



[2019] UKFTT 0673 (TC)

TC07448

Income tax – individual tax return – late filing penalty – whether reasonable excuse - old age -on holiday – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02278

BETWEEN

DAISY NCUBE

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE DR KAMEEL KHAN

The Tribunal determined the appeal on 29 October 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 12 April 2019 (with enclosures) and HMRC's Statement of Case submitted on 3 June 2019(with enclosures).

DECISION

INTRODUCTION

1. This is an appeal against:
2. A penalty imposed under Paragraph 3 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year 2015-2016.
3. Daily penalties imposed under Paragraph 4 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year.
4. A penalty imposed under Paragraph 5 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year.
5. A penalty imposed under Paragraph 6(5) of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year.

Background

6. Self-assessment (SA) is based on voluntary compliance. Taxpayers who are within the SA system must file their returns by the due date and pay the tax they owe by the date specified in law. The filing date is determined by Section 8 TMA 1970 et seq. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax Return.
7. If the return is not received by the filing date a penalty of £100 is payable in accordance with Paragraph 3 Schedule 55 FA 2009.
8. 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 period of 90 days are payable in accordance with Paragraph 4 Schedule 55 FA 2009.
9. If after a period of 6 months beginning with the penalty date the return remains outstanding a penalty of £300 is payable in accordance with Paragraph 5 Schedule 55 FA 2009.
10. If after a period of 12 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 6 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to tax which would have been shown on the return or £300.
11. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2009.

Reasonable Excuse

12. 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 has ended.
13. The law specifies two situations that are not reasonable excuse:

An insufficiency of funds, unless attributable to events outside the appellant's control and reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

14. There is no statutory definition of reasonable excuse, which “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*).

15. HMRC consider reasonable excuse to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. It is necessary to consider what a reasonable person, who wanted to meet their obligation, would have done in the same circumstances and decide if the action of the person met that standard as outlined by *Judge Medd in The Clean Car Company (LON/90/138X)*.

16. “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? Put in another way which does I think alter the sense of the question; was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?”

17. Whether a person has a reasonable excuse will depend on the particular circumstances in which the failure and the abilities of the person who has failed. What is a reasonable excuse for one person may not be a reasonable excuse for another person.

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

Burden and Standard of Proof

19. The onus of proof is for the respondents to show that the penalties have been correctly calculated. The burden then shifts to the appellant to demonstrate that a reasonable excuse exists for the defaults.

20. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.

Findings of Facts

21. Mrs Ncube’s Notice to File was properly issued on 6 April 2016 and sent to the latest address at 368 Shannon Road, HU8 9RZ. The issue of the notice to file or the return is made by an automated service so HMRC is unable to produce a copy of the actual notices sent to Mrs Ncube.

22. The filing date was 31 October 2016 for a non-electronic return and 31 January 2017 for an electronic return. The dates were shown on the Notice.

23. Mrs Ncube’s electronic return for the year was received on 3 February 2018 which is more than a year late.

24. As the return was not received by the filing date, HMRC issued a notice of penalty assessment (SA326D) on or around 7 February 2017 in the amount of £100. In *Donaldson v HMRC*, the Court of Appeal decided that HMRC had given notice under paragraph 4(1)(c) specifying the date from which the penalty was payable in the SA reminder and SA326D Notice.

25. Both notices stated that there would be liable to a £10 daily penalty if their return was more than three months late and specified the date from which they were payable depending on whether the person filed an electronic or paper return.

26. The warning on the £100 penalty notice issued to Mrs Ncube met the requirements of Para 4 (1)(c) Sch. 55 FA 09.

27. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of penalty assessment to Mrs Ncube on or around 11 August 2017 in the amount of £900. These amount to daily penalties of £10 per day up to a period of 90 days in accordance with Paragraph 4 Schedule 55 FA 2009.

28. As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment to Mrs Ncube on or around 11 August 2017 in the amount of £300.

29. As the return had still not been received 12 months after the penalty date, HMRC issued a notice of penalty assessment on or around 20 February 2018 in the amount of £300.

30. The penalties total £1,600.

The Appeal

31. On 19 November 2018, Mrs Ncube appealed against the penalties on the grounds that:

32. She is an elderly lady who depends on her relatives to complete her tax returns;

33. She went to Canada to her children as she was not able to work;

34. She was not working during this period so she didn't think it necessary to complete a tax return;

35. She is still not working and has no means of paying this penalty.

36. HMRC sent Mrs Ncube a decision letter on 1 February 2019 rejecting the appeal because it was late. A copy of HMRC's decision letter is not available but a follow up letter of 5 April 2019 was provided in the bundle of documents.

37. On 12 April 2019, Mrs Ncube notified her appeal to the Tribunal, giving the grounds as before.

HMRC Submissions

38. This appeal involves a straightforward area of law which is not technical but administrative, namely, the filing of a tax return by the due date.

39. Reliance on a 3rd party to complete her returns is not considered a reasonable excuse. The SA system places responsibility on customers for their own tax affairs. The responsibility lies entirely with the taxpayer to ensure her returns are completed and on time.

40. Not having the funds to pay the penalties is not a reasonable excuse for late filing. Penalties are in place to ensure those who file late gain no advantage over those who file on time.

41. There is no reasonable excuse based on the law.

Discussion

42. Mrs Ncube gives no dates for her trip to Canada so I am unable to comment on whether it lasted throughout the period of default which is 31 January 2017 (the actual deadline date) to 3 February 2018 (the date it was submitted).

43. Even if she did, it is clear that she made no provision for the submission of her return as would the prudent person envisaged by the legislation. A reasonable person would exercise foresight and due diligence and engage an agent to deal with the simple task of submitting their tax return. Leaving without making such arrangements can be viewed as irresponsible in meeting deadlines laid down by law.

44. By her own admission in information provided through her tax return for 2015-2106, she did receive income from self-employment. It is not correct that she had no income. Her return for the previous year did not show a cessation of her self-employment. In fact, there was an ongoing source of self-employed income on the SA system for a two-year period. This means she was working and it is not correct to say she had no income and was not working.

45. Moreover, she has been in SA since at least 2007 and this means she is considered an experienced and knowledgeable filer. The expectation from such a taxpayer is that their affairs would be in order and filings would be done diligently and on time.

46. If Mrs Ncube was having problems paying at this time, she could have contacted the HMRC's Payment Helpline (0300 200 3822) to arrange a Time to Pay (TTP) agreement where she can pay in instalments. This would have been sensible.

Human Rights and Proportionality

47. The penalties are simply an administrative means of securing the production of timely returns. Their aim is to encourage compliance, not punish defaults. There is no issue under Article 6 ECHR and the taxpayer was made fully aware of their right to a statutory review or to an appeal to an independent tribunal.

48. The penalties are not disproportionate and the penalty regime is proportional to its aim. Moreover, the regime includes provisions for 'reasonable excuse' and 'special circumstances' which allow mitigation in appropriate cases.

Special Reduction

49. Paragraph 16(1) allows HMRC to reduce a penalty if they think it is right because of special circumstances.

50. "Special circumstances" is undefined save that, under paragraph 16(2), it 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.

51. 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*).

52. There are no special circumstances which would merit a reduction of the penalties in this case. The tribunal has sympathy with her circumstances and her age but this alone cannot allow a reduction in penalties.

53. Where a person appeals against the amount of a penalty, paragraph 22 (2) and (3) of Schedule 55, FA2009 provides the tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make.

54. 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'.

55. The decision of HMRC decision not to reduce the penalties under paragraph 16 was not flawed.

Conclusion

56. There is no reasonable excuse for Mrs Ncube's failure to file her tax return on time and the penalties applied are upheld.

57. There are no special circumstances which would allow the penalty to be reduced under Special Reduction.

58. Therefore, the appeal is dismissed and the £1600 late filing penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

JUDGE DR KAMEEL KHAN

TRIBUNAL JUDGE

RELEASE DATE: 6 NOVEMBER 2019