



TC07294

Appeal number:TC 2019/01544

INCOME TAX - individual tax return - penalties for late filing - late appeal - application for permission to appeal out of time - application refused - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BUSTER STOOPS

Appellant

- and -

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

Respondents

TRIBUNAL: Dr KAMEEL KHAN

The Tribunal determined the appeal on 5 June 2019 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 29 December 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 28 March 2019

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 on time. The appeal includes an application by the appellant to appeal out of time.
2. The appellant appeals against a late filing penalty of £100, Daily Penalty of £900 - and 6-month Late Filing Penalty of £300.

FINDING OF FACTS

3. The notice to file (SA 316) for the year ending 5 April 2017 was issued to Mr Stoops on or about 6 April 2017 at his home address. The filing date was 31 October 2017 for a non-electric return or 31 January 2018 for an electronic return.
4. Mr Stoop’s electronic return for the year 2016-2017 was received on 20 December 2018.
5. As the return was not received by the filing date, penalties (as above) were imposed for late filing and notices of penalty assessments were correctly issued for non-filing and late filing.
6. The appellant admits that he filed the returns late for 2016-2017 but says that he had mental health issues for the last 5-6 years. He has provided no medical evidence for his illness though he had a medical consultation in 2016.
7. He contacted HMRC on 27 September 2018 to explain his medical condition. He employed an accountant to deal with his tax affairs around the same time.
8. His accountant appealed the penalties on 20 December 2018.
9. On 12 February 2019 the appeal was rejected as it was late.
10. Mr Stoops has been completing self-assessment tax returns since 2003 and is self-employed.
11. He had telephoned HMRC on 21 September 2018 to advise that he will be filing the 2016-2017 and 2017-2018 returns in next few weeks. He advised of his medical condition. The date was already passed the deadline for filing when he notified HMRC of his medical condition.
12. On 20 December 2019 Mr Stoops notified the tribunal of his appeal.

THE LEGISLATION

13. The statutory provision which permits a consideration of an application for giving a late notice of appeal is section 49 of the Taxes Management Act 1970 (“TMA 1970”) this reads as follows

49(1) This section applies in a case where - notice of appeal may be given to HMRC, but

a) no notice is given before the relevant time.

49(2) Notice may be given after the relevant time limit if-

a) HMRC agree, or

b) where HMRC do not agree, the tribunal gives permission.

49(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

CASE LAW

14. The Upper Tribunal in the case of *Martland (William Martland v HMRC [2018] UKUT 178)* undertook a detailed review of the relevant authorities. It has provided useful guidance on permission to appeal late.
15. The relevant extract from *Martland* is set out below

“When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three- stage process set out in Denton:

- (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.*
- (2) The reason (or reasons) why the default occurred should be established.*
- (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.*
- (4) That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.”*

APPELLANT’S SUBMISSIONS

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

“That there was a “reasonable excuse” for any failure to submit the return on time due to ill health. I was medically diagnosed with depression, anxiety disorder and severe psychological distress. “

The same points are made regarding his late appeal.

The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC refused consent under s49(2)(a) of TMA 1970 to a late notice being given.

HMRC SUBMISSIONS

17. The appellant's condition is neither sudden nor unexpected and have been ongoing. A long-term illness would mean that a taxpayer should have put in place measures to ensure his returns were filed on time.
18. No medical evidence was presented to support the medical conditions claimed.
19. The appellant did not act as a reasonable person in seeking to comply with his tax obligations.

DISCUSSION

20. Relevant statutory provisions are included as an Appendix to this decision.
21. I am satisfied on the facts that an officer of the Board issued a notice to file to the appellant under section 8 TMA 1970 and the penalty notices given to the appellant satisfy the requirements of paragraphs 4 and 18 of schedule 55 Finance Act 2009.
22. I have considered the appellant's contention that his appeal is not out of time. I do not agree. He had 30 days from the date on which he was given the relevant penalty notices in February 2018 to make his appeal to HMRC. No appeal was made until December 2018. As a matter of fact, his appeal is late.
23. The justification given by the appellant for his late appeal is that he had a medical diagnosis of depression, anxiety disorder and severe psychological distress and was not working.
24. If the appellant is suffering from a long-term ill-health, it can amount to a reasonable excuse. However, if the illness is long-term a reasonable taxpayer, conscious of their responsibilities, is expected to make arrangements for someone to act on their behalf. Such action would be those of a reasonable person considering all the circumstances.
25. In this case, the appellant suffered from depression for 5-6 years. This is not a sudden incapacity preventing a taxpayer from completing his return at the last minute. He only handed over his affairs to Bryn Hodder in 2018 and appealed out of time. The appeal was 314 days late. This is serious and significant delay.
26. I would normally treat the onset of a disability or a serious mental health condition, where they make the person unable to comply with a notice, as a reasonable excuse.
27. However, I would expect someone who knows they will find it difficult to meet a requirement, because of an existing condition, to make every reasonable effort to anticipate this and make alternative arrangements. The appellant should have made the necessary arrangements, with perhaps the help of family, to engage a third party to assist.
28. The tax returns show that in 2015-2016, 2016-2017 and 2017-2018 the appellant was working as a self-employed decorator and had received profits from his trade. The profits from his trade have been fairly consistent over the years and the financial constraints were neither sudden or new. He was able to work as a decorator and therefore should be able to complete his returns or get someone to do so on his behalf.

29. Finally, I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16.
30. The Tribunal's jurisdiction in this context is limited by paragraph 22 of Schedule 55 to circumstances where it considers HMRC's decision in respect of the application of paragraph 16 was flawed when considered in the light of the principles applicable in judicial review proceedings.
31. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction.
32. Applying the judicial review standards, I see no reason to overturn HMRC's decision.

CONCLUSION

33. I reject the application for permission to make a late appeal. The case is weak and the appeal is substantially late.
34. HMRC must be able to close their files and I can see very little prejudice to the appellant in this case.
35. I therefore dismiss the appeal for making a late appeal.

DR K KHAN

TRIBUNAL JUDGE

RELEASE DATE: 30 July 2019

Application for Permission to Appeal

This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When
5 these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

10 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.

15 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)—

20 (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.

25 (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)—

30 (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).

35 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—

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

10 6—

(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.

15 (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).

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

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

25 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- (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%.

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

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

35 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- (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—
 - (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.
 - (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.

6. 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.

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:

22—

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- 10 (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.
- 15 (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
 - 20 (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.
- 25