



TC07970

Appeal number: TC/2019/01289

*INCOME TAX – late filing penalty – whether reasonable excuse – yes –
appeal upheld*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOHN BROCKLESBY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Birmingham on 30 July 2019

The Appellant appeared in person

Mr Khan, presenting officer, for the Respondents

DECISION

Introduction

1. This is an appeal against late filing penalties in relation to the appellant's tax return for the tax year 2016/17. The penalties under appeal are:

(1) daily penalties of £900, issued under paragraph 4 of Schedule 55 FA 2009 on 31 July 2018; and

(2) a six month late filing penalty of £300, issued under paragraph 5 of Schedule 55 Finance Act (FA) 2009 on 10 August 2018.

2. An initial late filing penalty of £100 in respect of the same tax year was cancelled by HMRC on 5 March 2018, when the appellant called HMRC to dispute the penalty as he was having difficulty filing his return online.

3. It was not disputed that the appellant's tax return was filed late: the appellant filed a completed paper return on 30 October 2018. The due date for filing a paper return for the 2016/2017 tax year was 31 October 2017 and, as such, the return was filed almost a year late.

4. The appellant did not dispute that he was liable to file a tax return for the 2016/2017 tax year, nor did he dispute receiving the penalty notices under appeal and the reminders for those penalties.

Chronology

(1) 16 February 2017 - appellant filed his 2015/2016 tax return online (extension to 15 February 2017 had been given, and his government gateway ID had been replaced on 9 February 2017)

(2) Late January 2018 - appellant called HMRC about his return: HMRC has no record of this call

(3) 5 March 2018 - appellant called HMRC to dispute the initial late filing penalty (subsequently cancelled) and to request an activation code for online filing. HMRC advised that he was not enrolled for self-assessment services, although he had filed his tax returns online for a number of years.

(4) 22 March 2018 - appellant called HMRC to say that, as he had no computer at home, he was trying to use the computers at the library. He also had no mobile phone and so could not receive the activation code, which requires that a person has a mobile phone to receive the code. HMRC advised the appellant to complete a paper return and was given instructions as to how to download a return. The appellant's evidence was that this was the call he had made in January 2018. During the call the appellant was advised that "you do not need to pay any penalty because still your return is pending [sic]".

(5) 10 April 2018 - appellant called HMRC to say that he was unable to download a paper return, having tried to do so using a friend's computer; HMRC advised that a paper return would be sent to him. A paper return was sent the same day.

(6) 16 May 2018 - HMRC received one self-employment page from the paper return

(7) 6 July 2018 - HMRC issued a letter returning the self-employment page to the appellant with a further full return and advised him to submit the full return

(8) 14 July 2018 - appellant called HMRC to query the penalty reminder letter; he was advised that the automatic letters had been sent to him as a warning and that there were no late penalties on his record at that time. He was advised that it was "just a case of getting [the full return] back to" HMRC and that his tax liability would be assessed then.

(9) 9 August 2018 - HMRC received a completed return from the appellant, unsigned

(10) 25 August 2018 - appellant called HMRC to query the penalties and explained that he had been advised that he was not liable to the penalties.

(11) 28 September 2018 - HMRC issued a letter returning the unsigned return to the appellant for signature

(12) 30 October 2018 - HMRC received the appellant's completed, signed, return

5. The appellant appealed the penalties to HMRC on 4 September 2018; HMRC's decision in respect of that appeal was dated 18 December 2018. The appellant requested a review on 15 January 2019. HMRC's review decision was issued on 29 January 2019.

6. The appellant appealed to this tribunal on 25 February 2019.

Appellant's case

7. The appellant explained that he had been assisted by HMRC with his return in earlier years but the local HMRC office had closed in 2014. He struggled with online filing as he could not get all of the necessary pieces of information (password, gateway ID and activation code together). It had taken a while for him to realise that he had not received the requested activation code because he did not have a mobile phone.

8. He had tried to comply with requirements but found forms very difficult to deal with: this had led to some of the errors in the attempts to file the paper return before he succeeded in October 2018. For example, feeling under pressure to get the return sent to HMRC, he had forgotten to sign the return which he had sent in August 2018. It had also led to errors in filing an appeal with the tribunal, as he found the process confusing and had not understood why earlier submissions of the appeal notice were rejected.

9. Each time he had called HMRC he was told that penalty letters were sent out automatically and that he should not worry about the penalties. He had been told that the first penalty had been cancelled because it was a glitch in the system.

10. The appellant considered that, if he had not been lulled into this false sense of security he would have done everything in his power to avoid the fines incurred. In addition, a close friend had died in December 2017 and this had had a significant effect on the appellant, although he did not particularly wish to rely upon that.

HMRC's case

11. HMRC submitted, in summary:

- (1) the appellant had been completing tax returns since 1996 and so should be considered experienced with self-assessment, including due dates for paper and online returns. He had filed his returns via both methods in previous years;
- (2) the appellant has filed tax returns late in a number of previous years;
- (3) a prudent person would not leave the filing of their tax return to the last minute;
- (4) HMRC had never advised the appellant that he would not be liable to penalties. He had been advised in the call on 5 March 2018 to appeal the initial late filing penalty, although it was subsequently cancelled by the HMRC operator who had taken the appellant's call on 5 March 2018;
- (5) the appellant could have instructed an agent to deal with his return;
- (6) it was the responsibility of taxpayers to ensure that they comply with the statutory filing deadlines.

12. HMRC submitted that the penalties were correctly issued and had not been disputed. They further submitted that the appellant had provided no reasonable excuse for the late filing as he had contacted HMRC only after the filing date and had only done because he had received a late filing penalty.

13. HMRC further submitted that there were no circumstances applying to the appellant that would merit a special reduction in the penalties.

Discussion

14. The test in *Perrin v HMRC* [2018] UKUT 156 (TC) at para 71 as to what is a reasonable excuse should be applied:

“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*).”

15. The appellant is a singer/songwriter and for the year in question had income of £3,500. He is not a legal professional and, as such, his arguments as to reasonable excuse were not well-formed. He had previously relied on assistance from HMRC's office to complete his tax returns but, such assistance no longer being available, has attempted to deal with his return by himself since then. He had previously managed to file returns online but had had some technical difficulties in doing so.

16. Having considered the evidence in the case, however, I consider that he does have a reasonable excuse for the delays in the context of the penalties applied, as follows.

17. The appellant filed a paper return in response to HMRC's advice to do so in the call of 22 March 2018. The HMRC representative advised that the appellant's "other option ... is to send in a paper return". The appellant was not advised by HMRC in that call as to the penalty consequences of submitting a paper return rather than an online return. On the subsequent call on 10 April 2018, when he cannot download the paper return, the appellant expresses concern that he will have significant penalties if he does not complete the return (he worries that he would "fined out of existence"). The HMRC representative on the call also does not advise him that completing a paper return at that stage would mean that he would immediately have incurred significant penalties.

18. It is regrettable that HMRC advised the appellant in March and April 2018 to complete a paper return for the 2016/2017 tax year without explaining to the appellant that submission of a paper return would mean that the appellant would be immediately liable to a six month late filing penalty and to daily penalties, given the earlier filing date for paper returns compared to returns filed online. I note HMRC's submission that the appellant had been in self-assessment for a number of years and so should have known the deadlines, and that he could have engaged an agent, but I consider that it is not reasonable that a taxpayer should necessarily be aware that accepting HMRC's advice as to the format of a return would immediately render them liable to substantial penalties that would not arise if they filed their return online at that time, particularly when they have expressed concern about their exposure to penalties.

19. HMRC's own evidence (transcripts of telephone calls) shows that the appellant was no longer enrolled in online self-assessment services by March 2018. As such, he could not complete his return online. There was no evidence provided as to why he was no longer enrolled, nor any evidence that the taxpayer had been advised that he was no longer enrolled for online self-assessment. He had been able to file his previous year's tax return online in February 2017 (and HMRC's SA notes show that he also filed online in February 2015) and I consider that it would be reasonable for the appellant to assume that he would be able to do so for the 2016/2017 tax year.

20. Although HMRC submitted that a prudent tax payer would not leave it to the last minute to file a tax return, there is no obligation to file returns early and it is not unreasonable for a taxpayer to believe that they will be able to continue to file online when they have not been advised otherwise by HMRC.

21. Given that the taxpayer could not file his return online for reasons outside his control which would not have been apparent until he tried to file his return, and given also the incomplete advice from HMRC as to the penalty position of filing a paper return, I consider that the appellant should be treated as having filed an online return for the purposes of determining whether he has a reasonable excuse for the daily penalties (therefore accruing from 1 May 2017) and the six month penalty (considering the position as at 1 August 2017).
22. The appellant contacted HMRC in early March 2018. Although his evidence was that he first called in late January 2018, this is not supported by HMRC records and the appellant's annotation of the letter of review indicates that the call he believed he made in January 2018 is the telephone call which was made on 22 March 2018.
23. Subsequently, it is clear that HMRC contributed significantly to the delays involved in the filing of the return: the appellant's first attempt to file the return (sending in his self-employment page, believing this to be all that was necessary) was received by HMRC on 16 May 2018.
24. HMRC's SA notes show that this paper return had been noted as sent on 10 April 2018, but no evidence was provided as to when it might have entered the postal system from HMRC's systems.
25. The self-assessment page was not returned to the appellant for him to complete the return properly until 6 July 2018, over seven weeks later. Again, no evidence was provided as to when the letter returning this page would have entered the postal system from HMRC's systems.
26. In response, HMRC received from the appellant a completed but unsigned return on 9 August 2018. The appellant's evidence was that he was feeling under pressure and hurried to return the document. This unsigned return was not returned to him by HMRC until 28 September 2018, a further delay of over seven weeks (again, not counting any delays that may have also occurred between the date of the letter and it entering the postal system from HMRC's systems).
27. In other words, over fourteen weeks of the delay in filing – more than 98 days - are attributable to HMRC's delays in returning the incomplete returns to the appellant. Depending on how long it took for HMRC's letters to be sent out after they were issued, those attributable delays may be longer.
28. There was no suggestion that the appellant had acted deliberately in filing incomplete returns.
29. HMRC's review letter of 29 January 2019 did not dispute that "the time it takes for correspondence to work its way through HMRC's systems may have had an effect on the issues you have raised", although HMRC did not consider that this amounted to special circumstances. Unfortunately, it may well be correct that there is nothing special about the delays in HMRC's handling of this case but that does not mean that such delays cannot form part of a reasonable excuse.

30. I note that HMRC submitted that the appellant could have instructed an agent to deal with his return, presumably so that the paper return would have been filed correctly the first time or so that the online filing issues would not have arisen as it would have been filed under an agent's authorisation. I also note that the system of filing is known as self-assessment, not agent-assessment. It should not be a requirement for a sole trader with annual trading income of £3,500 to instruct an agent to deal with their tax affairs. I do not consider that the appellant's attempts to deal with the return himself, rather than instruct an agent, mean that he cannot have a reasonable excuse.

31. I have considered the appellant's submissions that he was advised that no penalties would be charged. I note from the transcripts of the conversations that HMRC's representatives were not particularly clear in explaining to him what the position was, as follows:

(1) In the call on 5 March 2018, the appellant is advised to appeal the late filing penalty in writing – but that penalty is subsequently cancelled without the appellant having had to appeal the penalty.

(2) In the call on 22 March 2018, HMRC's representative states that "you do not need to pay any penalty because still your return is pending [*sic*]". Although not crystal clear, it can certainly be interpreted as meaning that no penalties will be charged.

(3) On 14 July 2018, when calling about the daily penalties reminder, the appellant is advised that "it doesn't seem that there's any late penalties at moment ... it's automatic letters that's been sent out cuz we don't ... I can only apologise for that ... it's just a case of getting [the full return] back to us as soon as you can ... then we'll assess your liability from there [*sic*]"

32. In the context of these conversations, the appellant's belief that no penalties would be charged is understandable even if it might not, alone, amount to a reasonable excuse.

33. Considering all of the circumstances: the appellant could not be expected to have known before attempting to file his return that he was no longer enrolled in self-assessment and so could not file his return online. He was not advised by HMRC that he would incur penalties simply by filing a paper return in line with their advice; he also received conflicting and unclear information as to his liability to penalties.

34. Although the appellant made errors in submitting his return, the substantial majority of the delays once he had first submitted what he believed was required were attributable to HMRC; the appellant attempted to correct the position considerably more rapidly than HMRC.

35. Considering all of the circumstances of the case, I find that the appellant had a reasonable excuse in respect of the six month penalties and daily penalties under appeal for the delays in filing his return for the 2016/2017 tax year.

Decision

36. Accordingly, as I have found that the appellant had a reasonable excuse for the delays in filing his return in relation to the six month penalties, and the daily penalties, the appeal is upheld in full.

37. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 10 DECEMBER 2020