



TC06865

Appeal number: TC/2013/08145

INCOME TAX – penalty for failure to make returns – appellant believed submitted online – whether reasonable excuse - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CRAIG MIDDLE

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 11 September 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 18 October 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 29 June 2013.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2011-12 tax year on time.
2. The penalties that are being appealed are “daily” penalties totalling £720 under paragraph 4 of Schedule 55 imposed on 16 July 2013.

Appellant’s case

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) He argues that records show that he submitted his tax return online on 1 January 2013; at the time he believed he had submitted it one day late as he believed that the filing deadline was 13 December 2012. Accordingly, he paid the late filing penalty of £100 when he received it.

(2) He received a further penalty notice on 10 May 2013 but, as he had paid the late filing penalty and the letter indicated a £0.00 balance, he assumed no monies were owed.

(3) When he received a daily penalty reminder on 4 June 2013, he contacted HMRC to tell them that he had filed his return online on 1 January 2013. The only reply received was that HMRC had still not received the return, and he asked them to look into the matter at their end.

(4) On 18 June 2013 he received a letter from HMRC which stated that no monies were owed to HMRC.

(5) When he received a further letter dated 2 July 2013, he spoke to HMRC on 11 July 2013 and was told that the return had still not been received and advising him to go online to do so. He asked why he needed to do this, having already done so and asked why HMRC could not see the information submitted. He was transferred to HMRC’s “IT department” but the line was cut off. The appellant then went online to re-submit the information. He was not aware that he had done anything differently from his original submission on 1 January 2013.

(6) If HMRC had responded to his requests earlier and identified the problem, the matter could have been resolved sooner.

(7) He argues that these circumstances amount to a “reasonable excuse” as they showed that he had tried to resolve the situation from the start.

4. The appellant also stated in correspondence with HMRC that as no monies were owed to HMRC, he did not need to submit a return in any case. In addition, as no money was owed, he had no reason to delay submission of the return.

HMRC's case

5. HMRC's case, in summary, is as follows:

5 (1) The appellant has been in self-assessment since 23 August 2000. He has submitted his tax returns online since 2004. HMRC submitted that he is therefore familiar with the system. The appellant was issued with a return for the 2011-12 tax year on 6 April 2012. The appellant filed his tax return for 2010/11 late, on 20 February 2012, and was fined £100 which he paid without appeal. HMRC submitted that he would have been aware that the filing deadline for his tax return for 2011/12 was 31 January 2013.

10 (2) The appellant's electronic self-assessment return was received by HMRC on 11 July 2013. The appellant's reference to "records" showing that the return was filed online on 1 January 2013 must be the appellant's own records as no return had been received by HMRC on that date.

15 (3) In order to submit a tax return online, the taxpayer has to read and agree a statement confirming that the information provided is complete and correct; they are then required to re-enter their user ID and password to submit the return. When the return has been successfully submitted, an onscreen message is shown to confirm receipt. The fact that the appellant did not receive that message should have alerted him to the fact that the return had not been successfully submitted.

20 (4) The appellant was advised by HMRC when he called on 17 June 2013 that the return had not been received, and that daily penalties were accruing. As the appellant stated that he believed the return had been filed, he was advised to check online services to see if the submission had been completed.

25 (5) When the appellant called again on 11 July 2013, he was again advised to check online services to see if the submission had been completed. He was referred to the online helpdesk when he was unable to access the return.

30 (6) HMRC submitted that they had therefore advised the appellant by 17 June 2013 that his return had not been submitted and informed him of the action needed to resolve the problem. It was not until the appellant called again on 11 July 2013 that he took the action advised by HMRC.

6. HMRC submitted that the appellant therefore had no reasonable excuse for the delay in filing his tax return.

35 7. HMRC considered whether any special circumstances existed which would merit a reduction in the penalty but concluded that an incomplete submission of an electronic return does not amount to such special circumstances.

Discussion

8. Relevant statutory provisions are included as an Appendix to this decision.

40 9. I have concluded that the appellant's tax return for the 2011/12 tax year was submitted on or around 11 July 2013. It should have been submitted by 31 January 2013. Although the appellant believes that he filed the return online on 1 January 2013,

that return was not received by HMRC and the appellant has provided no evidence that he did complete the submission of the return on 1 January 2013, such as a copy of the submission receipt.

5 10. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

10 11. I note the appellant’s comments that as no monies were owed to HMRC, he did not need to complete a tax return in any case. This was not put forward as a ground of appeal but I have considered it and concluded that it cannot amount to a reasonable excuse for the failure to file the tax return on time. A tax return is required to be filed when it has been issued by HMRC and the appellant has not established that the return was not issued to him, nor has he indicated that he asked HMRC to withdraw the return.

12. The test of whether something is a “reasonable excuse” for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

15 “a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

20 13. For a reasonable excuse to be able to extinguish a penalty, that reasonable excuse must exist throughout the period of delay.

14. The appellant submitted, in brief, that he believed that his tax return had been submitted and that he has a reasonable excuse for the delay in filing because HMRC did not identify the problem sooner despite his requests.

25 15. HMRC’s letter of 10 May 2013 clearly requests that the appellant “Please file your tax return online” and so clearly indicates that HMRC has not received the return. The letter also advises that if the return is not filed, penalties of at least £1600 could be imposed. Although the letter also states that “if you have recently filed your tax return ... thank you” I do not consider that a taxpayer who believed that their tax return had
30 been filed in January 2013 would interpret that as having been “recently filed” with regard to a letter received in May 2013.

35 16. Considering the *Clean Car* test, therefore, I consider that a taxpayer with a responsible attitude to their duties as a taxpayer in the same position as the appellant would have checked HMRC’s online systems to confirm that their tax return had been correctly submitted once they had received the letter of 10 May 2013.

17. Accordingly, even if the appellant’s belief that he had submitted the return could be said to be a reasonable excuse for the initial failure to file his tax return on time, such reasonable excuse would have ended when he received the letter of 10 May 2013 and so did not exist throughout the period of default.

18. It is also clear that the appellant was advised by HMRC on his telephone calls of both 17 June 2013 (the appellant has annotated his copy of the 4 June 2013 letter with the comment “still saying 11-12 not on system”) and 11 July 2013 that his return had not been received by HMRC. I find, therefore, that HMRC had done enough to communicate to the appellant what the problem was.

19. Finally I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal’s jurisdiction in this context is limited to circumstances where it considers HMRC’s decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC’s decision.

Conclusion

20. The appeal is dismissed and the penalties are confirmed.

Application for permission to appeal

21. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 13 DECEMBER 2018

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

4—

(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)—

(a) may be earlier than the date on which the notice is given, but

20 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

5—

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—

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

30 (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

35 (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 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- 5 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

- 15 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

- 25 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

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

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.

35

(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

5

(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.

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

10

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

15

(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

20

(b) agreeing a compromise in relation to proceedings for a penalty.

7. 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:

25

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—

30

(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—

35

(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.

40

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