



TC05917

Appeal number: TC/2013/07254

INCOME TAX – penalties for failure to make return. Late filing penalty of £100 confirmed. Daily penalties totalling £900 - no evidence that date of commencement of daily penalties notified to appellant, appeal allowed in this respect. A 6 month late filing penalty of £300 was removed by respondents.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID J. THOMPSON

Appellant

- and -

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

TRIBUNAL: PRESIDING MEMBER

**PETER R. SHEPPARD FCIS FCIB
CTA AIT**

The Tribunal determined the appeal on 28 May 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 10 October 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 February 2017. The Tribunal wrote to the appellant on 24 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

1. In his notice of appeal the appellant appeals against penalties totalling £1,202.07
5 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 tax year ending 5
April 2012 on time.

2. The penalties that have been charged by HMRC can be summarised as follows:

10 (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed
on or around 12 February 2013.

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed
on or around 14 August 2013.

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55
imposed on or around 9 July 2013.

15 (4) Interest of £2.07 on the unpaid daily penalties

3. The appellant’s grounds for appealing against the penalties can be summarised as
follows:

(1) He argues that there was a “reasonable excuse” for his failure to
submit the return on time.

20 (2) He argues the fine is too severe.

4. Findings of fact

HMRC issued a notice to file a tax return for the year ending 5 April 2012 to the
appellant on 6 April 2012. The date for filing was 31 October 2012 if the return was
submitted non-electronically or 31 January 2013 if submitted electronically. The
25 return was received late by HMRC on 27 June 2013. In the past the appellant had
submitted his return electronically but on this occasion he submitted a paper return. It
appears that the above facts are not disputed.

30 In a letter dated 9 November 2015 HMRC wrote to the appellant saying that having
read his Notice of Appeal they have decided to remove the 6 month late filing penalty
of £300.

5. Appellant’s submissions

On 21 September 2013 the appellant wrote a long letter to HMRC Appeals and
Review Unit. In summary the letter includes:

35 The appellant was divorced in 2011 and he had to move out of his matrimonial home
with his 12 year old son. Following this the appellant had to move home twice in

April 2012 and December 2012 due to a lack of available funds and emotional and health reasons.

The appellant says that he did not inform HMRC of his change of address in April 2012.

- 5 The appellant says he was seriously ill at Christmas 2012 and that he was the victim of crime in March 2013.

10 He had historically sent his returns electronically but during his moves he had lost his unique taxpayer reference number. The appellant says that he only submitted a paper return as he believed it was the quickest way of correcting his oversight. He says he acted in total innocence of the division between the two forms of submission which he attributes to the highly distressed and worried state of mind he was in.

The appellant says that as soon as he was reminded in May 2013 that he had not submitted a return he sent off the paper return.

- 15 He said “why would I risk a £100 fine by not submitting a return, when submitting one would normally take only around 30 minutes to complete?”

The appellant says that the penalties are too severe and that as he is no longer working full time and he cannot afford to pay the penalties.

20 The appellant stresses that he has been in a highly distressed and worried state of mind and that between 2011/2013 he experienced severe emotional turmoil. He says that this provides reasonable excuse for his failure to submit his tax return on time.

6. HMRC submissions

25 In respect of reasonable excuse HMRC say that they consider the actions of a 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 on 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
30 as conforming to that standard.

7. HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

35 8. HMRC contend that to accept an illness as a reasonable excuse for not adhering to the legal requirement to submit one’s tax return by its due date; that an illness must be so serious that it prevented the taxpayer from controlling their personal and business affairs immediately before the due date of submission and from that date to the time a

return was received. HMRC also contend that such a condition should begin in a time frame where it would be reasonable to expect alternative arrangements or processes to be put in place to meet one's obligations i.e. on or shortly before the date of submission.

5 9. HMRC say that the potential effect that the payment of the penalties might have on the appellant's finances would not be considered a reasonable excuse for removal of the penalties

10. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.

10 11. HMRC say the penalties are not disproportionate. They say that in order for a national measure to be considered disproportionate it must be "not merely harsh but plainly unfair." They refer to the decision in *International Transport Roth GmbH v SSHD*.

12. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe*) or "something out of the ordinary run of events" (*Clarks of Hove Ltd. v Bakers' Union*). They say the special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*)

20 They consider that in this case a change in personal circumstances and illness do not represent special circumstances which would allow them to reduce the penalty.

13. Discussion

Relevant statutory provisions are included as an Appendix to this decision.

25 14. I have concluded that the tax return for the 2011-2012 tax year was submitted non-electronically on or around 27 June 2013 and therefore late. It should have been submitted by 31 October 2012.

15. The appellant's notice of appeal to the Tribunal appeals against the daily penalties totalling £900 plus interest of £2.07, and the 6 month penalty of £300. The appellant has appealed separately to HMRC in respect of the late filing penalty of £100. It seems to the Tribunal that to decide the appeals against the daily penalties and the six month penalty but leave outstanding the appeal against the daily penalty would unnecessarily prolong a conclusion to this matter which has been worrying the appellant since 2013. In the circumstances the Tribunal has also considered this as an appeal against the £100 late filing penalty. The Tribunal does not consider that this causes any prejudice against HMRC as their statement of case proceeds on the basis that the appellant has appealed the £100 late filing penalty to the Tribunal. HMRC has removed the 6 month filing penalty of £300.

16. It is therefore left to the Tribunal to consider the whether the late filing penalty and the daily penalty have been notified and calculated correctly. In respect of the £100 late filing penalty it is clear that notice of this was received by the appellant and the Tribunal has found that the return was submitted late. The appellant says “...I
5 simply made a genuine and honest mistake.” The appellant says that he only submitted a paper return as he believed it was the quickest way of correcting his oversight.

17. In the case of Garnmoss Ltd trading as Parham Builders [2012] UKFTT 315 (TC) the Tribunal observed at paragraph 12 “What is clear is that there was a muddle and a
10 bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”

In this case the Tribunal considers that the appellant made two simple mistakes. The first one was that he overlooked sending off his tax return. It was a most unfortunate
15 slip but one which does not provide a reasonable excuse for the appellant’s failure to submit his return on-time. The second mistake is referred to below as it is relevant to the daily penalties. In respect of the late filing penalty the Tribunal has had to consider whether the appellant’s anxiety and emotional distress at 31 January 2013 provides a reasonable excuse for him failing to send in his tax return on time.
20 Unfortunately the appellant has provided no medical evidence of his emotional state at that time. His initial appointment for assessment of his condition was not until October 2013. It is therefore with some regret that the Tribunal has concluded that the appellant has failed to establish that he had reasonable excuse for his failure to submit his 2011-2012 tax return either in paper form by 31 October 2012 or electronically by
25 31 January 2013.

18. The maximum daily penalty of £900 has been charged by HMRC indicating a daily penalty of £10 has been charged for 90 days. The Tribunal has had difficulty in checking the accuracy of this calculation. It is important to consider the relevant legislation.

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

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

- 35 (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 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)—

- 5 (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).

10 19. The Tribunal is aware that the procedure that HMRC followed when issuing such notices, was considered by the Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761. In particular paragraph 4 (1) (c) was considered. In that case it was decided that HMRC had given notice under paragraph 4 (1) (c) specifying the date from which the penalty was payable. The notices sent stated in terms that Mr. Donaldson would be liable to a £10 daily penalty if the return was more than 3 months late and depending on whether the return was made electronically or non-electronically gave a date from which the daily penalty would be levied. It was not important if the precise period of calculation was not notified to the appellant. In that case Mr. Donaldson knew the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him the end date of the period was 90 days later.

20 20. However this case differs in that there is no evidence before the Tribunal which shows that the appellant was notified of the date from which the daily penalty was payable, and no separate statement in the statement of case or any other correspondence of what that date was. The difficulty the Tribunal has had is that in the papers before it there is not a copy of the notice referred to in paragraph 4 (1) (c).
25 There is not a copy of the notice to file the return, and there is not a copy of any of the penalty notices which HMRC say they issued to the appellant. It is clear that HMRC issued an assessment for £900 on or around 9 July 2013 calculated at £10 per day for 90 days. A copy of that assessment is not in the papers. The only document in support of the £900 penalty is an HMRC internal document headed “Self-Assessment View/Cancel penalties”. It is dated 5 November 2015 and refers to the appellant. It lists penalties assessed on the appellant and simply records under the date 09/07/2013 a daily penalty of £900. The Tribunal considers that it is unlikely that the appellant had sight of this record until he received HMRC’s statement of case. It is unlikely that it would have assisted him as it provides no details of when the daily penalties commenced.
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21. In the bundle of papers provided to the Tribunal the earliest reference by HMRC to the appellant which mentions daily penalties is in a letter dated 29 May 2013. That letter is their response to the appellant’s appeal against the late filing penalty of £100. It may well be that the late filing penalty notice referred to the date of commencement of the daily penalties but the Tribunal was not provided with a copy of it. The letter of
40 29 May 2013 includes the imprecise statement “Daily penalties may already be building up”. The letter also says more clearly “If you send back a paper tax return now, we will charge you late filing daily penalties.”

22. The Tribunal notes that HMRC say that the late filing penalty was notified to the appellant on 12 February 2013. Three months from then is 12 May 2013. 90 days from then is 9 August 2013. However the return was received by HMRC on 27 June 2013 which is only 47 days after 12 May 2013. Therefore the Tribunal concludes that
5 either there has been a miscalculation or more likely the date from which the penalty was payable was not 12 May 2013.

23. Paragraph 4 (3) of Schedule 55 provides that HMRC may specify a date earlier than when the notice is given and it seems that it is possible that that is what they may have done. However without any evidence to show what day HMRC have specified
10 the daily penalties commence the Tribunal can only guess at the date the daily penalties might have commenced. It is therefore unable to verify that the penalty has been both notified and calculated correctly.

24. Although the foregoing determines the matter of the daily penalties the Tribunal has considered whether the appellant had “reasonable excuse” for his continued
15 failure to submit his tax return on time. The appellant has submitted a number of reasons but the Tribunal has considered that the chronology of events is important. For example the appellant says that since January 2013 he has suffered bouts of anxiety and submits a letter from a medical centre dated 26 September 2013 setting up an initial assessment on 22 October 2013. This is almost a year after the non-
20 electronic return was due on 31 October 2012 and therefore cannot constitute a reasonable excuse for the late submission of the return. For the same reason the fact that the appellant was a victim of crime in March 2013 cannot establish a reasonable excuse for not submitting a non-electronic return by 31 October 2012 or even an electronic return by 31 January 2013.

25. The Tribunal therefore has to assess whether the emotional distress of the appellant’s divorce in 2011, the upheaval caused by two moves in April 2012 and December 2012, and his severe illness at Christmas 2012 provide a reasonable excuse for the continued failure to submit a return. The Tribunal notes that the move in
25 December 2012 and the illness at Christmas are both also after the 31 October 2012 deadline for submission of a paper return.
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26. The Tribunal has also noticed that HMRC internal record states that the late filing penalty was assessed on or around 12 February 2013. Whereas the appellant says he sent a return as soon as he had been reminded that it had not been submitted in May 2013. That reminder was in the 29 May 2013 letter referred to above and yet despite
35 the warning of daily penalties a paper return was sent and that not until 27 June 2013 even though the appellant considers it only takes 30 minutes to complete a return. That reminder was also after the notification of the £100 late filing penalty which the appellant must have known about because he lodged an appeal against it on 14 May 2013.

27. However the Tribunal accepts the appellant’s submission that as at the time he had no means of electronic communication he sent off a paper return believing it would be the quickest way to resolve the outstanding return. Unfortunately this is where he

made the second simple mistake which was that he ignored the warning of daily penalties from HMRC and did not check what the consequences of sending a paper return rather than an electronic return would be. Had he sent the return electronically he would still have incurred the late filing penalty of £100 and he would have incurred three month daily penalties. However if an electronic return had been submitted by the end of June 2013 the number of days the £10 daily penalty would have covered is likely to have been much less than 90. As indicated above in the case of Garnmoss the legislation does not provide shelter for simple mistakes. The appellant has argued that his emotional state explains why he panicked and did not take a more measured approach to his circumstances, and this provides a reasonable excuse. In order for such an argument to succeed the Tribunal needs to have medical evidence to support the submission. Unfortunately the only medical evidence submitted is the copy of a letter confirming an appointment for an initial assessment of the appellant's condition on 22nd October 2013, which is almost a year after a paper return should have been submitted and almost 9 months after the date for submission of an electronic return. Therefore the Tribunal considers that the appellant has not established he had reasonable excuse for his continued failure to submit his 2011-2012 return on time.

28. The appellant has argued that he cannot afford to pay the penalties. That is putting the cart before the horse because had the return been sent in on time there would be no penalty. Therefore inability to pay a penalty for late submission of a return cannot establish a reasonable excuse for the late submission of the return.

29. The appellant has argued that the penalties charged are too severe. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

30. It is clear that HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They consider that the change in the appellant's personal circumstances and his illness do not represent special circumstances which would allow them to reduce the penalty. The Tribunal does not consider that HMRC's decision is flawed.

Conclusion

31. The Tribunal considers that the appellant's return for the tax year ending 5 April 2012 was submitted late and that as the appellant has failed to establish a reasonable excuse for the late submission a £100 late filing penalty is due. In respect of the £900 daily penalties the Tribunal has been provided with no evidence that HMRC notified the appellant of the date when these penalties were due to start. The tribunal has therefore been unable to verify whether the penalty has been both notified and calculated correctly and therefore allows the appeal in this respect. In respect of the £300 six month penalty HMRC have decided to remove it. Therefore the appeal is allowed with the exception of the late filing penalty of £100.

Application 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.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

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RELEASE DATE: 01 JUNE 2017

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.

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

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

10 (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.

15 (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)—

(a) may be earlier than the date on which the notice is given, but

20 (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—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (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.