



TC07823

INCOME TAX-late payment penalties and late filing penalty -whether out of time appeal accepted by HMRC- whether reasonable excuse for delay in making payment and/or filing return

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/08971

TAX CHAMBER

BETWEEN

MOHASIN MIAH

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 19 August 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of issues arising from the Covid-19 pandemic and the Tribunal considered that it was able to decide the matter without a hearing. The documents to which I was referred are the Notice of Appeal dated 21 November 2019 (with enclosures), HMRC's Statement of Case dated 24 January 2020, and the Document and Legislation Bundle of 112 pages prepared by HMRC.

DECISION

INTRODUCTION

1. The Appellant is appealing against a penalty 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 for the tax year 2014-15 and against late payment penalties imposed under Schedule 56 Finance Act 2009 (“Schedule 56”) for paying tax late for the tax years 2010-11 and 2012-13 to 2014-15 inclusive.
2. The appeal to HMRC was made late and HMRC state that they refused to accept the late appeal so that no decision has been made. Accordingly this matter, in their view, is an application under section 49(2)(b) Taxes Management Act 1970 (“TMA”) for permission from the Tribunal to appeal out of time. They object to this application.
3. It seems that HMRC may in fact have accepted the appeal. I need to determine whether this is the case. If not, I will need to consider the application to appeal out of time, but if HMRC has accepted the appeal, I will need to consider the substantive appeal against the penalties.

THE LAW

4. Paragraph 1 of Schedule 56 provides that a penalty is due if tax is unpaid at the “penalty date”. The Penalty date is 31 days after the due date under section 59(4) TMA ie 3 March in the relevant year or 2 March in a leap year.
5. Paragraph 3(2) of Schedule 56 states that the penalty is 5% of the tax unpaid.
6. Paragraph 3(3) of Schedule 56 provides that a further penalty is due if any tax remains unpaid at the end of the period of five months beginning with the penalty date ie six months after the tax is due. The penalty is 5% of any amount which is unpaid.
7. Paragraph 3(4) of Schedule 56 provides that a further penalty is due if any tax remains unpaid at the end of the period of eleven months beginning with the penalty date ie twelve months after the tax is due. The penalty is 5% of any amount which is unpaid.
8. Paragraph 3 of Schedule 55 provides that a person is liable for a penalty of £100 if they submit their tax return late.

Findings of fact

9. Mr Miah was self-employed during the period in question and regularly submitted tax returns. He submitted all his tax returns during the period on time except for the return for the year ending 5 April 2015. This return was due by 31 January 2016 and was submitted on 13 March 2016. HMRC issued a late filing penalty of £100.
10. Mr Miah was consistently late in paying the tax which was due.
11. Tax was due in each of the relevant years and the amount of the penalties was based on a percentage of the tax owing. The penalties that have been charged under Schedule 56 for late payment can be summarised as follows:
 - (1) A 30 day late payment penalty of £207 for the tax year 2010-11
 - (2) Thirty day and six months penalties totalling £351 for the tax year 2012-13.
 - (3) Thirty day, six months and twelve months penalties totalling £414 for the tax year 2013-14.

- (4) Thirty day, six months and twelve months penalties totalling £165 for the tax year 2014-15.
12. The total amount of penalties is £1,237.
 13. The appellant's reasons for appealing against the penalties out of time are similar to his substantive grounds for appealing against the penalties. They are set out in his Notice of Appeal dated 21 November 2019, his appeal to HMRC dated 11 March 2019 and his request for a review dated 11 September 2019.
 14. English is not Mr Miah's first language. In his Notice of Appeal, Mr Miah requested support at the hearing (had there been one) in the form of a Bengali interpreter. Having said that, I am satisfied from the letters written by Mr Miah, the records of his contacts with HMRC and the fact that he submitted his tax returns on time most of the time, that his grasp of English was sufficient for him to understand his tax obligations. I also note, from HMRC's records of telephone contacts, that Mr Miah was represented by an agent for at least some part of the relevant period.
 15. The reasons for a late appeal, for failing to pay the tax on time, and for late filing can be summarised as follows:
 - (1) Mr Miah was separated from his family who were in Bangladesh. He was applying to the Home Office for permission for them to join him but this was repeatedly refused. He made a number of visits back to Bangladesh to see his family. As a result of these family problems, Mr Miah suffered stress and mental health issues.
 - (2) The Notice of Appeal states that Mr Miah had a "medical record of being sick and having stress for a while and I am still having issues". He also refers to this in the letter of appeal to HMRC. The appellant's request for a review dated 11 September 2019, states that HMRC had underestimated the stress caused to him by the separation from his family and he had suffered severe stress, depression and sleeplessness and had been referred for therapy by his GP to help deal with these issues.
 - (3) In short, he argues that he had a reasonable excuse for the failures.
 - (4) He struggled to contact HMRC.
 - (5) He did not receive the first two letters but did receive subsequent ones. When he received the third letter he realised he had missed some and he did not realise that he had been charged. I interpret this to mean that Mr Miah asserts he did not receive at least some of the penalty notices
 16. Mr Miah has not provided any medical evidence of his stress and depression, nor has he provided any evidence of the period during which his problems persisted.
 17. The appellant's appeal to HMRC under section 31A TMA 1970 was made outside the statutory deadline. HMRC say that they have not given consent under section 49(2)(a) of TMA 1970 for the late appeal so that the appellant's appeal is an application to the Tribunal for permission to proceed with the late appeal under section 49(2)(b) TMA. HMRC object to the application.
 18. The earliest penalty notice date was 10 April 2012 when notice of the thirty day late payment penalty for 2010-11 was issued.
 19. Further late payment penalty notices were issued as follows:
 - (1) (2012-13): 18 March 2013 (thirty day), 18 August 2013 (six months).

- (2) (2013-14): 17 March 2015 (thirty day), 14 August 2015 (six months), 23 February 2016 (twelve months).
 - (3) (2014-15): 15 March 2016 (thirty day), 12 August 2016 (six months), 21 February 2017 (twelve months).
20. HMRC also issued a notice in respect of the late filing penalty for 2014-15 on 17 February 2016.
21. The appellant had 30 days from the issue of each penalty notice to appeal against the penalty to HMRC.
22. Mr Miah's appeal to HMRC in respect of all the penalties was dated 11 March 2019 and was received by HMRC on 2 April 2019. The appeals were therefore between 740 and 2,518 days late.
23. HMRC say that they refused to accept the late appeals. They were unable to produce a copy of the relevant letter, but I was provided with a copy of a standard form template and an extract from HMRC's SA Notes showing that a letter was issued on 28 April 2019.
24. The SA Notes state "28/4/2019...recd on 2/4/19 for 2009, 2010, 2011, 2012, 2013, 2014, & 2015 LPP Appeal issued APP21 as payment not made."
25. The template APP21 letter in the bundle was not a letter refusing to consider a late appeal, but a letter accepting an appeal against penalties for late payment and inviting the taxpayer to submit a reasonable excuse as to why the tax was not paid on time.
26. On 11 September 2019 Mr Miah sent a form to HMRC headed "Request for a review of HMRC's decision" and again set out his arguments as to why he should not be charged penalties.
27. HMRC responded on 25 October 2019 with a review conclusion letter which concluded HMRC's original decision to charge penalties for late payment of tax and late filing were correct and that Mr Miah did not have a reasonable excuse for his failures nor were there any special circumstances which would allow HMRC to reduce the penalties.
28. HMRC may well have intended not to admit the appeal out of time, but I conclude that they did accept the appeal, but decided that the penalties were properly chargeable as Mr Miah had no reasonable excuse for his failure to pay or to file.
29. The present appeal therefore stands as a substantive appeal against the penalties.
30. HMRC provided a full Statement of Case on the substantive issues in case I should agree to admit the appeal out of time. I have found that HMRC accepted the appeal to them out of time. The appeal to the Tribunal from the review conclusion letter was in time. I am therefore in a position to consider the substantive matter.
31. Section 59(4) TMA provides that, in the circumstances of this case, the tax due for a tax year must be paid by 31 January next following the end of the tax year.
32. HMRC provided copies of a series of statements of account for Mr Miah showing when the tax payable for the various years was in fact paid. Most of the tax was paid in instalments. HMRC and Mr Miah agreed four Time to Pay ("TTP") Agreements under section 108 Finance Act 2009 over the years. Where a TTP Agreement is applied for before the tax is due, no late payment penalties are due if the taxpayer complies with the terms of the Agreement. Mr Miah cancelled the first two, defaulted on the third and the fourth was set up after the tax was already due. Accordingly, the TTP Agreements do not prevent penalties being charged.

33. The tax for 2010-11 was due on 31 January 2012. It was paid in full on 4 September 2012, more than six months late.
34. The tax for 2012-13 was due on 31 January 2014. It was paid in full on 26 January 2015, more than twelve months late.
35. The tax for 2013-14 was due on 31 January 2015. It was paid in full on 30 January 2017, more than twelve months late.
36. The tax for 2014-15 was due on 31 January 2016. It was paid in full on 13 December 2017, more than twelve months late.
37. Mr Miah's tax return for the tax year 2014-15 was due on 31 January 2016. HMRC's records show it was submitted on 13 March 2016 and a late filing penalty of £100 was due. Although the only evidence of the submission of the return is HMRC's computer record this is not disputed by Mr Miah and I find that the return was late.
38. Paragraph 11 of Schedule 56 provides that where a taxpayer is liable for a penalty under the schedule, HMRC must assess the penalty and "notify P [the taxpayer]".
39. Mr Miah submits that he did not receive the first two "letters". It is unclear whether they were the penalty notices or other communications from HMRC.
40. HMRC submit that the penalty notices were issued to Mr Miah at the address it held for him, namely 23 West Avenue. None of the communications sent by HMRC were returned undelivered. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978.

41. The provisions are:

"115.— Delivery and service of documents.

- (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
- (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—
 - (a) at his usual or last known place of residence, or his place of business or employment, or...

"7. References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

42. Accordingly, HMRC submit that the penalty notices have been validly served and Mr Miah has been "notified" of them as required by paragraph 11 of schedule 56.
43. The Document Bundle contained two addresses for Mr Miah. His address between 19 March 2010 and 19 September 2011 is stated to be "23 West Avenue **Road**, London" ("Road"). (Emphasis added). The second address, for the period from 30 January 2012 to 14 June 2018 is shown as "23 West Avenue, Walthamstow, London" ("Avenue"). The postcode for both addresses is the same. There is a West Avenue **and** a West Avenue Road in Walthamstow.

44. The notice to file for 2010-11 was issued on or around 6 April 2011 to Road. It would seem that Mr Miah received it as the return was submitted on time. The first penalty notice for unpaid tax was issued on 10 April 2012 to the Road address. According to HMRC's records, Road was no longer Mr Miah's address.
45. The next late payment penalty notice related to the 2012-13 tax year and was issued on or around 18 March 2014 to the Avenue address, which HMRC's records indicate was the correct address at the time. All the remaining penalty notices, were, according to HMRC, issued to the Avenue address which was the address in the records for the rest of the relevant period. Mr Miah moved from there in 2018.
46. I have no other evidence of Mr Miah's address or addresses between 2010 and 2016. Mr Miah has not denied receiving all the notices of appeal. He states "I didn't receive first two letters for some unknown reason but when I received the third one, I realised that I missed few of them and I was appealed [presumably appalled] by the fact that I have been charged which I had no idea about." (sic)
47. I infer that Mr Miah had not received some communications from HMRC. I have also found that the first penalty notice was sent to an address which was not his then current address on HMRC's records. Section 115 TMA and section 7 Interpretation Act 1978 create a presumption about service. HMRC sent the notice to an address which was not the current or last known address in its records. It cannot therefore rely on the deeming provisions as the notice was not sent to Mr Miah's "usual or last known" address.
48. Taking all the evidence into account, I am not satisfied that, on the balance of probabilities, the penalty notice issued on 10 April 2012 was validly notified to Mr Miah.
49. I find that the remaining penalty notices were validly notified to Mr Miah.

DISCUSSION

50. I have concluded that Mr Miah's tax return for 2014-15 was filed late and that the tax for the tax years under appeal was paid late. The penalties charged are therefore due and have been correctly calculated, subject to the considerations of notification and reasonable excuse which I deal with below.
51. I have found that HMRC have not satisfied the burden of proving that the first penalty notice issued on 10 April 2012 was validly notified to Mr Miah. The requirements of paragraph 11 of Schedule 56 have not been met and, accordingly, I allow the appeal so far as it relates to the 30 day late payment penalty of £207 for 2010-11.
52. Mr Miah states that he suffered from stress and depression as a result of his separation from his family and the difficulties he had with the application to the Home Office. He states that he sought medical help for his condition.
53. Mental health issues are, of course, **capable** of constituting a "reasonable excuse" and if Mr Miah can establish that he had a reasonable excuse for the late payment of his taxes over a period of years, the penalties will not be due.
54. Mr Miah also refers to his constant contact with HMRC in an effort to sort all the problems out. HMRC's records show that Mr Miah did indeed telephone HMRC on numerous occasions. The notes of the calls indicate that they were concerned with the overdue tax and the need to make payment to clear the debt. There was nothing in the records to indicate a reasonable excuse for the failure to pay on time in the first place.
55. The Upper Tribunal in the case of *Perrin v HMRC* [2018] UKUT 156 (TCC) set out guidance for this Tribunal on the approach to "reasonable excuse". The Upper Tribunal said:

“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 give 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 those 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.”

56. Mr Miah asserts that the stress and depression he suffered as a result of his personal circumstances caused him to pay the tax late.
57. In order for Mr Miah to establish that this constituted a reasonable excuse he would have to show how his mental health issues affected his ability to make payment and/or file his return, the period during which the excuse continued and that he made payment /filed the return within a reasonable time of the excuse ceasing.
58. Mr Miah has not produced any evidence of his illness or its severity or how it prevented him from making payment of his tax or filing his return.
59. There is, however, evidence that Mr Miah was capable of dealing with his financial and business affairs during the period. He managed to complete his tax returns, and with one exception, to complete them on time. The returns showed that he was self-employed and able to work to generate an income on which tax was due. He did in fact make payments of tax throughout the period, although the payments were late.
60. Having taken all the evidence into account, I am not satisfied that Mr Miah has proved, on the balance of probabilities that he had a reasonable excuse for his failure to pay his tax liabilities on time or for the late filing of his 2014-15 tax return.
61. HMRC considered whether there were any “special circumstances” which would permit them to reduce the penalties. They concluded that there were no special circumstances.
62. I can only interfere with that decision if it was “flawed” in the judicial review sense. I consider that HMRC’s decision on special circumstances was not flawed and, accordingly must stand.

CONCLUSION

63. I have concluded that the penalty notice dated 10 April 2012 in respect of the 2010-11 tax year 30 day late payment penalty of £207 was not validly notified to Mr Miah and I allow the appeal in relation to that penalty which is cancelled.
64. Subject to that, I have found that the penalties assessed are due and as Mr Miah had no reasonable excuse for the late payment of the taxes or the late filing of the 2014-15 return, I dismiss the appeal and affirm HMRC's decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 25 AUGUST 2020