



[2019] UKFTT 0364 (TC)

TC07192

INCOME TAX – late filing penalty – out of time appeal – allowed – reasonable excuse – no appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/843

BETWEEN

TOMASZ KRUSZNIEWSKI

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
HELEN MYERSCOUGH**

Sitting in public at Chelmsford Magistrates Court, 10 New Street, Chelmsford on 17 May 2019

No appearance on behalf of the Appellant

Mr Joshua Jyasi, litigator of HM Revenue and Customs' Solicitor's Office], for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns penalties imposed by HM Revenue & Customs (“**HMRC**”) on Mr Tomasz Kruszniewski (“**Appellant**”) under Schedule 55 of the Finance Act 2009 (“**Schedule 55**”) for a failure to submit an annual self-assessment return on time in respect of the tax year ended 5 April 2017.
2. HMRC imposed the following late filing penalties:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018
 - (2) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018
 - (3) A £300 six month late filing penalty under paragraph 5 of Schedule 55 imposed on 18 August 2018.
3. HMRC had also imposed penalties under Schedule 56 of the Finance Act 2009 for late payment of sums shown on tax returns in years ended 5 April 2012, 2014, 2015 and 2016.
4. Despite the Notice of Appeal stating that the appeal was in respect of the Schedule 55 penalties, as a consequence of the reasons given in the grounds of appeal HMRC assumed, and proceeded on the assumption that the appeal concerned late appeals in respect of Schedule 56 penalties.

NON-ATTENDANCE OF THE APPELLANT

5. The Appellant did not attend the hearing. The Tribunal contacted the Appellant on the mobile telephone number provided on the Appellant’s Notice of Appeal. In this telephone conversation the Appellant confirmed that he had received notification of the hearing but had not understood that he needed to attend.
6. The Tribunal asked the Appellant to confirm the apparent inconsistency in the Notice of Appeal between the decision appealed (only late filing penalties) and the grounds of appeal (which referred to the Appellant’s inability to pay). The Appellant confirmed that it was his intention to appeal only the Schedule 55 penalties. He also explained that the sole basis on which his appeal was founded was as set out in the notice of appeal and not by reference to a letter dated 10 November 2018 prepared by his accountants.
7. The Tribunal notified the Appellant that HMRC had applied, pursuant to rule 33 Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009, for the hearing to proceed in his absence. The Appellant indicated his consent to that application.
8. On that basis the Tribunal proceeded to hear the appeal.

OUT OF TIME

9. By their Statement of Case HMRC noted that the time limit for appeal in respect of the Schedule 55 penalties was as set out below:

Penalty	Date of penalty	Last date to appeal	Date of appeal
£100	13 February 2018	15 March 2018	3 December 2018
£900	31 March 2018	30 August 2018	3 December 2018
£300	18 August 2018	17 September 2018	3 December 2018

10. The Statement of Case summarised HMRC's letter rejecting the Appellant's appeal stating:

“HMRC oppose the application [for an out of time appeal] with regard to the late filing penalty charged on 13 February 2018 and daily penalties charged on 31 July 2018. HMRC do not oppose the application with regard to the 6 month late filing penalty charged on 10 August 2018.”

HMRC provide no explanation as to why the 6 month penalty was accepted out of time but that the others were not.

11. However, the Statement of Case also provided:

“HMRC considered the late appeal under section 49 TMA [Taxes Management Act] 1970 and do not agree to the late notice being given and therefore refused the late appeal. A copy of HMRC's refusal letter is at folio 48 – 49. HMRC are **now withdrawing** the objection to bring a late appeal with regard to the 2016-17 late filing penalties.” (Emphasis added)

12. After the Tribunal had spoken with the Appellant and obtained the understanding set out in 6 above HMRC sought to reintroduce the objection to the out of time appeals for the initial £100 and daily penalties. Mr Jyasi sought to argue that the words emphasised in the quotation from the Statement of Case set out in 11 above were not intended to indicate that HMRC were not maintaining their objection.

13. The Tribunal considers that the language used is unambiguous and that any reasonable person would consider that HMRC had previously raised an objection to the out of time appeal in respect of the Schedule 55 penalties but that, at least by the time the statement of case was drafted, HMRC had determined to accept the appeal despite it being out of time (whilst then going on to reject the basis of the appeal).

14. Given that the Tribunal had determined to hear the appeal in the Appellant's absence with his consent by reference to the papers as presented it was considered that to permit HMRC to advance a case inconsistent with the plain language of their stated case would not have been in exercise of the overriding objective. The Tribunal therefore determined that the out of time application be allowed.

15. The Tribunal therefore accepts the application for late appeal.

FACTS FOUND

16. From the information provided, the Tribunal finds the following facts:

(1) The Appellant had been registered for the purposes of self-assessment from the tax year commencing 5 April 2010.

(2) At the time he became registered he was self-employed as a salesman for Hillary's blinds.

(3) His business suffered financial difficulties and despite rendering his tax returns by their due date for filing in all years prior to 2016/17 he struggled to make the payments of the tax declared on those returns. Non-payment led to increasing indebtedness as he received late payment penalties.

(4) HMRC's computer record shows that the Appellant was issued with a notice to file his tax return for the year ended 5 April 2017 on 6 April 2017. There is no evidence as to whether and if so when exactly the notice to file was in fact sent to the Appellant but

he does not deny having received it in a timely fashion (see paragraph 18 below where he simply says that it was not a priority at the time).

(5) However, when the notice to file was received the Appellant was struggling financially.

(6) The Appellant claims he was defrauded by the fitter he used to have the blinds he sold fitted. Because the Appellant was not available in the hearing the Tribunal is unable to determine the accuracy of this claim but accepts that the Appellant states that he was in a position where he and his partner were using pay day loans and selling assets in order to manage their day to day existence.

(7) The financial worries also caused the Appellant considerable stress and understandably impacted his mental wellbeing but the Appellant has not established that the impact on his mental health was anything requiring medical intervention.

(8) In September 2017 (before his 2016/17 return was due to be filed on 31 October 2017 in paper form or 31 January 2018 online) the Appellant gained employment.

(9) With regard to the payment of his outstanding tax liabilities the Appellant started to address the arrears by entering a time to pay agreement with HMRC which commenced with a payment of £7000 made on 19 January 2016 with required subsequent monthly payments. Having made the initial payment the Appellant failed to comply with the payment schedule agreed.

(10) On 17 October 2018 the Appellant filed his return online for 2016/17.

(11) In January 2019 the Appellant again was granted a time to pay arrangement and began to make payments reducing his indebtedness. The Appellant told the Tribunal that he understood he was close to settlement of his outstanding debts. HMRC did not contradict this position.

17. On the basis of the facts found the Tribunal has concluded that the tax return for the 2016/17 tax year was submitted on 17 October 2018 and it should have been submitted by 31 January 2018. Therefore subject to a consideration of reasonable excuse (see paragraphs 18 to 25 below) and special circumstances (see paragraphs 26 to 30 below) the penalties are due and have been correctly calculated.

TEST TO BE APPLIED FOR REASONABLE EXCUSE

18. The Appellant contends that he should be excused from payment of the Schedule 55 penalties on the basis that:

“I have just been able to bring myself back on my feet after a very hard time in my life. There were many reasons as to why I failed to pay my tax on time and why I failed to do my return.

I was essentially a ‘sub-contractor’ of Hillary’s blinds (self-employed status but they provided me with customers and booked appointments for me). I worked for Hillary’s from 2012 and everything was fine until I started to work with another gentleman (who was my fitter, I sold blinds and curtains and he fitted them). This man decided not to pay in the cash customers were giving him and of course as these were my customers and this man was fired, the burden lay on me to have to pay back thousand’s of pounds. As a result, my wages started to be a lot smaller each week. As this was taking place I started to fall back on other payments, taking out pay day loans, selling my car and getting myself in a very bad state financially and mentally. My partner and I

started to fallback on pay day loans to keep out house and we were really struggling to keep it with family not being able to help. The jobs I had in my diary started to be smaller until they completely froze everything and I had no work coming in at all and no wage. This may sound bad, but filling my tax return was the last thing on my mind with the thought of losing my house, my partner and everything we have worked hard to get. I got myself into a very bad mental state and couldn't find any work resulting in no money coming in from my end and debts piling up (pay day loans, loans, bills, mortgage). Everything at that time fell on my partner who was trying her best to keep up with everything but was struggling. It was in September 2017 I went and signed up to an agency (Best Connections) to get work with no skills and only having worked for Hillarys since a young age. Since then, I have been able to start getting back on my feet and I am able to bring myself to write this appeal and try to sort out everything I have messed up.

I hope that you take this into consideration and that I am of course am not evading paying tax I owe by coming to an agreement with HMRC. However, I feel the penalties should be taken off as I was going through a very rough time in my life and this was not intentional.”

19. The relevant statutory provisions are included as an Appendix to this decision.
20. Paragraph 23 Schedule 55 provides that liability to a penalty under Schedule 55 does not arise if the taxpayer satisfies HMRC or, on appeal, the Tribunal that there is a reasonable excuse for the failure.
21. By reference to the grounds of appeal, the Tribunal has considered whether the Appellant has established a reasonable excuse for the late filing of his 2016/17 tax return.
22. In the case of *Christine Perrin [2018] UKUT 0128*, the Upper Tribunal has recently confirmed the approach to be taken by the Tribunal in considering reasonable excuse appeals.

“[70] ... the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on the balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgement ...

[71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*). (Original emphasis)

....

[81] When considering a “reasonable excuse” defence therefore, in our view the FTT can usefully approach matters in the following way:

- (1) First, establish what facts the taxpayer asserts gives rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of these facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

...

[83] It is regrettably still the case that HMRC sometimes continue to argue that the law requires any reasonable excuse to be based on some “unforeseeable or inescapable” event, echoing the dissenting remarks of Scott LJ in *Commissioners for Customs & Excise v Steptoe [1992] STC 757*. It is quite clear that the concept of “reasonable excuse” is far wider than those remarks implied might be the case. ... The statutory phrase is “reasonable excuse”, and those are the words to be applied by HMRC and the FTT interpreted as set out above; the addition or substitution of other words beyond those used in the statute can very easily obscure rather than clarify the value judgment as to whether or not a taxpayer has a reasonable excuse, and should be avoided.”

23. It is thus important when considering a claim to a reasonable excuse that the majority of taxpayers do file and pay their returns on time and are entitled to expect that compliance will be enforced. A reasonable excuse should fully justify the relevant inaction by a non-compliant taxpayer such that it is just that such non-compliance should be excused. Reasonable excuse is not however, limited to matters that are unforeseeable or inescapable. In essence the Tribunal asks itself whether a reasonably prudent taxpayer in the position of the Appellant would have acted as he did vis a vis the filing and payment of his return.

DISCUSSION

24. Applying the *Perrin* steps to the present appeal:

(1) Facts relied on by the Appellant

The Appellant contends that he was in financial difficulty and suffering mental health problems thereby providing a reasonable excuse.

(2) Are the facts proven?

This appeal was not one scheduled to be heard on the papers; however, in essence that is how it transpired subject to HMRC presenting their case orally and a brief conversation with the Appellant.

The failure by the Appellant to attend had the consequence that the Tribunal could not explore with the Appellant the circumstances and time frame of the allegations of fraud/theft in respect of customer cash. The Tribunal therefore proceeds, as set out at paragraph 16 and 18, that the excuse is limited to a conscious decision by the Appellant to put aside his tax obligations whilst he put his life back in order.

Further, as indicated above there are no facts proven as to the impact of the financial issues on the Appellant's health.

(3) Do the proven facts amount to a reasonable excuse on an objective basis?

Paragraph 23(2) Schedule 55 provides that an insufficiency of funds is not a reasonable excuse.

The Appellant's case seems to rest on the insufficiency of funds causing distraction from important tasks such as filing his tax return. That cannot amount to a reasonable excuse.

(4) Did the Appellant remedy the failure without undue delay after the reasonable excuse ended?

As there was no reasonable excuse there was nothing to remedy and this question is irrelevant.

25. On the basis of the above analysis the Tribunal finds that there is no reasonable excuse for the non-filing of the 2016/17 tax return.

SPECIAL CIRCUMSTANCES

26. Paragraph 16 Schedule 55 provides that HMRC may reduce a penalty because of special circumstances. However, paragraph 16 explicitly excludes an inability to pay from amounting to a special circumstance.

27. There is much case law on the question as to what circumstances constitute special circumstances justifying a mitigation of a late filing penalty. That case law indicates that the circumstances affecting the Appellant which caused the failure to render the return by the due date must justify a mitigation of what would otherwise be an unfair penalty.

28. The Tribunal can review the exercise of HMRC's discretion to allow such a reduction. If in exercising their discretion HMRC took into account material that they should have not considered or failed to consider relevant material the Tribunal may intervene and reconsider whether special circumstances exist. Where HMRC's decision is not flawed the Tribunal may not intervene.

29. HMRC considered whether there were any special circumstances by reference to the matters raised in the Appellant's grounds of appeal. They did not consider that any matters constituted a reason to reduce the penalty.

30. The Tribunal agrees there is no basis to reduce the penalty by reference to the circumstances as explained by the Appellant in the present case.

DECISION

31. The Tribunal concludes that the penalties were due as a consequence of the Appellant having delayed the filing to file his 2016/17 tax return until 17 October 2018 over 8 months after the due date.

32. The Appellant has failed to establish either a reasonable excuse or identify any special circumstances by reference to which the penalty should be reduced.

33. The Appellants appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**AMANDA BROWN
TRIBUNAL JUDGE**

RELEASE DATE: 07 JUNE 2019

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.

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)—
 - (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).

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

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.

4. 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.
- (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.

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

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.

6. 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:

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.