



**TC07956**

**Appeal number: TC/2019/08881**

*Income tax - Schedule 55 Finance Act 2009 - fixed penalty for late filing of self-assessment return - Appellant not self-employed but issued with notice to file together with an explanation that this was because of an underpayment of PAYE in an earlier year - he nonetheless failed to file his return until after the filing date - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTOPHER HENDERSON**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 27 May 2020 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 13 November 2019, and HMRC's Statement of Case received by the Tribunal on 6 January 2020.**

## DECISION

1. This is an appeal by Mr Christopher Henderson (“the appellant”) against a penalty of £100 imposed by the Respondents (“HMRC”) under Paragraph 3 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment (“SA”) tax return for the tax year ending 5 April 2018.

2. The filing date is determined by s 8(1G) TMA 1970 which states that for the year ended 5 April 2018 if a notice in respect of Year 1 is given after 31 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. The HMRC computer system allows a concessionary period of 7 days on top of the 3 months, to allow for postal delivery times. HMRC required that the appellant’s non-electronic return be filed by 1 November 2019 or an electronic return by the same day.

3. The appellant’s electronic return for the year 2017-18 was received on 28 November 2019.

4. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

5. 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 Finance Act (“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.

6. A Penalty of £100, was imposed, under (i) above.

### *Penalty date*

7. The ‘penalty date’ is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

### *Reasonable excuse*

8. 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 ceased.

9. 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.

10. 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).

11. HMRC's view is that 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 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.

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

### *The background facts*

13. The notice to file a return for the year ending 5 April 2018 was issued to the appellant on or around 25 July 2019.

14. The address the notice to file was issued to 64 Shaftesbury Avenue SR2 OAQ.

15. The appellant's electronic return for the year 2017-18 was received on 28 November 2019 and was processed on 29 November 2019. The return was submitted 27 days late.

16. HMRC issued a notice of penalty assessment on or around 5 November 2019 in the amount of £100.

17. On 13 November 2019 the appellant lodged a Notice of Appeal against the penalty with the Tribunal.

18. Because the appellant appealed directly to Tribunal without first appealing to HMRC, under s 49D Taxes Management Act 1970 the Tribunal has no jurisdiction. However HMRC, in the interests of justice and to seek a timely resolution to the matter have agreed to accept the appeal to Tribunal as an appeal to HMRC at the same time. HMRC's paper submission is submitted as their view of the matter so that the appeal can be determined by the Tribunal.

*Points at issue*

19. Whether the appellant has a reasonable excuse for the late filing of the individual tax return for the period ending 5 April 2018.

20. If a reasonable excuse exists, whether the return was received without any unreasonable delay once any excuse had ended.

*Burden and standard of proof*

21. The onus of proof is for HMRC 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 default. The standard of proof is the ordinary civil standard, which is on the balance of probabilities

*Relevant statutory provisions*

**Taxes Management Act 1970**

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

(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
- 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
- (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

(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.]

(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.

(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

(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-

(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-

(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.

(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.

(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.

(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:**

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

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

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

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

(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

(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).

(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).

27. 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.

- (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.

28. 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.
- (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.

29. 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.
- (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.

30. 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.
- (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.

### **The Appellant's case**

31. The appellant's grounds of appeal as stated in his notice of appeal are:

"I am currently employed by James Jones and Sons. I am not self-employed, so believe it is down to my employer to be paying my tax".

### **HMRC's Case**

32. This case concerns a notice to file a return for 2017-18 issued as a result of a PAYE underpayment.

33. HMRC records show that on 24 October 2018 a calculation for 2017-18 was issued to the appellant showing that he had not paid enough tax for the 2017-18 tax year. The calculation showed that tax due on his level of income during 2017-18 was £1,832 but the appellant had been deducted tax of £1,688.60, by his employer, leaving a tax underpayment of £143.40. A payment slip was attached to the calculation sent to the appellant.

34. When there was no response from the appellant, a voluntary payment (VPL1) letter was issued to him 27 January 2019 which stated, that if payment was not received then a SA tax return may be issued.

35. On 21 April 2019, as there was no response from the appellant, a second voluntary payment letter (VPL2) was issued to him. This explained that if payment was not received a SA tax return may be issued.

36. As there was no response to HMRC's letters of 27 January 2019 and 21 April 2019, on 15 July 2019 HMRC set up a SA record for the appellant. A notice to file a return for the 2017-18 tax year was issued to him.

37. HMRC records show the appellant telephoned on 30 July 2019. It was explained to him why an SA record had been set up and he was advised to complete a return for 2017-18. Therefore, the appellant was aware why a return was required before the filing date of 1 November 2019.

38. The appellant called again on 20 November 2019 regarding the 2017-18 return. The reasons why a return was necessary were again explained to him and he was advised how to enrol online.

39. Individuals are required to complete tax returns for a variety of reasons; self-employment is only one of them. The law (Taxes Management Act 1970) does not specify which of HMRC's customers are required to complete a return. The legal



obligation to make a return is created when a 'Notice to file a return' or a paper return - a notice under s 8 TMA 1970 - is issued. Once issued the customer is legally obliged to complete that return. Using the criteria set out under self-assessment ("SA"), HMRC selects which customers should receive a return. The appellant was selected to receive a return for 2017-18 because despite sending him a calculation and two letters regarding tax due for 2017-18 it remained unpaid.

40. Generally speaking employers deduct the correct amount of tax. However sometimes, due to certain circumstances, for example having more than one employer in a tax year, individuals can end up having less tax deducted from them than is actually due when a tax year is looked at as a whole. This is what happened in the appellant's case. Tax records show that he had two employers during 2017-18. These were:

- GESTAM, where he earned £16,041.83 and paid £1,280 in tax and
- CAREPE, where he earned £4,678 and paid £408.60 in tax.

41. After expenses claimed this gave a total income of £20,660 and total tax paid of £1,688.60. However actual tax due on the appellant's income was £1,832 leaving £143.40 underpaid.

42. A completed return for 2017-18 was not received until 28 November 2019.

43. The appellant has not explained why he did not submit a completed 2017-18 return to HMRC by the filing date of 1 November 2019, even though it had been explained to him why a return was required in a telephone call to HMRC on 30 July 2019.

44. It is the contention of HMRC that in order for the appellant's appeal to succeed, he must demonstrate that a reasonable excuse existed which prevented him from complying with his Income Tax obligations. HMRC have concluded, based on the evidence held, that no reasonable excuse exists for the late submission of the Individual tax return and the penalties were correctly charged in accordance with legislation.

45. Paragraph 23 of Schedule 55 FA 2009 specifically 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 there is a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

46. 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.

47. 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). For example, in *Anthony Wood trading as Propave v HMRC* (2011 UK FTT 136 TC 001010), the First-tier Tribunal applied this definition in their decision released on 23 February 2011.

48. 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)

“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?”

49. Reasonable excuse is not further defined beyond paragraph 23 (2) of Schedule 55 but was considered in detail in the Upper Tribunal decision in *Christine Perrin v Commissioners for HMRC* ([2018] UKUT 0156 (TCC)). Whilst confirming at paragraph 70 of that decision that reasonable excuse should be judged objectively, Judge Herrington stated at paragraph 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 *Coates*).”

50. And at paragraph 74:

“Where a taxpayer’s belief is in issue, it is often put forward as either the sole or main fact which is being relied on — e.g. ‘I did not think it was necessary to file a return’, or ‘I genuinely and honestly believed that I had submitted a return’. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.”

51. Whether a person has a reasonable excuse will depend on the particular circumstances in which the failure occurred 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.
52. If there is a reasonable excuse it must exist throughout the failure period.
53. Late filing penalties are raised solely because the SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.
54. The appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every-day responsibilities of the appellant to ensure his tax returns were filed by the legislative dates and payment made on time.
55. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.
56. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.
57. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

### *Special Reduction*

58. 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 potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.
59. 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).
60. 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 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'.

61. HMRC have considered the appellant's grounds of appeal. However, these do not amount to special circumstances which would merit a reduction of the penalties

62. 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**

63. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

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

65. A taxpayer is required to make and deliver to HMRC, on or before the requisite date, a return containing such information as may reasonably be required in pursuance of the notice to file a return. Once the appellant became aware that he had to file a return, particularly after the reason for that had been explained to him, he should have taken all reasonable steps to file the return as soon as possible.

66. Accordingly, no reasonable excuse has been shown for the appellant's failure to file his tax return for 2017-18 on time.

67. The late filing penalty has therefore been charged in accordance with legislation.

68. The Tribunal find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations

69. The appeal is therefore dismissed and the late filing penalty of £100 confirmed.

70. 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: 30 NOVEMBER 2020**