



TC06589

Appeal number: TC/2018/01279

INCOME TAX – penalties for failure to file tax return – whether reasonable excuse: no – whether special circumstances: yes – appeals allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FARHATH MOHAMMED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 26 June 2018 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 15 February 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 April 2018.

DECISION

1. This was an appeal by Miss Farhath Mohammed (“the appellant”) against penalties imposed by the Respondents (“HMRC”) under Schedule 55 FA 2019 for her continued failure to deliver a tax return.

Facts

2. The appellant was issued with a notice to file an income tax return for the tax year 2015-16 on 6 April 2016. That notice required her to deliver the return by 31 October 2016 if filed in paper form or by 31 January 2017 if filed electronically (“the due date”).

3. On 7 February 2017 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

4. On 11 August 2017 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

5. In the same notice HMRC informed the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

6. The return was filed electronically on 23 November 2017.

7. On 5 December 2017 the appellant, through her accountant, appealed to HMRC against penalties of £1,200.

8. On 15 December 2017 HMRC in the person of Mrs A Dodgson rejected the appeals as they said to the appellant that she had not shown that an unusual or unexpected event prevented “the individual” (*sic*) from filing on time, and that only such an event would amount to a reasonable excuse. They informed her that she could provide further information, request a review or notify her appeal to the Tribunal.

9. On 17 January 2018 the appellant herself gave further information and made a request for HMRC to look at her appeals again.

10. On 13 February 2018 T Turner, a Customer Service Advisor in HMRC, wrote to the appellant saying that she had been sent a form SA633 and SA634 with the letter of 15 December 2017. They added:

“As you are still appealing the penalties charged for the 2015-16 tax year you will need to complete the SA634 and return it to the address printed on the top of the form.

The form should have been sent to [unit and address in HMRC] by the 14 January 2018.

I cannot say whether they will review your case as it is after the time allowed”.

11. On 15 February 2018 the appellant notified her appeals to the Tribunal.

The law in brief

12. The law imposing these penalties is in Schedule 55 Finance Act 2009 and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively).

The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed.

13. Certain provisions of Schedule 55 FA 2009 are in the Appendix.

The appeals

14. The position is that throughout the correspondence it is clear that the appellant has appealed only against the daily penalty and the 6 month penalty. HMRC have prepared their statement of case to include the initial filing penalty and so I consider that too, and waive any formalities that might be necessary to get an appeal before the Tribunal.

Grounds of appeal & HMRC's response

15. The grounds of appeal are that:

(1) The appellant filed her return online but HMRC did not accept it as they said it was not completed, and that although she completed it with the help of HMRC they did not receive it.

(2) She could not use an accountant because she could not afford to.

16. HMRC say in response that they did receive supplementary pages for 2015-16 on 14 October and 9 November 2017 but these were returned to her as the full return SA100 had not been submitted.

Reasons for my decision

Reasonable excuse?

17. In my view there is no reasonable excuse for the failure to file the return by 31 January 2017. It is clear from her own account that the appellant was in touch with HMRC in her attempts to file the return as early as October 2016 but she did not explain why she was unable to file by 31 January 2017.

Special circumstances?

18. HMRC have addressed the question whether there were special circumstances, but have found none. The matter they took into account was, they say, her attempts to file on paper and online. They do not say why those circumstances were not special, nor do they mention anything else. In my view the decision is flawed because of its lack of reasoning and because I think that there are a number of matters which HMRC did not taken into account which they should have.

19. One thing Mrs D Waldron, the compiler of the SOC and the only person capable of having considered whether there were special circumstances, did not take into account was the misleading of the appellant by officers of HMRC. Mrs Dodgson incorrectly said that only an unusual or unexpected event could be a reasonable excuse. T Turner said that a review must be requested on a form SA634 and that the appellant was out of time to ask for a review. All of these statements are incorrect. The first error could have prevented the appellant from putting forward a properly formulated reasonable excuse. The second and third errors could have, and probably did, mislead the appellant into thinking she could not have a review, as she notified her appeal to the tribunal immediately.

20. Mrs Waldron's own sin is that of omission. She did not mention in her statement of case that, according to the SA Notes, on 14 July 2017 the appellant telephoned HMRC and was issued with "SA100", ie a paper return. This return would have shown a due date for filing it of 3 months after receipt, say 21 October 2017. The return was filed on 23 November, about one month after the due date yet the appellant was assessed to daily penalties and 6 month penalties.

21. What is more the SA Notes also show that the appellant phoned HMRC on 13 September 2017 about the penalties assessed in August and was told that "she needs to fill out 15/16 *then* appeal penalties" [my emphasis]

22. In my view this multiple combination of errors by HMRC was a special circumstance as was the fact that the appellant was issued with a paper return after the filing date for the return for which she was issued with a notice to file and was told that she could not appeal until she had filed the return, something which itself is an error.

23. Misleading conduct by HMRC, even if not accompanied by erroneous and prejudicial statements, was held to amount to a special circumstance in *Morgan & another v HMRC* [2013] UKFTT 317 (TC) at [109] to [145].

Decision

24. Under paragraph 22(2)(b) Schedule 55 FA 2009 I substitute for HMRC's decision to assess three penalties totalling £1,300 my decision to specially reduce the daily and 6 month penalties to nil to reflect the special circumstances of this case.

25. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 9 July 2018

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APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

1—(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraphs 14 to 17, the amount of the penalty.

...

(4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“penalty date”, in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

- (a) any reference to a return includes a reference to any other document specified in the Table, and
- (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

| | <i>Tax to which return etc relates</i> | <i>Return or other document</i> |
|-----|--|--|
| 1 | Income tax or capital gains tax | (a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970 |
| ... | ... | ... |

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

4—(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).

5—(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.

SPECIAL REDUCTION

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—

(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.

...

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) “appeal period” means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

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—

(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—

(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.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

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.

(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.