



**TC06025**

**Appeal number: TC/2013/1357**

*INCOME TAX – penalties for late submission of returns – Sch 55 FA 2009*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**B J MURRAY**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER**

**The Tribunal determined the appeal on 24 April 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 14 February 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 2 February 2017**

## DECISION

### Introduction

1. This is a decision giving full findings of fact and reasons. In a decision in summary form released on 28 April 2017, I dismissed Mr Murray's appeal. Mr Murray then wrote to the tribunal saying that he wished to appeal against that decision. Before an appeal can be made the tribunal's rules require the tribunal or the Upper Tribunal to give permission for the appeal. But the tribunal's Rules permit an application for permission to appeal to be made only after a decision giving full findings of fact and reasons has been produced and sent to the Appellant. Mr Murray's application to appeal has therefore been taken as an application for a full decision. Mr Murray may now seek permission to appeal against this decision. The time limits and procedure for seeking such permission are set out at the end of the decision.

2. In Mr Murray's letter he makes a statement about his actions, namely that it was "on receiving [his] tax return", that is to say immediately after receiving it or very shortly thereafter, that he phoned HMRC, which did not appear in the material which was before me when I wrote the summary decision. I deal with this issue after setting out the full reasons and findings for the summary decision. Those are based solely on the material which was before me at the time I made that decision.

### The Appeal

3. Mr Murray appeals against the assessment by HMRC of penalties totalling £1,200 under Schedule 55 Finance Act 2009 for a failure to submit his tax return for 2010/11 in time.

4. The penalties were:

(1) A penalty of £900 under para 4 Sch 55, being £10 for each day the return was late after the date 3 months after it was due, assessed on 7 August 2012; and

(2) A penalty of £300, assessed on around 7 August 2012 under para 5 Sch 55, being a penalty for submitting the return more than 6 months after the due date.

5. Mr Murray was also assessed to a £100 penalty under para 3 Sch 55, being a penalty for submitting the return after the due date, Mr Murray's notice of appeal does not encompass an appeal against this penalty.

### The Relevant Legislation

7. Section 8 Taxes Management Act 1970 provides that a person may be required by notice from HMRC to make a tax return, and that, if such notice is given before 31 July after the end of the relevant tax year, the return, if it is made in paper form, must be delivered on or before 31 October after the end of the relevant tax year.

8. Para 1 Schedule 55 Finance Act 2009 provides that if a person (“P”) fails to deliver such a return before the required date penalties are payable as described in paragraphs 2 to 13. Paragraph 3 provides for an initial penalty of £100 once the return is late, Paragraphs 4, 5, 16 and 23 provide:

- 5 “4.(1) P is liable to a penalty under this paragraph if (and only if)
- (a) P’s failure continues after the end of a period of 3 months beginning with the penalty date,
  - (b) HMRC decide that a penalty should be payable, and
  - (c) HMRC give notice to P specifying the date from which the penalty is
- 10 payable.

(2) the penalty payable 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 under paragraph (1)(c).

(3) The date specified in the notice under paragraph (1)(c)-

- 15 (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).

5. (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

20 date.

(2) The penalty under this paragraph is the greater of-

- (a) 5% of any liability to tax which would have been shown on the return in question, and
- (b) 300.

25 ...

16. (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

[(2) and (3) are not relevant to this appeal]

[paragraph 22 provides that on an appeal to this tribunal it may substitute its

30 own view for that of HMRC but only if it considers that HMRC’s decision was flawed in a judicial review sense.]

...

23. (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

35 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,

5 (b) where P relies on another 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 was remedied without unreasonable delay after the excuse ceased.

### **The Evidence and Findings of Fact**

10 9. So far as related to evidence from Mr Murray at the time I made the summary decision I had before me: Mr Murray's initial appeal to HMRC which set out his reasons for making an appeal, his request to HMRC for a review and his Grounds of Appeal to the tribunal. From HMRC I had their Statement of case and the documents attached to it. Mr Murray had been sent a copy of HMRC's statement of case by the  
15 tribunal in a letter which explained that he was entitled to submit a Reply to the tribunal. He had not made any Reply.

10. From these documents I make the following initial finding of facts as to what happened when:

6 April 2011	HMRC send Mr Murray a notice requiring a return
20 Aug/Sept 2011	HMRC send Mr Murray a reminder about his return
31 October 2011	The date on which a paper return was due
December 2011	HMRC send Mr Murray a second reminder
14 February 2012	£100 penalty notice sent to Mr Murray
29 February 2012	HMRC send statement of account including £100 penalty
25 5 June 2012	HMRC send penalty reminder notice
27 June 2012	HMRC send another statement of account
3 July 2012	HMRC send another penalty reminder notice
7 August 2012	£900 penalty notice sent to Mr Murray
8 August 2012	£300 penalty notice sent to Mr Murray
30 30 August 2012	Mr Murray appeal to HMRC
10 September 2012	statement of account showing £100, £900 and £300
16 October 2012	Mr Murray's tax return received by HMRC

11. I find that the return for 2010/11 was submitted in paper form, was due on 31 October 2011 and was not received by HMRC until 16 October 2012. It was thus some 11 months and 16 days late,

12. I make findings of fact below in relation to the telephone contact Mr Murray had with HMRC during the period from 6 April 2011 to 16 October 2012.

### **Discussion**

13. Mr Murray did not dispute the calculation of the penalties and there was nothing in the papers before me to cast any doubt on their computation. I conclude that they were correctly calculated and accordingly that, subject to any particular relieving provisions of Sch 55, the assessment of the penalties was authorised by Sch 55.

14. The only provisions of Sch 55 which could avail Mr Murray are (i) para 23 which provides that a penalty does not arise for a failure if the taxpayer has a reasonable excuse for the failure, and (ii) para 16 which provides for remission or abatement in “special circumstances”.

#### *Reasonable Excuse*

15. I turn first to consider whether at any time relevant to the penalties Mr Murray has shown that he had a reasonable excuse for his failure.

16. First of all I note that Mr Murray says he was a computer novice. But he could have delivered a paper return. That therefore does not seem to me to be an excuse for his failure. It thus cannot be a reasonable excuse.

17. Next Mr Murray’s says that his income is such that no tax is due. This does not seem to me to afford any excuse for not completing a return.

18. Next I consider Mr Murray’s argument that he was effectively given to understand that he did not have to be concerned about making a return.

19. In his initial appeal to HMRC dated 30 August 2012 Mr Murray says:

“I was under the impression that this had been dealt with a number of months ago. On receiving notification I was immediately in contact via the phone. I explained that all my financial details were with the working tax credits. Your colleague then informed me he could access this information... you would be in touch later on. As it had been a number of months I thought that this had been resolved.”

20. In his request for a review (dated 5 December 2012) of HMRC’s decision Mr Murray says that he was aware that he had to submit a tax return and whilst in the past he had had an accountant he decided that this year he would do it himself:

“When I received the self assessment forms I contacted [HMRC] explaining that this was the first time I had done it myself and also I do not have a computer and am computer illiterate and needed help. I was informed they would contact

me – whereupon I received a letter informing me I had been fined for a late Tax Return. I say I acted accordingly and explained my predicament before the said date”.

21. In his Notice of Appeal of 14 February 2013 Mr Murray says:

5 “ On receiving my tax return, I was aware that I was on a low income, and therefore would not be liable for any income tax. So I decided to dispense with the use of accountants and save myself the money. Within the accepted time limit, I was eventually able to get through to HMRC. I explained my predicament, that this was the first time I had ever filed my own return, and  
10 therefore needed some assistance, explaining that I had no access to a computer, and that, could I do it over the phone. I was advised then, that one of his colleagues would be in touch, and not to worry. While waiting I tried numerous times to ring but was always unable to get through. The next time anyone was in touch, was to inform me that I had been fined for a late return.”.

15 22. HMRC say that their records show that Mr Murray phoned the helpdesk on 19 September 2012. They imply that they have no records of any earlier call being made to the helpdesk. They say this call was made after the penalties were notified to Mr Murray. They include no documentary record of the call on 19 September.

20 23. It was not clear to me whether Mr Murray recounts two separate telephone conversations with HMRC – one in which the tax credit department was discussed, and one in which he explained his computer difficulties - or only one.

24. If there were two conversations then it seems to me that the one in which the tax credit department was mentioned took place after the penalties had been assessed. I come to that conclusion because Mr Murray was notified of the penalties around 7  
25 August and says (in his 30 August appeal to HMRC) that after receiving notification he was immediately on the phone. I interpreted “notification” to mean notification of the penalty rather than the requirement to make a return because he says that he then thought all had been resolved, and that indicated that he meant that the penalty had  
30 been resolved. On this basis that call to HMRC can provided no excuse for the earlier failure to submit the returns.

25. As to the other call, still assuming that there were two, Mr Murray gives no date for it but says that he made it “before the said date” in his review request of 5 December 2012, and in his Grounds of Appeal that it was “within the accepted time limit”.

35 26. It was not clear to me that the time limits and dates Mr Murray was referring to were those relevant to the delivery of the return (or whether he was referring to the paper return date of 31 October 2011 or the electronic return date of 31 January 2012) or those for appealing against one or other of the penalty notices. Indeed the fact that Mr Murray referred to his difficulties with computers tends to suggest that he had in  
40 mind 31 January 2012 and may therefore have made the call after 31 October 2011. The only other evidence of its date is the statement in HMRC’s statement of case that the first recorded call to the helpline was on 19 September 2012.

27. I am unable on this evidence to conclude that Mr Murray made this (second) call before the due date for a paper return of 31 October 2011. I am also not persuaded that it was made before he received the larger penalty notifications in August 2012. Thus any assurance he received could not provide an excuse for his failure to deliver the return on that date.

28. If there was only one call there was no evidence to suggest that it was made before the penalties were assessed. Indeed the evidence recounted in the last two paragraphs suggests that it was made after that time. Thus it cannot provide any excuse for the failures before that time.

29. I therefore conclude that the contents of the call or calls to HMRC – whatever was said in them- provide no excuse, and thus can provide no reasonable excuse, for the failure to deliver the return in the period relevant to the penalty assessments.

30. If I were wrong in this conclusion and the evidence showed that Mr Murray had phoned HMRC in April 2011 on receipt of the return and had then been told not to worry and that HMRC would be in touch, that would in my view have provided a reasonable excuse for doing nothing about the return for several months after the date of the call.

31. But in August or September 2011 Mr Murray did hear from HMRC. He received a reminder that a return was due. That should have caused alarm bells to ring. At the least it would have been reasonable for him to worry that this was the “being in touch” which had been promised. Then came 31 October 2011, the date the tax return was due. By then a reasonable person would have become seriously concerned: all he had heard in the six months since his phone call was a reminder that a tax return *was* due.

32. Mr Murray says that “while waiting [he] tried numerous times to get through”. That indicates that he was (properly) somewhat concerned. But I consider that a reasonably concerned person would have made such a number of calls before 31 October 2011 that either at least one would have got through or he would either:

(1) have completed and submitted a paper return by 31 October 2011. or

(2) if he had the ability and IT resource to be reasonably sure of being able to submit an electronic return by 31 January 2012, would have decided to submit electronically before 31 January 2012 and to pursue HMRC in the meantime by phone.

33. Mr Murray did not take the first course. Unless he had intended to take serious steps to improve his computer capability it was not reasonable for him to have taken the second; and there is no evidence that he took any steps to improve his capability in that sphere. I am not therefore persuaded that he took reasonable steps to resolve the position before the return was due. And I find that by 31 October 2011 he had no reasonable excuse for not delivering his tax return

34. Thus even if I had concluded that Mr Murray phoned HMRC in April 2011, I would have come to the same conclusion: namely that he had no reasonable excuse

for his failure to deliver his return on or before 31 October 2011 or thereafter, and accordingly I would have affirmed the penalties.

### *Special Circumstances*

5 35. HMRC considered the facts that Mr Murray had a low income, had dispensed with the services of an accountant, had no access to a computer and had difficulty in contacting HMRC by phone. They concluded that there were no special circumstances afflicting Mr Murray which would merit a reduction in any penalty.

10 36. I can interfere with that decision only if I consider that it was “flawed”: that is to say only if HMRC took into account irrelevant matters, failed to take into account relevant matters, made a material mistake of law or made a decision which no reasonable person would have made.

15 37. I find that the matters they considered were relevant and that there was nothing relevant they failed to take into account. I would have made the same decision. I therefore find that I cannot interfere with their decision to make no reduction under this power.

### **Mr Murray’s letter of 15 May 2017 seeking to appeal**

20 38. This letter was sent after Mr Murray had received a copy of the summary decision. In it letter Mr Murray says that “On receiving my tax return, I made a phone call to HMRC” and that he was told not to worry and that HMRC would be in touch. In other words Mr Murray is saying that he made the phone call immediately on, or very shortly after the receipt of the tax return.

25 39. Had I had this evidence at the time of my decision I would have come to different conclusions in the reasoning in paragraphs 21 – 28 above. I would have concluded that he made a call to a department of HMRC in April 2011 and understood that he had been told that they would be in touch and that he did not have to worry about filling in the tax return.

30 40. But for the reasons set out in paragraphs 32 to 36 above, that would not have persuaded me that he had a reasonable excuse for failing to submit his electronic return by 31 October 2011. In other words I would have come to the same overall conclusion.

### **Conclusion**

41. I affirm the penalties of £900 and £300.

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## **Rights of Appeal**

42. 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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**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 JULY 2017**

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