



TC06867

Appeal number: TC/2015/00024

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment return on time - Appellant was caring for her mother - her computer broke down and she lost all her data - her agent was very busy - six month delay - whether reasonable excuse – no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GAYLE WARD

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 24 August 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 20 December 2014 and HMRC's Statement of Case received by the Tribunal on 12 June 2018 with enclosures. The Tribunal wrote to the Appellant on 20 June 2018 stating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days. No reply was received.

DECISION

1. This is an appeal by Gayle Ward ('the Appellant') against penalties totalling £1,200 imposed by the Respondents ('HMRC') under Paragraphs 5 and 6 of Schedule 55 Finance Act 2009, for her failure to file a self-assessment ('SA') tax return for the tax year ending 5 April 2013 on time.

Background

2. The Appellant's return for 2012-13, was, if filed in paper form due no later than 31 October 2013 and if filed electronically, no later than 31 January 2014.

3. The Appellant's return was received by HMRC on 12 August 2014.

4. 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.

5. Penalties of £100, £900 and £300 were imposed, under (i), (ii), and (iii) above for the late filing of the 2012-13 return.

6. The Appellant appeals the £900 daily penalties and the £300 six month penalty.

Filing date and Penalty date

7. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

8. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

9. 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.

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

5 (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.

11. 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).

12. 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.

The background facts

13. The Appellant has been within the SA regime since the 1996-97 tax year.

14. The Appellant's 2012-13 return was issued on 6 April 2013 and so was due to be returned in paper form by 31 October 2013 or on line by 31 January 2014.

25 15. The Appellant failed to file her return by 31 January 2014.

16. She was issued with a £100 late filing notice on 18 February 2014. This would have advised the Appellant that if her return was more than three months late HMRC would charge her a penalty of £10 for each day it remained outstanding for a maximum of 90 days.

30 17. On 18 August 2014, 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 for 90 days were imposed under Paragraph 4 of Schedule 55 and 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.

35 18. On 13 August 2014, the Appellant's agent, Gane Jackson Scott, appealed against the penalties, on the grounds that:

- The Appellant's computer had a virus. She had to replace it and lost data in the process which had to be re-inputted.

- The Appellant was about to undergo an eye operation (6 June 2014).
- The Appellant was looking after her mother who had Alzheimer's.
- The Appellant was working six days a week.

19. HMRC sent the Appellant and her agent a decision letter on 17 September 2014
5 rejecting the appeal against the six month and daily penalties and offering a review. A
separate letter was issued to say the appeal against the £100 late filing penalty was
made out of time so could not be considered.

20. On 29 October 2014 the Appellant requested a review of HMRC's decision,
reiterating her earlier grounds of appeal and adding that her agent had a heavy
10 workload.

21. HMRC carried out a review and issued their review conclusion on 24 November
2014. The outcome of the review was that HMRC's decision should be upheld.

22. On 29 December 2014 the Appellant notified her appeal to the Tribunal, giving
her grounds as:

15 "My mother had late stage Alzheimer's (she died 14 November 2014) which meant I
had to do all her care 24/7.

My accountant doesn't allow provisional figures so I was unaware of this option.

20 Operation dates are only given weeks in advance and not months as you appear to be
indicating. Also I had to attend pre-op assessment and I suffer from age related macular
disease which requires me to attend Moorfield Hospital every six weeks. My
accountant has many clients and I have to wait my turn. I can't suddenly use another
because they can't fit me in. Are you aware outside nursing help is £15 per hour? My
accounts take over a week to input."

Relevant statutory provisions

25 **Taxes Management Act 1970**

23. 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
30 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
35 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

24. The penalties at issue in the appeal are imposed under Schedule 55 FA 2009.

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

20 26. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

27. 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).

40 28. 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-

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

10 29. 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.

15 (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
- 20 (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.

25 30. 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.

30 (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.

35 (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.

40 31. 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.

45 (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.

50 (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.
- 5 (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

HMRC's case

10 32. The Appellant has been self-employed since January 1998. She has been completing SA tax returns since 1996-97, so is aware of her obligations. However she has been late filing her SA tax returns for the six years prior to 2012-13.

15 33. The Appellant must have a reasonable excuse why the 2012-13 SA tax return was not filed by the deadline. The reasonable excuse must exist throughout the period from the deadline 31 January 2014 to the day before HMRC received her tax return on 12 August 2014.

34. While HMRC sympathise with the Appellant regarding her visual problems, her eye operation was on 6 June 2014, well after the deadline date so the date of the operation and the immediate preceding period does not cover the period of failing to submit the return.

20 35. The Appellant said she had to wait over six weeks for her accountant due to his heavy workload. As the return was filed on 12 August 2014 this implies the information was only given to the accountant in late June 2014. Even if this is accepted as a reasonable excuse, any delay caused by her accountant cannot be considered a reasonable excuse which covers the whole period of default.

25 36. The Appellant was caring for her mother for a long period of time. When illness and caring responsibilities are ongoing, HMRC expects the taxpayer to make appropriate amendments to ensure completion and submission of the tax return on time.

30 37. The Appellant had from 6 April 2013 to 31 January 2014 to complete and submit her 2012-13 SA tax return without incurring late filing penalties. HMRC consider that sufficient time is given for the completion of a tax return and expect all of their customers to make arrangements to complete the return before the deadline clearly shown on the front of the return. HMRC would expect that all customers give due priority to their tax affairs. HMRC contend that the Appellant did not take sufficient care in relation to her statutory obligations.

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38. There were warnings on the £100 penalty notice (SA326D) issued to the Appellant on 18 February 2014 of further penalties. The £900 and £300 penalties were issued six months later.

40 39. For the Appellant's appeal to succeed, she must demonstrate that a reasonable excuse existed which prevented her from complying with her Income Tax obligations throughout the period of failure from 31 January 2014 to 12 August 2014 when the

return was filed. Based on the evidence provided, no reasonable excuse exists and as a consequence the penalties were correctly charged in accordance with legislation.

40. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has
5 already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

41. The onus lies with HMRC to show that the penalties were issued correctly and
10 within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that she has a reasonable excuse for the late filing of her SA return.

42. Under Paragraph 23 (1) Schedule 55 FA 2009, liability to a penalty does not
15 arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

43. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

20 "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 142 3rd line et seq.].

25 44. HMRC considers a reasonable excuse to be 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.

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

46. The Appellant has not provided a reasonable excuse for her failure to file her individual tax returns for the years 2012-13 on time. The penalties have been correctly charged in accordance with the legislation.

35 47. 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

40 48. 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.

49. 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).

50. 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’.

51. HMRC have considered the Appellant’s grounds of appeal but her circumstances do not amount to special circumstances which would merit a reduction of the penalties.

52. 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

53. 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.

54. 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.

55. HMRC first sent a late filing penalty to the Appellant on or around 18 April 2014 for £100. This should have acted as a prompt to her that her return was due and had not been submitted. The £100 penalty notice would have also advised the Appellant that if her return was more than three months late HMRC would begin charging her a penalty of £10 for each day it remained outstanding for a maximum of 90 days. The penalty notices would have also warned about the six month £300 penalty.

56. The Appellant has been self-employed since January 1998 and has been completing SA tax returns since 1996-97. She will therefore be aware of her obligations. However HMRC say that she has been late filing her SA tax returns for the six years prior to 2012-13.

57. The Appellant's return was not filed until 12 August 2014. The delay was over six months. This is a significant delay.

58. The reasons given by the Appellant for the delay in filing her 2012-13 return do not amount to a reasonable excuse. An excuse must endure through the entire period of default.

59. The Tribunal has sympathy with the Appellant, given that she lost data from her computer and had to arrange for it to be inputted, was caring for her mother, and was also suffering eye problems. However, being aware of the 31 January 2014 deadline she should have prepared for this and could have appointed an agent to deal with the return, which is what she did eventually in any event.

60. The late filing penalties have therefore been charged in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file her tax return on time.

61. There are no special circumstances which would allow the penalties to be reduced under Special Reduction and therefore the appeal is dismissed and the £1,200 late filing penalties are confirmed

62. 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: 14 DECEMBER 2018