the returns which HMRC required the appellant to complete, and was not advised that a self-assessment record had been set up.

29. In connection with postal delivery to the appellant the Tribunal wonders if the UK Interpretation Act applies in Vietnam and whether HMRC have arrangements for the return of post which has not been delivered in Vietnam. There appears to be some doubt that the appellant received all post sent to him, but in the absence of more precise evidence the Tribunal can come to no conclusion on the matter.

30. The Tribunal has considered HMRC's view that the appellant made a conscious decision to use a correspondence address with a consequent risk of non-receipt and failed to take adequate steps to ensure receipt of any correspondence.

It is true that the appellant did take a conscious decision to use a correspondence address with a consequent risk of non-receipt however the Tribunal does not accept that the appellant failed to take adequate steps to ensure receipt of any correspondence. In respect of his tax affairs he took what the thought would be adequate steps. He appointed an accountant to act as his agent and completed and signed a form 64-8 which was sent To HMRC. The appellant would not have expected HMRC to fail to process that form so that the accountant did not receive the copies of correspondence from HMRC

31. It is evident that as soon as the appellant returned to the UK he checked on the position with his tax returns and the missing returns were submitted by his agent within 6 weeks.

For all the above reasons the Tribunal finds that the appellant has established a reasonable excuse for the late filing of his tax returns for the years ending 5 April 2011 and 2012. That excuse ceased on 29 January 2013 but the delay in submission was rectified within a reasonable period of time on 7 March 2013

Conclusion

32. The Tribunal has found that the appellant's self-assessment tax returns for the tax year ending 5 April 2011 should have been submitted non-electronically by 31 October 2011 or electronically by 31 January 2012. The appellant's self-assessment tax return for the year ended 5 April 2012 should have been submitted non-electronically by 31 October 2012 or electronically by 31 January 2013. Both returns were received by HMRC on or around 7 March 2013 which was after the deadline in both cases.

However the appellant has established a reasonable excuse for the late submissions. That excuse ceased in January 2013 and matters were put right within a reasonable time on 7 March 2013. Therefore the appeal is allowed.

Application for permission to appeal

33. 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

5 reasons. When these have been prepared, the Tribunal 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.

10 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE: 02 MAY 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 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.

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

23—

5 (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)—

10 (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

15 (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:

20 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—

25 (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—

30 (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:

35 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—

40 (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.