



TC06171

Appeal number: TC/2015/06254

INCOME TAX – penalty for failure to make returns--HMRC’s burden of proof when daily penalties charged-appeal against daily penalties allowed-appeal against £100 and £300 penalties dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTIANO BIAZUSSI

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 13 October 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 6 November 2015 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 20 March 2017 and the Appellant’s reply received by the Tribunal on 18 August 2017.

DECISION

The issue

- 5 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 year 2011/12 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 18 February 2014,
- (2) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 18 August 2014,
- (3) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 18 August 2014, and
- 15 (4) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 both of which were imposed on 24 February 2015.

Preliminary Matter

- 20 3. The Notice of Appeal includes an application to admit the appeal out of time. In the Statement of Case HMRC have included all of the penalties and have not mentioned the late appeal. I have had due regard to the Tribunal Rules and grant the application.

Legislation

4. In summary, paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return.
- 25 5. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.
6. Paragraph 5 provides that if after a period of six months beginning with the penalty date, the return remains outstanding, then a penalty is payable which is the greater of 5% of any liability to tax or £300.
- 30 7. Paragraph 6 provides that if after a period of twelve months beginning with the penalty date, the return remains outstanding, then a penalty is payable which is the greater of 5% of any liability to tax or £300.
8. Paragraph 23 of Schedule 55 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.
- 35

9. That paragraph specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control and where the taxpayer relies on any other person to do anything then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

5 **Discussion**

Was the return late?

10. There is no doubt that the return was late. The £100 and two £300 penalties are therefore due unless the appellant had a reasonable excuse for the late submission or special circumstances applied. I discuss special circumstances at paragraphs 20 to 22 below.

11. The stated basis of the appeal is that the appellant left the UK on 2 October 2013 and only returned in 2015. He did not realise that he needed to file the return. He only found out about the penalties on his return to the UK and he immediately filed the outstanding returns. He has no money to pay the penalties.

15 *Reasonable excuse*

12. Was there any reasonable excuse? *Rowland v HMRC*¹ at paragraph 18 makes it clear that a reasonable excuse "... is a matter to be considered in the light of all the circumstances of the particular case".

20. There is no statutory definition of reasonable excuse but in my view the test articulated by Judge Medd in *The Clean Car Company Limited v CEE*² should be applied. Judge Medd said:-

25. "...the test of whether 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 in at the relevant time, a reasonable thing to do?"

The same principle applies to all taxpayers, whether traders or not. It would have been prudent to have submitted the return timeously in compliance with the provisions of Section 8 Taxes Management Act 1970.

30. 14. Applying this test to the facts, the question is whether the appellant had acted reasonably.

15. The appellant had been self-employed for four years and had filed returns. He received the return before he left the UK. The appellant knew or should have known that he had received a tax return. The face of that return made it clear that he was

¹ 2006 STC (SCD) 536

² 1991 VTTR 234

required to lodge it and within the specified time limits otherwise penalties would be applied.

5 16. If he did hold a belief that no return was required, then he was mistaken. In that context, firstly, it is a well-established principle that ignorance of the law cannot be an excuse.

10 17. Secondly, perhaps the appellant did get muddled about what he should have done, and poor English will not have helped, but the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*³ where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

“What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...”.

15 He should have checked what he needed to do before he left the UK. It was a mistake not to have done so but that is not a reasonable excuse.

18. As I indicate at paragraph 9 above, the law provides that lack of money is not a reasonable excuse for failure to lodge a return on time.

20 19. Lastly, the fact that no tax was payable is not relevant. These are penalties for late submission of a return. If a return is issued to a taxpayer then he has a statutory responsibility to file it.

20. It is for the appellant to prove that he had a reasonable excuse and he has not done so.

Special Circumstances

25 21. Paragraph 16 of Schedule 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁴ said “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

30 22. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances.

35 23. I did consider whether HMRC had acted in a way that no reasonable body could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. I think not. I have also

³ 2012 UKFTT 315 (TC)

⁴ 1971 3 All ER 967

considered whether HMRC have erred on a point of law. They have not. I find no reason to disagree with their conclusion. HMRC's decisions in that regard are not flawed when considered in light of the principles applicable in proceedings for judicial review.

5 *General*

24. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Bosher*⁵ makes it clear that I do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

25. The decision of the Upper Tribunal in *HMRC v Hok*⁶ is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

26. The £100 and two £300 penalties are therefore confirmed.

Daily Penalties

27. That leaves the daily penalties. This appeal was stayed behind *Donaldson v HMRC*⁷. I do not think that the appellant could reasonably be expected to be aware of the finer detail of *Donaldson*. In their submission HMRC refer extensively to that decision stating in particular that:-

25 “HMRC submit that following the Court of Appeal decision the Tribunal should find that in the present appeal HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which daily penalties had been assessed in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice”.

28. That is a submission. It is not evidence. The Statement of Case does not focus in any way on how the requirements of those paragraphs have been met in the appellant's case. Crucially in *Donaldson*, Mr Donaldson had received an “SA Reminder” (after the deadline for submitting a paper return had expired) that informed him that daily penalties would be charged if his return was not filed by 30 31 January 2012. He also received a SA 326D Notice informing him of the first £100 fixed penalty and warning that if the return was more than three months late, daily penalties would be charged. Those documents were sufficient to constitute notices to Mr Donaldson that complied with paragraph 4(1)(c) of Schedule 55. It is with that 35 with which I am concerned.

⁵ 2013 UKUT 579 (TCC)

⁶ 2012 UKUT 363

⁷ 2016 EWCA Civ 761

29. In this instance, whilst I can see that the appellant was notified of the £100 penalty, HMRC have not asserted that the appellant received an “SA Reminder” in similar terms to that considered in *Donaldson*. They have not asserted that he received a “SA 326D Notice” in a form similar to that in *Donaldson* and nor have they included in the Statement of Case the actual text of the Notice notifying the appellant of the £100 penalty (or a document that is expressed to be a standard form of such a penalty notice at the relevant time).

30. HMRC have the burden of proving that daily penalties are chargeable and although the appellant has not taken the point, it is clear from *Burgess and Brimheath Limited v HMRC*⁸ that HMRC must prove their case, even if the appellant has not taken the point. I find that they have not established that there has been compliance with paragraph 4(1)(c) of Schedule 55. Accordingly the daily penalties are not chargeable.

Decision

31. The appeal is therefore dismissed in part and the late filing penalties of £100 and £300 are confirmed. The daily penalties of £900 are not confirmed.

32. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 17 OCTOBER 2017

⁸ 2015 UKUT 0578 (TCC)