



TC05735

Appeal number: TC/2013/02181

INCOME TAX – penalty for failure to make returns – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LYUBOV STENDING

Appellant

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT

The Tribunal determined the appeal on 27 March 2017 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 22 March 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 January 2017.

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 for the year ended 5 April 2011 on time.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012.
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012.
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

She argues that there was a “reasonable excuse” for any failure to submit the return on time.

Agreed facts

4. The Appellant’s tax return was due on 31 January 2012 and was filed on 18 September 2012.
5. The appellant was arrested on 17 July 2010.
6. The appellant was given to a 12 month prison and in fact was in prison from 5 May 2011 to 3 November 2011.

Discussion

7. Relevant statutory provisions are included as an Appendix to this decision.
8. The tax return for the 2011 tax year was submitted on or around 18 September 2012. It should have been submitted by 31 January 2012. Subject to consideration of “reasonable excuse” set out below, the penalties imposed are due and have been calculated correctly.
9. The appellant contends that she has a reasonable excuse for failure to submit the tax return on time as when she was arrested in July 2010 the police took all her paperwork, and this was not restored to her.
10. She contends the return was completed ‘without undue delay’ following her release from prison, recovery from the distress prison had caused, and the need to recompile the business paperwork.
11. HMRC contend this is not a reasonable excuse. They say that her accountants phoned HMRC on 23 May 2012 to advise the return would be submitted within a

week. I have no evidence for this. The Appellant does not dispute the filing date of 18 September 2012.

12. The law on reasonable excuse is set out in para 23 of Schedule 55 Finance Act 2009 and shown in the Appendix.

13. There is no 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. HMRC contend that it means 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.

14. It is clear from 23 (2) (c) that where a reasonable excuse exists, the return must be filed ‘without unreasonable delay’ after the excuse ceased.

15. I do not consider that being in prison constitutes a reasonable excuse for failing to file a tax return. I do not consider that being in prison would prevent the recompiling of the business records. In any case, there was a period of almost three months from the date the appellant was released until the date that the tax return was due to be filed. I consider this to be ample time to recompile the business records. I therefore do not consider that a reasonable excuse existed at any time, and in particular not until 18 September 2013.

Conclusion

16. For the reasons set out above, I affirm HMRC’s decision to issue the 3 penalties that are the subject of this appeal. The appeal is therefore dismissed.

Application for permission to appeal

17. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

RELEASE DATE: 30 MARCH 2017

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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.

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

4—

- 10 (1) P is liable to a penalty under this 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
 - 15 (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (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)—
- 20 (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).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

- 25 (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—
- 30 (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:

6—

- 35 (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.

5 (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).

(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

10 (b) £300.

(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

15 (c) for the withholding of category 3 information, 200%.

(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

20 (b) £300.

(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

25 (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

30 (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—

35 (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.
 - (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.

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(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

1.