



TC06439

Appeal number: TC/2016/02289

Income tax - penalties under s 59C Taxes Management Act 1970 for late payment of income tax and fixed penalties under Schedule 55 Finance Act 2009 for failure to file self-assessment returns - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RUSSELL GARY ATKINS

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER SUSAN LOUSADA**

**Sitting in public at the Tax Appeals Tribunal, Centre City Tower, Birmingham
on 19 October 2017**

The Appellant did not attend and was not represented

Ms Mary Hendrick, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Russell Gary Atkins ('the Appellant') against
5 surcharges totalling £777.06 imposed under s 59C Taxes Management Act 1970 by
the Respondents ('HMRC') in respect of tax years ending 5 April 2006 and 5 April
2010.

2. The Appellant also appeals penalties totalling £2,900 imposed by HMRC under
Paragraphs 3, 4 and 5 of Schedule 55 Finance Act 2009 for his failure to file self-
10 assessment ('SA') tax returns for the tax years ending 5 April 2013 and 5 April 2014.

3. The Appellant did not attend the hearing. The Tribunal was satisfied that the
Appellant 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.

Background

4. The Appellant has been self-employed since 1996 in the steel fabrication
15 industry and has been registered for SA since 6 December 1996.

5. Under s 8(1D) TMA 1970 an individual's non-electronic tax return must be
filed by 31 October in the relevant financial year or an electronic return by 31 January
in the year following.

6. The Appellant's SA return for 2005-06 was due for submission by 31 January
2007. The return was not received until 9 November 2010. An assessment to tax for
2005-06 was issued on 20 March 2012, tax becoming due 30 days after that date. As
the liability was unpaid following 28 days and 6 months from the due date surcharges
of £291.79 representing 5% of the unpaid tax (totalling £583.58) were charged under
25 s 59C Taxes Management Act 1970.

7. HMRC assert that the tax remains outstanding.

8. The Appellant's SA return for 2009-10 was submitted on 11 August 2010, on
time. The tax was due to be paid for 2009-10 by 31 January 2011. As the tax
remained outstanding following 28 days and 6 months from the due date surcharges
30 of £96.74 representing 5% of the unpaid tax (totalling £193.48) were charged under s
59C Taxes Management Act 1970.

9. An appeal against a surcharge can be made within 30 days of the date on which
the surcharge was imposed. No in time appeals were made.

10. The tax for 2009-10 was not paid in full until 14 February 2014.

11. With regard to late returns in 2010-11 and later tax years the penalty regime is
35 as prescribed in FA 2009 s 106 and Schedule 55.

12. The ‘penalty date’ is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
13. The Appellant’s returns for 2012-13 and 2013-14, were due no later than 31 January in the year following each tax year.
- 5 14. The return for 2012-13 was not received until 20 December 2015.
15. The return for 2013-14 was not received until 20 December 2015.
16. The penalties for late filing of a return can be summarised as follows:
- 10 i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act (‘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.
 - 15 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 £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
- 20 17. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above for year 2012-13.
18. Penalties of £100, £900, and £300 were imposed, under (i), (ii), and (iii) above for year 2013-14.
- 25 19. On 6 January 2016 the Appellant sent an appeal to HMRC. He acknowledged that he had not submitted his returns on time but claimed he had a reasonable excuse due to personal and financial difficulties he had experienced from 2010. In his letter the Appellant said:
- 30 “My business suffered a great down turn when my main work provider placed the bulk of their orders with overseas competitors with whom I could not compete. I was no longer able to pay my creditors and resorted to bank financing and credit card finance to support my business and my family.
- 35 During the onset of financial difficulties, my marriage deteriorated, with the result being a very traumatic divorce with the loss of contact with my only child and the loss of my marital home. Following my divorce I was forced to live with my parents and endured a period of depression for which I received medical help. The settlement funds from the sale of the marital home, amounting to approximately £35k were used to reduce credit card bills, prop up my business and to live on until the end of 2014 when

ceased trading as it was clear my business of 30yrs had failed and I have been left with outstanding debts to creditors of approximately £30k.

5 My parents have supported me financially as best they can and after a period of unemployment I secured a part-time position with B & Q which pays me a monthly net salary of approximately £700 with the occasional opportunity to do extra hours in overtime.

My only asset is my 54 plate vehicle valued at approximately £450.00. I do not own any other property or have any other assets available for liquidation.

10 I feel that the huge stress and mental anguish I have endured has severely impaired my ability to deal with my financial affairs and do not consider that I would have had any tax to pay and would certainly not have incurred such penalty charges if I had not been suffering such mental and financial turmoil.

I attach forms SA370 for the relevant years which I have signed but left the amounts blank as I am unsure which amounts are applicable to which year.”

15 20. HMRC replied on 1 February 2016 explaining that the surcharges and penalties were raised between 18 June 2012 and 14 August 2015. The Appellant’s appeal of 16 January 2016 was therefore outside the 30 day period of appeal.

20 21. On 13 February the Appellant wrote to HMRC and referred again to the reasons for not being unable to deal with his personal and business affairs during the default years. He said that he had been mentally unable to deal with his financial matters and completion of his tax returns. The severe financial and personal difficulties he had experienced meant he had been unable to afford to pay an accountant to handle his business affairs. To avoid bankruptcy, he had made arrangements to pay HMRC
25 £150.00 per calendar month whilst his appeal and tax liability was reviewed. He said that excluding any debt to HMRC, he had other debts totalling approximately £30k and was in the process of applying for an IVA.

22. On 23 March HMRC reiterated that the appeals were out of time and could only be accepted if there was a reasonable excuse for late filing of the appeal.

23. The Appellant submitted a notice of appeal to the Tribunal on 21 April 2016.

30 24. In his appeal to the Tribunal the Appellant refers to total tax/surcharges/penalties of £12,730.04, without any breakdown or further explanation. The figure does not correlate with tax shown to be due for those years in HMRC’s ‘official online self-assessment’ overview. He also refers to appealing tax assessments, for years 2010-11 to 2013-14, saying that he had lodged a claim for ‘special relief’ to
35 which HMRC have not responded.

25. On 12 May 2016 the appeal was stood behind *Donaldson*.

26. On 16 February 2017 HMRC wrote to the Appellant to say that the *Donaldson* appeal had been determined and that the matter would therefore proceed for determination by the Tribunal.

27. HMRC filed their Statement of Case on 10 April 2017.

28. On 6 July 2017 the Appellant wrote to the Tribunal saying:

“I have previously stated my reasons for failing to submit my tax returns and further advise that my alcoholism has also been a major contributory factor.

5 I am now in a stable supportive relationship and have entered a period of recovery under the guidance of my doctor and NHS supported counselling/rehabilitation. I am prescribed Sertraline, Thiamine and strong multi vitamin compound to treat my depression and anxiety and the effects of alcoholism. This can be substantiated by my medical practitioner, Doctor John Moloughney, Bidford Health Centre, Bidford on
10 Avon, Warwickshire, 01789 773372. Please accept this letter as my authority to contact my Doctor for access to my medical records if required.

I have secured full time employment through an employment agency and my other debts are being dealt with via an IVA.

15 My genuine inability to deal with my financial affairs has led to penalty charges being applied by HMRC, which I consider to be wholly disproportionate to the amount of outstanding tax I actually owe.

HMRC have also failed to correct an error in interest charged at an unexplained rate in tax year ending 2006 (£2366.37). This in turn is subject to interest being charged on the overall debt HMRC consider to be outstanding.

20 I have previously made monthly repayments of £150.00 to reduce the tax owing.

The basis of my appeal remains for the disproportionate charges levied to be removed and HMRC to provide a correct calculation of outstanding tax due and agreement to be reached for repayment of my recalculated tax debt plus interest by monthly direct debit.”

25 *Reasonable excuse*

29. Section 59C(9) TMA 1970 sets out the Tribunal’s powers on appeals made against surcharges and provides that the Tribunal may:

30 (a) If it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(b) If it does not so appear to them, confirm the imposition of the surcharge.

30. 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
35 failure without unreasonable delay after the excuse ceased.

31. 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.

5 32. 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).

10 33. HMRC's view is that 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
15 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.

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

Relevant statutory provisions

20 **Taxes Management Act 1970**

35. Section 8 - Personal return- provides as follows:

25 (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-

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

30 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-

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

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

(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

5 (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].

10 (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 the 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.

15 (1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

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

(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.

20 (1E) But subsection (1D) is subject to the following two exceptions.

(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

25 (b) on or before 31st January (for an electronic return).

(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-

30 (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the 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.

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

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

5 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the 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.

10 (5) In the section and sections 8A, 9 and 12AA of the 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:

36. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

37. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

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

39. 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 the paragraph if (and only if)-

20 (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.

25 (2) The penalty under the 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)-

30 (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).

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

35 (1) P is liable to a penalty under the 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 the paragraph is the greater of-

40 (a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

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

- 5 (1) Liability to a penalty under any paragraph of the 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.

42. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

- 20 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.
- 25 (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.

43. 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 (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.
- 40 (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
- 45 (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

44. The Appellant's case is set out in his Notice of Appeal and his correspondence with HMRC. His letter of 6 July 2017, preceded by HMRC's Statement of Case appears to have narrowed the issues to those set out in paragraphs 1-2 above subject
5 to HMRC providing the Appellant with an up to date and reconciled statement of account showing his current outstanding tax liabilities. HMRC's online SA statement of the Appellant's tax liabilities are significantly less than the figure referred to by the Appellant in his Notice of Appeal. [HMRC's Statement of Case makes it clear that late filing and daily penalties previously charged for the years 2010-11 and 2011-12
10 have been cancelled by HMRC and this will have significantly reduced the amount outstanding].

HMRC's Case

45. No evidence has been submitted to support the Appellant's assertion that he was suffering from mental health arising as a result of suffering from alcoholism and
15 personal and financial difficulties between 2010 and 2014. HMRC say that if the Appellant's difficulties did commence in 2010 then he has not provided an explanation as to why he did not deal with his affairs for 2005-06 and 2009-10. Therefore the surcharges for those periods have been correctly charged.

46. For the years 2012-13 and 2013-14 no medical or other documentary evidence
20 has been submitted to support the Appellant's assertions relating to his health. From examination of his SA records it would appear the Appellant is a habitual late filer of his returns. In fact only the return for the year 2009-10 was filed on time. HMRC say that they have had to chase returns from 4 November 1998 and have had to raise determinations to try to secure submission of returns in the past. The Appellant has
25 been charged surcharges and penalties on several occasions. There is no evidence that there was any change in circumstances that may have affected the Appellant during 2012-13 and 2013-14, other than the usual failure to comply with his SA requirements.

47. Whilst HMRC empathises, it is noted that the Appellant managed to continue in
30 business throughout the default periods and up until 2014 when he ceased trading. It is clear therefore that he was able to manage various other financial aspects of his life.

48. With regard to proportionality, as the Appellant is required by UK law to submit
his SA tax returns and the returns were not submitted by the due date, it is HMRC's
35 position that the surcharges and penalties have been charged because of that failure and in accordance with the legislation. The First-tier Tribunal do not have jurisdiction to dismiss penalties that are properly due. This position is supported by the case of *Hok Limited*. [2012] UKUT 363.

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

40 50. The onus lies with HMRC to show that the surcharges and penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued these

correctly, the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA returns.

51. HMRC submit that the Appellant does not have a reasonable excuse. He should have completed his tax returns even if they were nil returns.

5 52. The 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. He received numerous reminders and explanations as to why he had to file SA tax returns.

10 53. 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.

15 54. 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.

Special Reduction

20 55. 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 56. 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).

30 57. 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'.

35 58. HMRC have considered the Appellant's grounds of appeal but his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

59. Accordingly, 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.

Conclusion

5 60. 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.

61. 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.

10 62. No reasonable excuse has been shown for the Appellant's failure to discharge his tax liabilities for 2005-06 and 2009-10. As HMRC say, if the difficulties described by the Appellant commenced in 2010, then he has not provided an explanation as to why he did not deal with his affairs for 2005-06 and 2009-10. Therefore the surcharges for those years have been correctly charged.

15 63. With regard to the penalties imposed for late filing in 2012-13 and 2013-14, the Appellant has not supported his claim that he was unable to deal with the returns because of mental health and other related difficulties. Again as HMRC say, the Appellant managed to continue in business throughout the default periods and up until 2014 when he ceased trading. His previous filing record indicates that the Appellant has been late filing his returns in every year but one since 1998.

20 64. We find that the Appellant does not have a reasonable excuse for late filing of his SA returns for the years 2012-13 and 2013-14. The late filing penalties for the years 2012-13 and 2013-14 have been charged in accordance Schedule 55 FA 2009.

65. The Tribunal finds that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations.

25 66. The appeals are therefore dismissed and the late payment surcharges and late filing penalties confirmed.

30 67. 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.

35 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2018

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