

[2018] UKFTT 46 (TC)



TC06324

Appeal number: TC/2017/04954

Income tax - Schedule 55 FA 2009 - fixed and daily penalties for the late filing of self-assessment returns over a four year period - Appellant asserted that returns had been filed on time and either lost in the post or by HMRC – however no evidence of postage provided - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YOGESH RAIZADA

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID EARLE**

Sitting in public at Taylor House, Rosebery Avenue, London on 17 October 2017

The Appellant did not attend and was not represented

Ms Amy Biney, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal by Yogesh Raizada ('the Appellant') against penalties totalling £4,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4, 5 and 6 of Schedule 55 Finance Act ('FA') 2009 for the late filing by the Appellant of his self-assessment ('SA') tax returns for the tax years ending 5 April 2011, 2012, 2013 and 2014.

2. The Appellant did not attend the hearing. He had previously written to the Tribunal to say that he would not be attending. The Tribunal was therefore satisfied that he had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

3. The Appellant's returns, if filed electronically, were due no later than 31 January in each of the years following the end of the financial years to which they related. They were all filed late as set out in paragraph 7 below.

Filing date and Penalty date

4. Under s 8(1D) TMA 1970 for the year ended 5 April 2012 et seq. a non-electronic return must be filed by 31 October 2012 and an electronic return by 31 January 2013. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

5. Under Schedule 55 FA 2009 a late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

6. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 FA 2009 for the late filing of the Individual Tax Return.
- ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

7. The returns were due/ received as shown in the table below:

Tax Year	Date return issued to appellant	Date return due by	Date of receipt
2010-11	6 April 2011	31 January 2012	3 February 2015
2011-12	6 April 2012	31 January 2013	7 March 2013
2012-13	6 April 2013	31 January 2014	31 October 2014
2013-14	6 April 2014	31 January 2015	23 November 2015

8. Penalties of £100, £300, £900 and £300 were imposed, under (i), (ii), (iii) and (iv) above in respect of year ending 2011; penalties of £100, were imposed, under (i), in respect of year ending 2012; penalties were imposed under (i), (ii) and (iii) in respect of years ending 2013 and 2014 – a total of £4,300.

9. The Appellant’s appeal is against all the penalties.

Reasonable excuse

10. Paragraph 23 of Schedule 55 FA 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 unreasonable delay after the excuse ceased.

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

(a) An insufficiency of funds, unless attributable to events outside the Appellant’s control, and

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

12. There is no statutory definition of “reasonable excuse”. Whether or not a person had 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).

13. The actions of the 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 upon 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.

14. If there is a reasonable excuse it must exist throughout the failure period.

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15. On 31 March 2017 the Appellant appealed the penalties to HMRC. He said that he had filed all the returns on time.

16. On 19 May 2017 HMRC upheld the penalties on the basis that any appeal had to be made within 30 days and so the appeals were out of time.

5 17. On 15 June 2017 the Appellant lodged a Notice of Appeal with the Tribunal.

Relevant statutory provisions

18. The relevant statutory provisions are as follows:

Taxes Management Act 1970

Section 8 - Personal return - provides as follows:

10 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board -

15 a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is -

20 (a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above -

25 (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

30 (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

35 (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this section for a year of assessment (Year 1) must be delivered -

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- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
 - (b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

10 (1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered -

- (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or
- (b) on or before 31st January (for an electronic return).

15 (1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners -

- (a) shall prescribe what constitutes an electronic return, and
- (b) may make different provision for different cases or circumstances.

20 (2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

25 (3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

30 (4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person’s income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

35 (5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

5 Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(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).

Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

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.

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

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.

- 40 (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:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

10 (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.

15 (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.

20 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:

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

25 (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.

30 (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

35 (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.

The Appellant’s case

40 19. The Appellant appeals on the grounds that in each of years 2011, 2012, 2013 and 2014 he sent his self-assessment returns on time in the post, but for some reason they were lost, either in the post or in HMRC offices. HMRC sent duplicate forms to the Appellant for each of the years in question so that they could be completed, and they were sent back straight away but appear to have been delayed. He says HMRC
45 promised to remove the penalties after they received the completed duplicate returns.

HMRC’s Case

20. Late filing penalties for the year ended 5 April 2012 et seq., are due in accordance with Schedule 55 Finance Act 2009.

21. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

5 22. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure his tax returns were filed by the legislative dates and payment made on time.

23. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

15 24. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

25. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

20 26. Under para 23(1) Schedule 55 FA 2009, liability to a penalty will not arise where there was a reasonable excuse for the failure, and the failure was remedied without unreasonable delay after the excuse ceased.

25 27. There is no statutory definition of "reasonable excuse". A reasonable excuse "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).

28. In *Clean Car Company v The Commissioners of Customs & Excise* [1991] VATTR 234, J Medd held that:

30 "... 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 test. 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 at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do.."

29. HMRC submit that the Appellant's grounds of appeal do not constitute a "reasonable excuse" for the purposes of Paragraph 23(1) Schedule 55 FA 2009.

30. In *Liutauras Skorobogatovas vs The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 305, Judge Ian Hyde held:

“The Appellants first argument that the return was filed but lost in the post, the Appellant has not provided any evidence that it was posted. An Appellant cannot succeed simply by making an assertion when HMRC records give a different story.”

5 31. The Appellant has asserted that the returns were lost in the post, but no evidence such as record of postage has been provided. HMRC do not hold any record of receiving the paper returns which the Appellant claims he sent for the four years involved.

10 32. HMRC do not accept this as a reasonable excuse and state that it is the responsibility of a self-employed individual to ensure that their returns are sent to HMRC.

33. HMRC also do not hold any record of agreeing to remove the penalties after they received a copy of the self-assessment returns. If the Appellant provided a reasonable excuse for the late filing then the penalties would have been rescinded but he has not done so.

15 *Special Reduction*

20 34. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. “Special circumstances” is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

25 35. In other contexts “special” has been held to mean ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

36. HMRC have considered the Appellant’s grounds of appeal but these are not special circumstances which would merit a reduction of the penalties below the statutory amount.

30 *Conclusion*

37. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

35 38. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise they would have complied with. No reasonable excuse has been shown for the Appellant’s failure to file his tax returns for 2011, 2012, 2013 and 2014 on time.

39. As HMRC say, no evidence such as a record of postage, has been provided and there is no evidence of HMRC agreeing to remove the penalties after they received the late copy self-assessment returns.

5 40. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

10 41. HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the tribunal to reduce the penalties.

42. The late filing penalties have therefore been charged in accordance with legislation.

15 43. The appeal is therefore dismissed and the late filing penalties of £4,300 are confirmed.

44. 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 2 FEBRUARY 2018

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