



TC07188

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Appeal number: TC/2015/02881

Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment returns on time - fixed penalties for late payment of tax - employer had inadvertently used incorrect PAYE code which generated an under collection of income tax - Appellant unaware that he was obliged to file a self-assessment return - whether reasonable excuse - yes - appeal allowed

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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THOMAS MAHOOD

Appellant

- and -

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

Respondents

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**TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: HELEN MYERSCOUGH**

**Sitting in public at Tax Appeals Tribunal, Taylor House, Rosebery Avenue,
London on 15 January 2018**

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The Appellant in person

Mr David Miles, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal by Mr Thomas Mahood ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009, for his failure to file a self-assessment ('SA') tax return on time, for the tax year ending 5 April 2013.

2. The Appellant also appeals penalties totalling £162 imposed by HMRC under Paragraph 3(2) of Schedule 56 Finance Act ('FA') 2009 for his failure to pay tax on time, in respect of his personal SA liability for the year ending 5 April 2013.

Background

3. The Appellant, in the tax year to 5 April 2013, worked as a joiner/builder for Peverel Services Limited, with which company he had been employed since June 2011, paying tax by way of PAYE.

4. Unknown to him, his employer deducted tax at source using the wrong PAYE code, which generated an income tax underpayment.

5. Since June 2011, the Appellant has lived at various addresses and more recently at c/o Flat 5, 199 Old Marylebone Road, London, having left his previous address at 28B Chesson Road, West Kensington, which he had shared with his brother since April 2010. He registered as homeless with Westminster City Council and still awaits to be re-housed. He did not inform HMRC of his various changes of address as he did not consider there was any need to do so, particularly given that they were temporary addresses. His move from 28B Chesson Road was due to a family dispute and this may have contributed to correspondence from HMRC, sent to Chesson Road, not being forwarded onto him.

6. HMRC became aware of the underpayment of the Appellant's PAYE tax and on 6 March 2014, issued a 2012-13 SA individual return to the Appellant. The return was due to be filed no later than three months and seven days later, that is, by 13 June 2014.

7. 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.

8. 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 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.
9. The Appellant failed to file return, and on 17 June 2014, HMRC issued a 30 day £100 late filing penalty.
10. The Appellant remained unaware of the tax underpayment, the correspondence from HMRC, the issue of the SA return and the £100 penalty until the end of November 2014, when he visited 28B Chesson Road.
11. On 1 December 2014, the Appellant contacted HMRC to explain that he had been in between addresses and until then been unaware of the correspondence from HMRC and the penalties. He wished to ascertain why he had been sent a SA return. HMRC explained the position to him. HMRC said that they would forward to him his employment history (details of his earnings, the tax paid/unpaid) together with a SA return to complete and arrange for the outstanding tax to be paid.
12. On 16 December 2014 HMRC issued £900 daily penalties and a six month late filing penalty on the same date.
13. Having collated the information he needed, the Appellant filed his SA return on 23 December 2014.
14. On 12 January 2015, HMRC returned it to him as unfortunately he had omitted to sign it.
15. On 22 January 2015, the Appellant telephoned HMRC to appeal the penalties. He was informed that his appeal could not be considered until HMRC had received his completed and signed SA 2012-13 return.
16. The return was finally received by HMRC in good order on 30 January 2015.
17. The SA tax payable by the Appellant was payable no later than 31 January 2014, but remained unpaid.
18. A 30 day late payment penalty of £81 was issued on 10 March 2015 and a 6 month late payment penalty, also of £81 on the same date.
19. On 11 March 2015 HMRC wrote to the Appellant to say that he had not shown a reasonable excuse for the late filing of his 2012-13 return. It had been sent to him on 6 March 2014 and not returned until 30 January 2015. The Appellant was advised that if he disagreed with the decision he could respond by filing whatever further information he wished HMRC to consider, in which event a review would be undertaken by another HMRC Officer.

20. The Appellant requested a review on 28 March 2015. He said that it was not correct to say he had received the SA return on 6 March 2014. He had not lived at 28B Chesson Road since June 2011 and had been unaware that his employers had used the wrong PAYE tax code which generated the underpayment of tax. He had not
5 been informed by HMRC that he had been put on SA. It was only when he visited his previous address in November 2014 that he became aware of the problem. He had immediately contacted HMRC to query the tax underpayment, and thereafter had dealt with matters as promptly as he could. He had now arranged with HMRC to pay the underpaid tax by instalments.

10 21. On 2 April 2015, HMRC undertook a review, but upheld their decision to impose penalties. HMRC said that it was the Appellant's responsibility to notify HMRC of any change of address. Letters sent to the Appellant at 28B Chesson Road had not been returned as undelivered. Although he had left 28B Chesson Road in June
15 June 2011, he had given that as his address when employed at Peverel Services Limited in June 2012 and again in July 2013. He had not given 199 Old Marylebone Road, London as his new address.

22. On 22 April 2015, the Appellant lodged an appeal with H M Courts & Tribunals Service.

20 23. Daily penalties had 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 Notice of Appeal, *Donaldson* was due to be heard by the Court of Appeal.

25 24. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed on 5 May 2015 that the appeal should be stood over until the *Donaldson* appeal was determined.

30 25. 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, in the notice of assessment, of the correct period for which daily penalties had been assessed, the omission did not affect the validity of the notice.

26. On 15 December 2017, the Appellant was advised that the Court of Appeal's decision in the *Donaldson* case had been released and that accordingly the Appellant's case was to be listed for hearing

Relevant statutory provisions

35 **Taxes Management Act 1970**

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

40 (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

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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

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(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]

(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

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(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.]

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(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.

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(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

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(b) in the case of an electronic return, on or before 31st January in Year 2.

(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-

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(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(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-

5 (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.

10 (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.

15 (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.

20 (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:

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

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

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

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

30 (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

35 (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).
- 5 (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).

10 32. 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.
- 15 (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.

20 33. 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.
- 25 (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
30 (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.

35 34. 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.
- 40 (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.
- 45 (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.

35. 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.
- 5 (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.
- 10 (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
- 15 (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

20 36. The Appellant's grounds of appeal can be readily ascertained from his exchange of correspondence with HMRC.

37. At the hearing, the Appellant said that he did not have a permanent address to give to HMRC in March 2014. He was registered as homeless with the Council. His address at Flat 5, 199 Old Marylebone Road was a care of address. Unfortunately he had left 28B Chesson Road following a dispute with his brother, who regrettably had not sent on to him correspondence from HMRC. Although that was the address which HMRC had on their records, he had no reason to know that HMRC would have reason to correspond with him or that that his employers had used the wrong PAYE tax code. He therefore had no reason to know that he was required to file a SA return for 2012-13. Even had he known about an underpayment of tax, he would have expected that to be collected by way of PAYE in the following tax year, by way of an adjustment to his PAYE code. That, in his experience, is what normally happens. It appeared that his employers were not aware that he had been put into SA. It is not the usual practice of HMRC to advise an employer of this.

35 38. The Appellant said that he could not understand why HMRC had not tried other methods of contacting him. They had his telephone number and email address, or could have contacted him via his employer.

39. With regard to the late payment penalties, having spoken to HMRC in December 2014, he had made immediate arrangements to pay the outstanding tax by monthly instalments. HMRC were aware of this and so far as he knew had no objection to the arrangement. It was not his fault that there had been an under deduction of PAYE tax.

HMRC's Case

40. HMRC accepts that the onus rests with it to demonstrate that the 2012-13 tax return was issued to the Appellant and that the Appellant had failed to submit the return on time.
- 5 41. It is not in dispute that the Appellant's tax return for the year 2012-13 was correctly issued to the Appellant. As such he was legally bound to complete and file the return by the legislative deadline for that year.
42. 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
10 Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.
43. The evidential burden is therefore on the Appellant to show that he has a reasonable excuse for the failure to file his return on time and that any reasonable excuse that he may have had lasted for the entire period of the failure.
- 15 44. 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.
- 20 45. 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).
- 25 46. 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
30 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.
47. Reasonable excuse was considered in the case *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by the Tribunal Chairman Judge Medd:
- 35 "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.].

48. The Appellant should have given HMRC details of his new address in June 2011 when he left 28B Chesson Road, irrespective of the fact that any new address
5 may be temporary. He had given that address to his employers in June 2012 and confirmed it in July 2013.

49. The Appellant had not made every effort to file his return, after discovering it was due in late November 2014. It was not until 30 January 2015, that HMRC received the completed signed return

10 50. HMRC contend therefore that the Appellant has not provided a reasonable excuse for his failure to file his individual tax return for the year 2012-13 on time.

51. Further the Appellant has not shown a reasonable excuse for the late payment of tax due.

15 52. The penalties have accordingly been correctly charged in accordance with the legislation.

Special Reduction

53. 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
20 potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

54. 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).
25 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).

55. 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
30 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 56. 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.

57. 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

58. 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.

59. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or his from complying with an obligation which otherwise they would have complied with.

60. Having considered all the facts of the case, we conclude that the Appellant has shown a reasonable excuse for the late filing of his 2012-13 return and the late payment of tax due. We concur with the Appellant, that in his particular circumstances, having been unaware of the mistake by his employers in using the wrong PAYE code and the under deduction of tax, there was no pressing reason for him to notify HMRC of his new address, which in any event would have been a care of address and only temporary. On becoming aware of the underpayment of tax he dealt with matters diligently and as quickly as he could. He made a mistake in not signing his SA return which therefore had to be returned to him, but equally there were delays on the part of HMRC in returning the document to him. As he correctly says, he could not have known that there had been an underpayment of tax and immediately put in place arrangements to discharge the outstanding tax by monthly instalments.

61. The appeal is therefore allowed and the late filing and late payment penalties discharged.

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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 07 JUNE 2019