



TC05905

Appeal number: TC/2014/03524

INCOME TAX – penalty for failure to make returns - whether reasonable excuse - application to appeal to HMRC out of time - section 49 Taxes Management Act 1970

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FRANCIS ANDREW

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY’S Respondents

REVENUE & CUSTOMS

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 3 May 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 24 June 2014 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 1 March 2017 and the Appellant’s Reply dated 24 March 2017. The original decision was a Summary Decision. By an email of 11 May 2017, the Appellant requested full facts and findings for the decision and I have also taken that email into account in preparing this decision.

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 tax year 2011-12 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 2 July 2013
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 14 August 2013
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:
4. He argues that there was a “reasonable excuse” for any failure to submit the return on time in that he had ongoing problems in accessing his online account and so could not submit his return. In addition, he had problems contacting HMRC by telephone and was only able to request a paper return on 30 May 2013.
5. Further, he was under stress as his wife left him in 2011 and he was a single parent looking after his son. His wife had always done all the paperwork.
6. He argues that as he had nothing to pay for the tax year in question, the penalties are disproportionate.
7. 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, in their Statement of Case HMRC have said that they have no objection to the taxpayer’s appeal under s31A being made late. I therefore consider that HMRC have now given consent under s49(2)(a).

Findings of fact

8. HMRC sent Mr Andrew a notice to file his 2011-12 tax return on 6 April 2012. The filing dates were 31 October 2012 for a paper return and 31 January 2013 for a return filed online. Mr Andrew submitted a paper return which was received by HMRC on 27 June 2013.
9. HMRC stated that Mr Andrew has been within the self-assessment regime for many years and so should be well aware of his responsibilities in relation to tax returns. They also provided evidence that he has a history of failing to submit his tax return on time and incurring late filing penalties and had failed to submit later returns on time. Even so, I am concerned only with the 2011-12 return and the late submission of that return.

10. When the new penalty regime was introduced in 2010-11 Mr Andrew was issued with a flyer which set out clearly the dates for submitting returns on paper or online and the consequences of failing to file on time. The 2011-12 tax return itself reiterated the due dates and the penalties for failing to submit on time.
11. I have set out above the dates when the penalty notices were issued, the last one, for the daily penalties, being 14 August 2013.
12. The first correspondence from Mr Andrew was a letter of 14 February 2014 which appears to have followed a telephone call and was treated as an appeal against the penalties. Mr Andrew explained that he had had constant problems logging on to his online account and that he had “called up to report this problem several times on a monthly basis until I eventually requested all applications via post so I could resolve this now frustrating matter”. Mr Andrew had contacted HMRC on 30 May 2013 and requested that duplicate paper returns be sent to him in the post. This was done, but the paper return was not received by HMRC until 27 June 2013.
13. Mr Andrew subsequently discovered that his problem with the internet arose because he was using a different email address from that which he had originally registered with HMRC and he was attempting to log in with his new email address which the system did not recognise. This was resolved in January 2014.
14. In his Reply, which appeared to be a second notice of appeal, dated 27 March 2017, Mr Andrew states that his wife used to do all his paperwork and she left him in 2011. He became a single father, looking after his son and suffered a lot of stress.
15. He also said he did not have access to the internet and did not know how the tax return system worked. He stated that his first contact from HMRC was a letter of 14 February 2014 to which he immediately responded.
16. This is inconsistent with his previous letters and notice of appeal. Even if he did not have internet access in 2011, it seems he had it in 2012, since his earlier correspondence states that the reason the return was late was because he had problems accessing his internet account. He stated in his letter of 14 February 2014 that he had first registered to file his returns online in 2011. This was with his old email address.
17. HMRC’s computer records show that he had enrolled for online self-assessment and activated his new account in January 2012. From Mr Andrew’s own letters, it is clear that he had internet access at that time if not earlier.
18. Mr Andrew eventually requested a paper return so he was clearly aware that it was possible to submit his return on paper.
19. HMRC’s Statement of Case indicates that Mr Andrew’s address had remained the same throughout the period in question and there is nothing to indicate that the original notice to file and the penalty notices did not reach him.

Discussion

20. The statutory provisions relevant to late returns and the imposition of penalties are included as an Appendix to this decision.
21. I sympathise with Mr Andrew's personal problems and recognise that it must have been a stressful and difficult time for him when his wife left. However, this occurred some time in 2011 and Mr Andrew's tax return was not due until 31 October 2012 at the earliest. I am therefore unable to accept that these difficulties were sufficient to constitute a reasonable excuse for failing to submit his return on time.
22. Nor is the fact that his wife previously dealt with the paperwork sufficient to constitute a reasonable excuse. Self-assessment places the obligation for timely tax compliance firmly on the individual.
23. It is clear that, by January 2012 at the latest, Mr Andrew had internet access and had tried to obtain access to his online account. The self-assessment part of HMRC's website contains a great deal of information including information about the options to submit returns on paper as well as online and information about the deadlines. It is also clear from that section of the website that one can download the tax return from the website, print it and fill it in and there is no need to request a paper return from HMRC.
24. HMRC sent Mr Andrew a notice to file a tax return on 6 April 2012. There is no evidence that he did not receive this. The notice to file sets out the options for submitting returns online or on paper, the due dates for submission in both cases and states a special telephone number for ordering paper returns in addition to explaining how a paper return can be downloaded from HMRC's website.
25. Mr Andrew states in his Reply that he had no correspondence from HMRC until 14 February 2014. It is unclear what this letter was and I had nothing of that date (except Mr Andrew's own letter) in my bundle. He was, however, sent at least two other communications before that: the notice to file, on 6 April 2012 and he the initial late filing penalty on 12 February 2012.
26. As noted above, other aspects of Mr Andrew's Reply were inconsistent with his earlier statements. I do not accept that Mr Andrew did not receive any of the notice to file a tax return or the penalty notices. I find that he did receive them and that he was aware of the possibility of obtaining a paper tax return and the deadline for submitting it.
27. If Mr Andrew had all the information for his tax return available, which I infer was the case from the fact he tried to log on to his account in January 2012, it is unclear why there were still several weeks' delay in submitting the paper return once it was sent.
28. I do not consider that the facts found above disclose a reasonable excuse for submitting the tax return late. Mr Andrew had been provided with information

about the alternative ways of submitting tax returns, the respective deadlines and the consequences of failing to meet them. If he was having problems with internet access, he did not have to wait to request HMRC to send him a duplicate paper return; he could have downloaded that from the internet and he did or should have known that. The information was clearly set out in the notices sent to him and was readily available on HMRC's website. It appears that he had internet access, at the latest, in January 2012 (the appellant's letter of 14 February 2014). Even if he did not have internet access for a period, had he obtained a paper return in January 2013, when he did have access (if not before) he could have limited the penalty to £100.

29. To the extent that Mr Andrew is seeking to rely on the fact that his wife dealt with all the paperwork, that is precluded from being a reasonable excuse by paragraph 23(2)(b) of schedule 55. The responsibility for ensuring that his tax return is submitted on time is his. I have also found that the stress occasioned by his wife leaving him and his change of circumstances does not constitute a reasonable excuse in the circumstances.
30. The appellant has argued that the penalties charged are disproportionate as he did not, in fact, owe any tax for the year in question. 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.

Conclusion

31. For the reasons set out above, I have concluded that Mr Andrew submitted his 2011-12 tax return late and did not have a reasonable excuse.
32. Accordingly, I affirm HMRC's decision and dismiss the appeal.

Application for permission to appeal

33. 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.

**MARILYN MCKEEVER
TRIBUNAL JUDGE**

RELEASE DATE: 26 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.
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. 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.