



TC05954

Appeal number: TC/2013/06718

*INCOME TAX – penalty for failure to make returns – not aware of
obligation to file – whether reasonable excuse - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YASMIN WANDIMU

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 24 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 25 September 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 February 2017.

DECISION

5 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 tax year ending 5 April 2012 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 12 February 2013

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 4 June 2013

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 14 May 2013

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

(1) The appellant argues that she had informed HMRC in February 2012 that her self-employment had ceased. She was not aware that she had to fill in a tax return for the tax year ending 5 April 2012. She argues that she has no knowledge of the requirement to submit a tax return, and had required 20 assistance from HMRC in completing her previous tax return. Although not specifically argued, I have taken the view that the appellant claims that she has a reasonable excuse for the delay in filing because she has no knowledge of the UK tax system and did not realise that she had to complete a tax return.

25 (2) She argues that she had submitted her tax return for the 2011-12 tax year on 2 May 2013, as soon as she received the initial £100 penalty notice from HMRC.

(3) She argues that she received a letter from HMRC dated 4 June 2013 stating that she had nothing to pay for the tax year ending 5 April 2012.

30 (4) Although no specific argument was made as to special circumstances, the appellant provided details of various debt recovery actions. Although these were provided in the context of a hardship application which is not relevant to income tax appeals I have taken that view that the appellant intended by these details to argue that she has insufficient funds to pay the penalties and that, therefore, has special circumstances that should be taken into account.

35 **Findings of fact**

4. What follows in the section is taken from the papers, primarily the HMRC statement of case and the exhibits to it and the Notice of Appeal, are not in dispute and they are my findings of fact.

5. The appellant's self-assessment return for the tax year ending 5 April 2012 was filed late.

6. No tax was payable by the appellant in respect of the tax year ending 5 April 2012.

5 7. HMRC correctly calculated the late filing penalty, the "six month" penalty and the "daily" penalties.

8. HMRC failed to specify the period in respect of which the "daily" penalties were assessed in the notice of assessment required under Paragraph 18 of Schedule 55 FA 2009. Despite that omission of the correct period, for which the "daily" penalties had been assessed in the notice of assessment, the validity of the notice was not affected.

9. The appellant has limited knowledge of English and no knowledge of the UK tax system and required assistance in completing her tax returns.

10. HMRC addressed in their statement of case, although not in their review of the penalties, whether there were special circumstances permitting a reduction of the penalty.

Discussion

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

12. The appellant claimed that she had a reasonable excuse for the delay in filing her self-assessment tax return because she has no knowledge of the UK tax system and did not realise that she had to complete a tax return.

13. The appellant had previously completed tax returns and so I am of the view that she would have been aware of her obligations to file returns by the due date. The fact that she was unaware of her obligation to file a tax return for the tax year ending 5 April 2012 does not remove her responsibility to file that tax return. The appellant had previously sought the assistance of HMRC in respect of tax matters and so was aware that assistance is available. The appellant failed to make adequate enquiries as to her obligations and this cannot amount to a reasonable excuse, which it is must be a factor which was unforeseen or exceptional or outside her control.

14. The appellant also set out in her grounds of appeal that HMRC had written to her to confirm that no tax was payable for the tax year ending 5 April 2012. In their review, HMRC took this to be an argument as to reasonable excuse. I have taken the view that the appellant intended by this that she has special circumstances that should be taken into account as the letter was received after the tax return had been submitted and the appellant would not have known prior to receipt of the letter that she had no tax liability. Nevertheless, the lack of any tax liability cannot amount to a reasonable excuse for late filing and neither does it amount to special circumstances as these must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER

967). The fact that a taxpayer on a very low income does not have any tax to pay is not “exceptional, abnormal or unusual”.

15. The appellant also claims that she has insufficient funds to pay the penalties and I have taken this to mean that she argues that she has special circumstances that should be taken into account. This was not specifically considered in HMRC’s statement of case. However, special circumstances cannot include ability to pay (paragraph 16(2) of Schedule 55 of Finance Act 2009) and so I do not consider that HMRC’s consideration of special circumstances was flawed in failing to take ability to pay into account.

16. I have concluded that the tax return for the tax year ending 5 April 2012 was submitted on or around 2 May 2013. It should have been submitted by 31 October 2012. As I have concluded that there was no reasonable excuse for the delay and that no special circumstances apply, the penalties imposed are due and have been calculated correctly.

Conclusion

17. For the reasons given my conclusion is that:

- (1) HMRC’s decision to charge the late filing penalty of £100 is upheld;
- (2) HMRC’s decision to charge the “six month” penalty of £300 is upheld;
- (3) HMRC’s decision to charge the “daily” penalties of £900 is upheld.

Application for permission to appeal

18. 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: 14 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)—

- 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.

- (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).
- 5 (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
 - (b) £300.
- 10 (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
 - (c) for the withholding of category 3 information, 200%.
- 15 (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
 - (b) £300.
- 20 (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
 - (c) for the withholding of category 3 information, 140%.
- 25 (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
 - (b) £300.
- 30 (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.

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

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