



TC05915

Appeal number: TC/2013/09659

INCOME TAX – Late Filing Penalties - Daily penalties - Schedule 55 Finance Act 2009 - Whether a reasonable excuse? - No - Whether participation of appellant in 'My Tax Return Catch-up' campaign exempted him from penalties - No, since not justiciable - Whether special circumstances? - No - Whether penalties disproportionate? - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR RASTISLAV GARDAS

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

The Tribunal determined the appeal on 22 May 2017, without a hearing, and under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read:

HMRC's Statement of Case / Paper Hearing Submission received by the Tribunal on 23 February 2017 and its attachments, and the Appellant's Notice of Appeal dated 20 December 2013 and the letters from Well Accounted Ltd.

DECISION

1. The Appellant appeals against penalties amounting to £1300 that HMRC have imposed under Schedule 55 of the Finance Act 2009 ('the 2009 Act') in relation to his failure to submit an annual self-assessment return for the year ending 5 April 2012 on time. I set out the relevant legislation in the Appendix.

2. The penalties that have been charged are as follows:

(1) An individual tax return late filing penalty of £100, imposed pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;

(2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days) imposed pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;

(3) A 6 month late filing penalty of £300, imposed pursuant to Paragraph 5 of Schedule 55 of the 2009 Act.

3. The filing dates for the year ending 5 April 2012 were 31 October 2012 for a non-electronic (paper) return and 31 January 2013 for an electronic return.

4. The appellant's electronic return was received on 6 August 2013.

The Grounds of Appeal

5. The principal grounds of appeal are:

(1) Mr Gardas is a Slovakian national who does not understand the UK tax regime and has limited command of the English language;

(2) The failure to file was not deliberate, but a genuine misunderstanding of his obligations;

(3) Prompted by the 'My Tax Return Catch Up' campaign, he tried to bring his tax affairs up to date, but thought that, having done so, HMRC would not charge any penalties;

(4) The 3 month late filing penalty was not issued until 14 August 2013, thereby not allowing him to correct the position sooner;

(5) It is unjust to charge £1,300 for late filing.

Findings of Fact

6. On the basis of the information and materials before me, and applying the usual civil standard of proof (the balance of probabilities) I make the following findings of fact:

(1) Mr Gardas registered for self-assessment as a sole trader on 13 March 2012;

(2) A notice to file for the year ending 5 April 2012 was issued to the appellant on 19 April 2012;

(3) The 2011/12 return was due by no later than 31 October 2012, if filed non-electronically, and 31 January 2013, if filed electronically;

5 (4) On 12 February 2013, HMRC issued a notice of penalty assessment in the sum of £100;

(5) On or around 14 August 2013, HMRC issued a notice of daily penalty assessment in the sum of £900 (calculated at £10 per day for 90 days);

10 (6) On or around 14 August 2013, HMRC issued a notice of penalty assessment in the sum of £300.

7. The 2011/12 return was received online on 6 August 2013. The return was therefore filed late, and was filed more than 6 months after the final due date.

8. Therefore, and subject to any considerations of 'reasonable excuse', 'special circumstances', and the argument about proportionality, I find that the penalties imposed are due and have been calculated correctly.

Reasonable Excuse

9. The question for me is whether Mr Gardas had a reasonable excuse for the late filing.

10. Although there is no definition of "reasonable excuse" in the statute, its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd QC stated (in the analogous context of VAT penalties):

25 “ 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
30 at the relevant time, a reasonable thing to do?”

11. I apply that test here.

12. Whilst there is nothing to suggest that Mr Gardas acted in any way dishonestly or in bad faith, I have nonetheless concluded, applying the above test, that he did not have a reasonable excuse for the late filing.

35 13. There are no special rules in the self-assessment system for those whose first language is not English. But, and in any event, Mr Gardas does not point to any particular aspect of the language of the self-assessment return which he says caused him such difficulty that he could not make his return in time. I remind myself that the situation before me in this appeal is not that he made a mistake on the form itself, and

completed it incorrectly (but on time), but rather that he submitted his return accurately, but late.

14. When it comes to Mr Gardas' language ability, I note - although the point is not conclusive either way - that Mr Gardas had been able to engage with the tax system in registering for self-assessment as recently as 13 March 2012.

15. I do not accept HMRC's argument (since it is founded largely on inference, and cannot be tested in cross-examination) that Mr Gardas, having been employed in the UK since 2009, 'must have a certain level of understanding of the English language'. That may or may not be true, but it cannot be tested where the case is being dealt with on paper rather than at a hearing.

16. But, in my view, a reasonable taxpayer, if they did not understand the forms, would seek help from someone who did.

17. I reject the argument that Mr Gardas was not warned about the 3 month penalty until after the event (and indeed, until after he had filed his self-assessment return).

18. I find that HMRC sent Mr Gardas (i) the Notice to complete a tax return, which sets out the penalties for filing late (including *'Three months late - you will also receive a daily penalty of £10 a day, up to £900'*) and (ii) the Self-Assessment Tax Return and Payment Reminder (of which a specimen appears at Folio 11a) which reads *'a £10 daily penalty will be charged every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days, starting from 1 February for paper tax returns or 1 May for online tax returns'*.

19. The latter is the same computer-generated form which was considered and upheld by the Court of Appeal in *Keith Donaldson v HMRC [2016] EWCA Civ 761*. In my view, Mr Gardas received sufficient notice that daily penalties of £10 would be charged if he did not file on time.

20. There is no evidence that those documents were not received by Mr Gardas, at the time.

21. For the purposes of this appeal, I must also reject the argument, which is advanced on Mr Gardas' behalf, that, in having participated in the 'My Tax Return Catch up' campaign, he had understood that no penalties would be charged. Mr Gardas' representatives have not put before me any literature concerning that campaign which, in their view, led Mr Gardas (or, for that matter, them) to the conclusion that penalties would not be charged. Indeed, neither party has sought to put anything before me relating to that campaign.

22. But, even if there were such literature, it would not affect the position in relation to this appeal. This is because, in my view, the argument, even if sound, falls within the category of 'legitimate expectation' (namely, an expectation that no penalties would be charged) which is not a matter which this Tribunal has jurisdiction to consider: see the decision of the Upper Tribunal in *HMRC v Abdul Noor [2013] UKUT 071 (TCC)* by which I am bound.

Proportionality

23. I must reject the argument about proportionality. It is plain that penalties adding up to £1,300 are harsh (although I note that these are not one penalty, but three different penalties added together).

24. In *HMRC v Hok Ltd [2012] UKUT 363 (TCC)* the Upper Tribunal held that it was plain that the First-tier Tribunal has no discretion to adjust penalties because of a perception that they are unfair.

25. In *HMRC v Anthony Boshier [2013] UKUT 0579 (TCC)* the Upper Tribunal held that the First-tier Tribunal had no jurisdiction to consider the proportionality of fixed penalties, such as those charged in this appeal, given that the overall scheme is one which is proportionate to the legitimate aim to be achieved - namely, the efficient administration of the taxation system.

26. I am bound by those decisions, and therefore I am bound to reject the argument as to proportionality.

27. In any event, the penalties relate to the obligation to file a self-assessment return. They are not geared (as Mr Gardas' representative, Lenka Drablow MAAT, correctly recognised) to the amount of tax. The obligation to file a self-assessment return applies equally to all taxpayers who are in the self-assessment regime, regardless of whether any tax is due or not. Whilst late filing penalties for the years up to and including 2009/10 were linked to liability (with the penalty being reduced to the amount owing for the year, if any), that situation changed with effect from 2010/11.

28. Late filing penalties are no longer automatically reduced even if there is no tax to pay, or if there has been, as a matter of fact (and as there may have been here), an overpayment of tax. Hence, the fact that Mr Gardas may in fact have been owed £187.60 by HMRC as at 31 January 2013 does not, when it comes to these penalties, affect the position.

Special Circumstances

29. I have also considered whether there are any 'special circumstances', within the meaning of Paragraph 16 of Schedule 55 which would have justified reduction of the penalty.

30. In *Clarks of Hove Ltd v Bakers' Union [1979] All ER 152* the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "... *to be special the event must be something out of the ordinary, something uncommon ...*". Similarly, in *Crabtree v Hinchcliffe [1971] 3 All ER 967* in the context of share valuations for the purposes of capital gains tax, Lord Reid said "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'." In the same case, Viscount Dilhorne said "*for circumstances to be special they must be exceptional, abnormal or unusual ...*".

31. I do not consider that anything put forward in support of this appeal amounts to special circumstances, in the above meaning of the expression, so as to merit reduction of the penalties below the statutory amount.

5 32. For these reasons, and for the reasons set out above in relation to reasonable excuse, I do not consider there to be any arguable basis for a special reduction.

Decision

33. For the reasons set out, I must dismiss the appeal and I affirm the penalties.

10 34. 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
15 “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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**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 31 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:

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(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:

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(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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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:

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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—

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(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—

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(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:

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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—

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(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.