



TC06510

Appeal number: TC/2015/03944

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file on time self-assessment returns for three years - Appellant suffering depression and stress - request for review out of time - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALAN PETER METCALFE

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SHAMEEM AKHTAR**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 30
November 2017**

The Appellant in person

Gareth McKinley, Officer of HMRC for the Respondents

DECISION

1. This is an appeal by Mr Alan Peter Metcalfe ('the Appellant') against penalties totalling £3,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4, 5 and 6 of Schedule 55 Finance Act 2009, for his failure to file self-assessment ('SA') tax returns on time for the tax years ending 5 April 2012, 5 April 2013 and 5 April 2014.

Background

2. The Appellant has been within the Self-Assessment regime since the 2006-07 tax year.

3. The Appellant's 2011-12, 2012-13, and 2013-14 SA returns were issued on 6 April in each year. If filed electronically, they were due no later than 31 January in the year following each tax year. If filed in paper form they were due by 31 October in each tax year.

4. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

5. The Appellant failed to file SA returns on time for the years 2006-07, 2007-08, 2009-10, 2010-11, and also for the three years under appeal as referred to above.

6. Paper returns for the first two years under appeal were received by HMRC on 19 February 2015. The return for the third year was filed on 23 February 2015.

7. 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 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.

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.

8. Penalties were imposed for the late filing of the returns for the years 2007-11, but later cancelled by HMRC. The reasons are set out below.

9. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above for years 2011-12 and 2012-13. A Penalty of £100 was imposed for the year 2013-14.
- 5 10. The Appellant was issued with a £100 late filing notice in respect of the late 2011-12 return on 21 March 2013. This would have also advised the Appellant that if the delay continued and his return was more than three months late HMRC would begin charging him a penalty of £10 for each day it remained outstanding for a maximum of 90 days.
- 10 11. As the Appellant's 2011-12 return had not been filed after a period of 3 months beginning with the penalty date, daily penalties of £10 per day were imposed under Paragraph 4 of Schedule 55, and on 20 September 2013 a Notice of Penalties totalling £900 was issued to the Appellant. A 6 month penalty of £300 was also imposed under Paragraph 5 of Schedule 55 on the same date.
- 15 12. As the Appellant's 2012-13 return had not been filed after a period of 30 days beginning with the penalty date, a fixed penalty of £100 was imposed under Paragraph 3 of Schedule 55 on 4 June 2013.
13. As the Appellant's 2011-12 return had not been filed after a period of 12 months beginning with the penalty date a fixed penalty of £300 was imposed under Paragraph 6 of Schedule on 3 April 2014.
- 20 14. At this stage a total of £1,600 penalties had been imposed for the late filing of the Appellant's 2011-12 return and a £100 penalty in respect of the Appellant's 2012-13 return.
15. A 60 day daily penalty reminder was issued to the Appellant in July 2013.
- 25 16. As the Appellant's 2012-13 return had not been filed after a period of 3 months beginning with the penalty date, daily penalties of £10 per day were imposed and on 24 September 2014 a Notice of Penalties totalling £900 was issued to the Appellant. A six month late filing penalty of £300 was issued on the same date.
- 30 17. On 15 February 2015, the Appellant's agent filed the outstanding returns in paper form for 2011-12 and 2012-13. The Appellant's return for 2013-14 was filed online on 23 February 2015.
18. As the Appellant's 2013-14 return had not been filed after a period of 30 days beginning with the penalty date, a fixed penalty of £100 was imposed under Paragraph 3 of Schedule 55 on 4 June 2015.
- 35 19. The Appellant had appealed the penalties in May 2015 via his agent, TaxAid. They explained that he had suffered severe personal difficulties over the years. His problems had started in 2006 when close family members became ill and his father died. He struggled to cope after that and his work was also hit by the recession. Matters were compounded when the property adjacent to the Appellant's terraced house changed hands and was rented out. The tenant had a drug and alcohol problem

and in the Appellant's words, he and his family "went through four years of hell with numerous reports to the police and the local authority" because of the tenant's antisocial behaviour and noise all through the night. The Appellant's wife had to take four months off work because she became so unwell. The Appellant and his wife were
5 forced to move to another property, but to do so had to take out a larger mortgage than the one they had and as a result got into financial difficulties. The Appellant's mother-in-law helped them through this period. The Appellant is a painter and decorator and struggled to get work. His turnover was very modest and only in 2015 did this begin to improve.

10 20. Having considered the Appellant's appeal, HMRC decided to cancel the penalties for the years 2006-07 to 2010-11 inclusive and the penalties were thereby settled under s 54 TMA 1970.

15 21. With regard to the years 2011-12 to 2013-14, HMRC did not consider that the Appellant had a reasonable excuse for the late filing of his returns. HMRC's records show that the Appellant had changed address in September 2011 and therefore based on that information considered that the Appellant's reasonable excuse ended shortly after that date.

20 22. HMRC informed the Appellant that the deadline for appealing against the penalties for 2011-12 to 2013-14 had passed. The penalty notices said that the taxpayer has 30 days in which to submit an appeal against a penalty. The appeal had therefore been received out of time and could not be accepted unless the Appellant had a reasonable excuse for not appealing in time and the appeal was made without unreasonable delay after the excuse ended. HMRC did not consider that the Appellant had a reasonable excuse for the delay in appealing given that he was able to manage
25 the rest of his business and private affairs.

23. The Appellant lodged a notice of appeal with the Tribunal service on 12 June 2015.

30 24. Daily penalties have been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "Donaldson" case). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties and at the date of the Appellant's appeal, *Donaldson* was due to be heard by the Court of Appeal.

35 25. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed on 30 June 2015 that the appeal should be stood over until the *Donaldson* appeal was determined.

26. The Court of Appeal decision in *Donaldson* was that HMRC had satisfied the requirements of Paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment the omission did not affect the validity of the notice.

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Reasonable excuse

27. 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.

28. 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.

29. 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).

30. 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 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.

Relevant statutory provisions

Taxes Management Act 1970

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

(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

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 the day on which the notice is given]

5 (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

10 (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.]

15 (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.

20 (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.

25 (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

30 (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-

35 (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.

5 (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.

10 (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.

15 (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:

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

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

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

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

25 (1) P is liable to a penalty under the 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
30 (c) HMRC give notice to P specifying the date from which the penalty is payable.

(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).

35 (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).

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

(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-

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

(b) £300.

37. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

(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)-

(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.

38. 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 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.

(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.

39. 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.

(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 ‘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-
 - 5 (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.
 - 10 (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. In his notice of appeal, the Appellant reiterates the grounds of appeal put to HMRC in May 2015 by his agent TaxAid.

15 **HMRC’s Case**

41. Individual tax returns for the years 2011-12, 2012-13 and 2013-14 were correctly issued to Mr Metcalfe, and as such he was legally bound to complete and file the returns by the legislative deadline.

42. HMRC accepts that the onus rests with it to demonstrate that the 2011-12, 2012-13 and 2013-14 tax returns were issued to the Appellant and that the Appellant had failed to submit the returns on time.

43. The Appellant in his notice of appeal accepts that the returns were not filed on time. The evidential burden therefore shifts to him to show that he has a reasonable excuse for any such failure and that that reasonable excuse lasted for the entire period of the failure.

44. Under Paragraph 23 (1) Schedule 55 Finance Act 2009, liability to a penalty does not arise in relation to failure to make a return if the Appellant satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for failure.

45. A reasonable excuse is something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard. If there is a reasonable excuse it must exist throughout the failure period.

46. Reasonable excuse was considered in the case *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by the Tribunal Chairman Judge Medd:

“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 at the relevant time, a reasonable thing to do?” [Page 128 3rd line et seq.].

47. HMRC accepted that the Appellant’s issues with his neighbour amounted to a reasonable excuse. However he contacted HMRC on 12 September 2011 to notify a change of address. It is HMRC’s position that Mr Metcalfe’s reasonable excuse would have ceased soon after this date as per Schedule 55 Paragraph 23(2)(c).

48. Insufficiency of funds, for example, arising as a result of the recession do not on their own amount to a reasonable excuse, as set out in Schedule 55 Paragraph 23(2)(a).

49. The Appellant was in contact with HMRC on 24 October 2011 when he advised that he would be completing his outstanding returns. He contacted HMRC again on 19 December 2012 when he advised that he had contacted the tax office with a view to obtaining the required evidence to complete his outstanding returns. During this call, the Appellant was educated regarding the penalties that were on his account and with regard to making a late appeal.

50. HMRC contend that Mr Metcalfe has not provided a reasonable excuse for his failure to file his individual tax returns for the years 2011-12, 2012-13 and 2013-14 on time and that the penalties have been correctly charged in accordance with the legislation.

Special Reduction

51. 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.

52. The courts accept that for circumstances to be special they must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers’ Union*).

53. 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).

54. 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”.

55. 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.

56. 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

57. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. Whether there was a reasonable excuse, which lasted for the entire period of default, is a matter to be considered in the light of all the circumstances of the particular case. In this matter SA returns for three years were filed late. The 2011-12 return was over two years late; the 2012-13 return was over one year late and the 2013-14 return was over three months late.

58. HMRC first sent a late filing penalty to the Appellant in respect of his late 2011-12 return on 21 March 2013 for £100. This should have acted as a prompt to him that a return was due and had not been submitted. If he had any doubts about his obligation to file a return or difficulties in doing so, he could have raised these with HMRC who would have advised him accordingly.

59. The £100 penalty notice would have also advised the Appellant that if his return was more than three months late, HMRC would begin charging him a penalty of £10 for each day it remained outstanding, for a maximum of 90 days.

60. In the event, HMRC did not issue the 90 day penalty notice, nor the six-month late filing penalty until 20 September 2013. The 12 month late filing penalty followed on 3 April 2014.

61. In the meantime however the Appellant would have received a notice to file his SA return for 2012-13 on or around 6 April 2013.

62. Penalties for the Appellant's late 2012-13 return were imposed on 27 March, 24 September 2014 and 2 April 2015.

63. The Appellant was aware that his returns were overdue. He was also aware that penalties had been issued and would continue to be imposed until his returns were filed. The Appellant did not appoint his agent until around April/May 2015, by which date his 2011-12 and 2012-13 returns were respectively 24 months and 12 months late. His 2013-14 return was also late and a £100 penalty had been issued on 27 March 2015.

64. It is clear that no reasonable excuse has been shown for the Appellant's failure to file his tax returns on time. The Tribunal recognises the Appellant was under considerable stress during the years up to 2011, but as HMRC say, after he had moved to a new address there was no reason why he could not have filed his returns or

enlisted the help of an agent to do so. He was working and able to manage the rest of his business and private affairs.

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

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

67. The appeal is therefore dismissed and the late filing penalties confirmed.

68. 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**

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RELEASE DATE: 25 MAY 2018