



TC06113

Appeal number: TC/2017/01849

Income tax - Schedule 55 Finance Act 2009 - daily penalty for late filing of self-assessment return - Appellant had prematurely and erroneously registered with HMRC for self-assessment - Notice to File issued - s8A TMA 1970 - special circumstances - Sch 55 para 16 - Appellant unaware and not advised that HMRC may withdraw a Notice to File - HMRC's internal guidance SAM120000 considered - whether special circumstances - yes - Sch 55 Para 17A - cancellation of penalties - appeal allowed and penalty cancelled

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AURELIE BERTHET

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 30 June 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 27 February 2017, and HMRC's Statement of Case received by the Tribunal on 21 March 2017 and the Appellant's reply received on 19 April 2017.

DECISION

5 1. This is an appeal by Ms Aurelie Berthet ('the Appellant') against a penalty of £480 imposed by the Respondents ('HMRC') under Paragraph 4 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of her self-assessment ('SA') tax return for the year ending 5 April 2015.

10 2. A taxpayer's return, if filed electronically, is due no later than 31 January in the year following the end of the financial year to which it relates. The Appellant's return was due by 31 January 2016 but not filed until 21 June 2016.

3. The penalties for late filing of a return can be summarised as follows:

- 15 i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
- ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- 20 iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

4. Penalties of £100 and £480 were imposed, under (i) and (ii) above.

25 5. The Appellant's appeal is against the £480 penalty.

Filing date and Penalty date

30 6. Under s 8(1D) of the Taxes Management Act 1970 (TMA) a non-electronic return must ordinarily be filed by 31 October in the relevant financial year, or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

7. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

Reasonable excuse

35 8. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a

Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

9. There is no statutory 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” (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

10. HMRC’s view is 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. The decision depends upon 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 as conforming to that standard.

11. If there is a reasonable excuse it must exist throughout the failure period.

The background facts

12. The Appellant was at the time of the default an Avocat à la Court and Mediateur practising in Paris.

13. On 15 November 2015 she notified HMRC online, using form CWF1 that she had become a Registered European Lawyer in England and Wales, her self-employment having commenced on 24 February 2015, and for that purpose registered with HMRC for self-assessment.

14. A Notice to File for the year ending 5 April 2015 was issued to the Appellant on 26 November 2015.

15. As the return was issued outside the normal cycle for the year, the Appellant was given 3 months and 7 days to complete and return it (TMA s 8(1A)(b)). The last filing date was 3 March 2016 regardless of whether a paper or electronic return was filed.

16. The Appellant’s return was not received by the filing date and as a result, HMRC issued a notice of penalty assessment on or around 8 March 2016 in the amount of £100.

17. By Notice of Appeal dated 8 April 2016, the Appellant appealed the £100 penalty. She maintained that she had a reasonable excuse. She believed that she did not need to file the return because she had received no income from her employment in tax year 2014-15. She contacted HMRC but was told that as she had registered for self assessment and a notice to file a return had been issued, she had to file a return. It appears that the Appellant either did not understand that she could file a nil return or that was not explained to her.

18. The Appellant's appeal was heard by the Tribunal on 6 October 2016 [and the decision released in January 2017]. The Tribunal made a finding of fact that:

5 *"...she started to work in that capacity (as a Registered European Lawyer) on 24 February 2015... (being the date she had indicated in her self-assessment registration form that her period of self-employment had started) ...and received her first fees in June 2015. As she had "made no money" she thought "I did not need to pay tax on it or tell you about it".*

19. The Tribunal found that:

"9 The Appellant was wrong in her assumption. Her knowledge of the law was incorrect and ignorance of the law cannot amount to a reasonable excuse.

10 *10 It was the Appellant who had notified HMRC that she needed to complete a self-assessment return with effect from 24 February 2015. After HMRC received notice from the Appellant it issued the Return to her on 26 November 2015.*

15 *11 Once the Appellant was issued with a notice to file the Return she was legally obliged to file the Return on or before the filing date even though she had not received any fees from her employment at that time. The fact that no fees had been paid to the Appellant was irrelevant. The duty to file was paramount and the Appellant had failed to comply with that duty. It followed that a penalty was payable.*

20 *20 The Appellant has failed to demonstrate that she had a reasonable excuse. There was nothing of an exceptional or unexpected or unusual nature, either foreseeable or beyond the Appellant's control, which prevented her from complying with an obligation to file the Return."*

20. Prior to the above appeal hearing, the Appellant's electronic return had been received by HMRC on 21 July 2016, possibly prompted by HMRC's statement of Case dated 27 April 2016 relating to her appeal against the £100 penalty which referred to further penalties accruing.

21. On 26 July 2016, HMRC issued a further notice of penalty assessment of £480 (daily penalties calculated at £10 per day for 48 days – that is from 3 June to 21 July 2016).

22. This appeal concerns the £480 penalty. The Appellant notified her appeal to the Tribunal on 27 February 2017, giving her grounds as:

"As I told before (for £100 penalty), I did not receive any revenue in UK for 2014-2015 year of assessment. My first fees for being a Registered European Lawyer in UK are of June 2015.

35 *The Taxes Management Act 1970 says one needs to fill (sic) a return for a year of assessment if he is "a person chargeable to income tax and capital gains tax". Regarding my personal case, for 2014-2015 year of assessment, I only worked and earned money in France and not in England and Wales.*

I had during this time absolutely no professional activity, no client and no file in England and Wales and I regularly paid my taxes in France for working as a lawyer

there. I had my first client in England during the following year of assessment, i.e. 2015-2016, and filled a return for this. During 2014-2015 year of assessment, I was not “a person chargeable to income tax and capital gains tax” according to Taxes Management Act 1970 so I did not need to fill a return.

5 I explained previously that I made a mistake by registering for a return and stopped it when I understood, but HMRC kept considering I should have proceeded on.

As, under the law, I was not chargeable, I could not be punished for not having given a tax return. At least, this reason seems to be a reasonable excuse to be late and not having given a tax return in time. I ask for all penalties and interests for 2014-2015 to be cancelled.”
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23. In response to HMRC’s Statement of Case, the Appellant elaborated on her grounds of appeal, saying:

“English is not my first language and I have not been raised and taught in UK, where I arrived only in September 2014. That’s why I cannot be considered equivalent as a “reasonable taxpayer in the same position” as HRMC wrote I have to be (page 3 of its statement of case).
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My conduct cannot be compared to British standards but to standards for unaware persons, having difficulties to understand English laws and process. I am trying my best since I arrived to understand things and do it correctly, but I remain a foreigner who makes mistakes that can be forgiven. Especially when there is no damage for England, because it is not that I hid revenues for 2014-2015 and avoided tax payments: it is just than I had no revenues and England, was not chargeable and thought I had not to fill any return. I did not steal money to HRMC, I just thought, faithfully, that I had not to fill a return. I even phoned to HRMC to say:
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- that I did not understand why I was asked to fill a return and that as I did not earn money on 2014-2015, there should be an error,
- that I did not understand why the penalties were increasing as I had already appealed against the first £100 penalty,
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- that I needed help as a non-English native speaker, but it had no effect.

At least, if the tribunal does not consider that I have a reasonable excuse, I ask for all penalties and interests for 2014-2015 to be cancelled. HRMC is allowed to reduce a penalty if they think it is right because of special circumstances.
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- I was not a ‘chargeable person’ for this period,
- HRMC does not consider me as a taxpayer for this period as I received nothing saying it,
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- I “fairly” made a mistake and tried to explain it. I thought my appeal against £100 would solve the entire case.”

Relevant statutory provisions

Taxes Management Act 1970 as amended

24. If a person, who has not received a notice to deliver a tax return from HMRC under s 8 of TMA but is otherwise chargeable to income tax, he has an obligation under s 7(1) of TMA to notify HMRC that he is chargeable to income tax. The taxpayer has six months after the end of the tax year to notify HMRC i.e. before 5 October following the tax year.

Sections 7(3) to (7) of TMA excepts a taxpayer from this obligation if he has no net liability to income tax for the year, or has had all the tax deducted at source to meet the net income tax liability for the year.

24. Section 8 of TMA - Personal return - provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2,
and

(b) in the case of an electronic return, on or before 31st January in Year 2.

5 (1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

10 (b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

15 (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

20 (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

25 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

30 (5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Withdrawal of a notice to file

35 8B Withdrawal by HMRC of notice under section 8 or 8A - [Inserted by the Finance Act 2013, s 233, Sch 51, paras 1, 3.]

- (1) This section applies to a person who is given a notice under section 8 or 8A.
- (2) Before the end of the withdrawal period, [HMRC may withdraw the notice (whether at the request of the person or otherwise)].
- 5 (3) But [the notice may not be withdrawn] if—
- (a) the person has made a return under section 8 or 8A in pursuance of the notice under that section, or
- (b) the person has been served with notice of a determination under section 28C by virtue of the notice under section 8 or 8A having been given to the person.
- 10 (4) If, . . . HMRC decide to withdraw the notice under section 8 or 8A they must do so by giving the person a notice under this section.
- (5) A notice under this section must specify the date on which the notice under section 8 or 8A is withdrawn.
- (6) For the purposes of subsection (2) “the withdrawal period” means—
- 15 (a) the period of 2 years beginning with the end of the year of assessment to which the notice under section 8 or 8A relates, or
- (b) in exceptional circumstances, such extended period as HMRC may [determine].
- (7) Withdrawal of a notice given to a person under section 8 or 8A in relation to a year of assessment does not prevent HMRC from giving the person a further notice under that section
- 20 in relation to that year.
- (8) See paragraph 17A of Schedule 55 to FA 2009 as to the cancellation of liability to a penalty under any paragraph of that Schedule by including provision in a notice under this section.

25 **Schedule 55 Finance Act 2009:**

25. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

- (1) P is liable to a penalty under the 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.

- 5 (2) The penalty under the 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)-
- 10 (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).

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

- 15 (1) P is liable to a penalty under the 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 the paragraph is the greater of-
- (a) 5% of any liability to tax which would have been shown in the return in
- 20 question, and
- (b) £300.

Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

- 25 (1) Liability to a penalty under any paragraph of the 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)-
- 30 (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
- 35 remedied without unreasonable delay after the excuse ceased.

Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

- 40 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the Schedule.
- (2) In sub-paragraph (1) "special circumstances" does not include-
- 45 (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.

HMRC has the power, under FA 2009 para 17A, Sch. 55, to include cancellation of late filing penalties when it issues a notice confirming withdrawal of notice to file:-

“Cancellation of penalty

17A(1) This paragraph applies where-

(a) P is liable for a penalty under any paragraph of this Schedule in relation to a failure to make a return falling within item 1 or 2 in the Table, and

(b) P makes a request under section 8B of TMA 1970 for HMRC to withdraw a notice under section 8 or 8A of that Act.

(2) The notice under section 8B of TMA 1970 may include provision under this paragraph cancelling liability to the penalty from the date specified in the notice

17B(1) This paragraph applies where -

(a) P is liable for a penalty under any paragraph of this Schedule in relation to a failure to make a return falling within item 3 in the Table, and

(b) a request is made under section 12AAA of TMA 1970 for HMRC to withdraw a notice under section 12AA of that Act.

(2) The notice under section 12AAA of TMA 1970 may include provision under this paragraph cancelling liability to the penalty from the date specified in the notice.”

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:

(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.

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

The Appellant’s case

26. The Appellant’s grounds of appeal are set out in paragraphs 22 and 23 above.

HMRC's Case

27. On 15 November 2015 the Appellant submitted form CWF1 notifying HMRC online that she wished to register for self-assessment as a Registered European Lawyer in England and Wales with effect from 24 February 2015. HMRC set up a self-assessment record for her on 16 November 2015.

28. A notice to file for the year ending 5 April 2015 was issued to the Appellant on 26 November 2015. Under s 8 (1) TMA, once the Appellant was issued with a notice to file a personal tax return, she became legally obliged to ensure that return was filed on or before the filing date.

29. HMRC contend that the Appellant is not relieved from her filing obligation simply because she believes that she does not meet the criteria for inclusion in self-assessment and/or did not receive any income from her business during the period of the return. There is nothing in legislation to relieve the Appellant from the filing obligation simply because she did not receive any revenue and therefore believed that she did not have to file a return for the year in question.

30. For an appeal to be successful the Appellant must have a reasonable excuse as to why the return was not filed by the deadline and the reasonable excuse must exist throughout the period from the deadline to the day before HMRC receive the return.

31. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond the person's control which prevents them from complying with an obligation which they would otherwise have complied with.

32. On 8 April 2016 the Appellant submitted an appeal to HM Courts & Tribunal Service against the initial £100 late filing penalty. HMRC's Statement of Case in respect of that appeal (a paper hearing) was prepared on 27 April 2016 and sent to the Appellant. This advised that further late filing penalties would become due.

33. The Appellant's electronic return was received on 21 July 2016.

34. On 26 June 2016, HMRC issued the further notice of penalty assessments in the sum of £480.

35. The Appellant's appeal against the £100 penalty was dismissed by the Tribunal on 6 October 2016.

36. HMRC contend that in her appeal (against the remaining penalties) to the Tribunal on 27 February 2017, the Appellant has not provided any fresh information to support this further appeal.

37. Late filing penalties are raised solely because the self-assessment tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Penalties are not linked to liability.

38. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

39. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

40. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

41. There is no statutory requirement for HMRC to issue reminders. The £100 penalty notice should have acted as a prompt to the Appellant to take the necessary corrective action and therefore avoid the later penalties.

42. There is no reasonable excuse for the Appellant's failure to file her tax return on time, or by the date the penalties arose.

Special Reduction

43. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined.

44. "Special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

45. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

46. HMRC have considered whether a taxpayer believing that they should not have to complete a return are special circumstances and submit that they are not.

47. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 Schedule 55 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

48. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

49. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

50. HMRC sent a late filing penalty of £100 to the Appellant on or around 8 March 2016. This acted as a prompt to her that her return had not been submitted and she immediately raised her concerns with HMRC who would have advised her accordingly. However, her return was not received until 21 July 2016. As HMRC say they are under no obligation to issue reminders.

51. The Appellant says that she only worked and received income in France during the tax year 2014-15, whilst working as a lawyer there. She says that in the 2014-15 tax year, she undertook absolutely no professional activity in the UK. She says that she was not during this period "*a person chargeable to income tax and capital gains tax*" according to s 7 TMA 1970, and therefore had no need to register for self-assessment. She had made a mistake in registering for self-assessment prematurely as from 24 February 2015 and she adds that she did not actually commence self-employment or indeed receive any income until June 2015. She says that she contacted HMRC and was told that the only way to stop any further penalties was to file a return. It appears that the Appellant either did not understand or was not told that her obligation to file a new return continued and in default further penalties would arise.

52. HMRC's Internal self-assessment manual SAM120000 states that:

"..for tax years 2012-2013, and later, an individual,can request that we withdraw a notice to file and, if the customer no longer satisfies SA criteria for that year, we can agree to withdraw the notice,.. and cancel any penalties for failing to file the return, under Schedule 55 FA 2009.

The period during which a customer may request the withdrawal of the notice to file is 2 years beginning with the end of the year of assessment, or a period agreed between HMRC and the customer."

HMRC's guidance followed the introduction of s 8B TMA 1970 by FA 2013 s 233, Sch 51, paras 1, 3.

53. It appears that the Appellant was not advised of her right to request that the notice to file a return for the year 2014-15 be withdrawn and that she could do so at any time before 5 April 2017, or a period agreed with HMRC.

54. HMRC have not disputed the Appellant's assertion that she had no chargeable income during the year 2014-15 and did not actually commence self-employment until June 2015.

55. The Tribunal has some sympathy with the Appellant. She clearly made an honest mistake when completing form CWF1. It is possible that the Appellant when completing the 'self-employment commencement date' referred to the date she registered as a Registered European Lawyer. The form includes a declaration which states "*I will tell HMRC straightaway if my circumstances change in a way that affects the answers I have given on this form*". She did that after she received the first £100 fixed penalty. One might have expected, on receiving her explanation as to her 'change of circumstances', that HMRC would have cancelled her registration for self-assessment for 2014-15. However it appears she was told that she nonetheless had to file a return. Clearly that was incorrect. She should have been told that she could ask for the notice to file to be withdrawn.

56. HMRC also has the power, under FA 2009 s 17B, Sch 55, to cancel late filing penalties when it issues a notice confirming withdrawal of notice to file. The statute uses the word "may", rather than "shall", and therefore whilst cancellation of penalties is not mandatory, the Appellant having queried the position with HMRC should have been advised of HMRC's power to cancel the penalty.

57. Whilst a taxpayer's misunderstanding of their obligation to file a return may be a genuine error, it does not amount to reasonable excuse. This is supported in a judgment by Judge Hellier in the [Vat] case of *Garmoss Ltd v HMRC* – TC2001 where he said "what is clear is that there was a muddle and a 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". In this case however, in 2014-15, the Appellant did not have obligation to file a return under s 7 TMA but made the mistake of informing HMRC that she did.

58. Although HMRC are not obliged to give advice to taxpayers, it is reasonable to expect some assistance when a taxpayer, particularly one from abroad who has not yet commenced self-employment in this country and in endeavouring to comply with relevant regulations, has so obviously misunderstood their position. HMRC's tax Charter states "*We want to give you a service that is fair, accurate and based on mutual trust and respect. We also want to make it as easy as we can for you to get things right..... We'll help you understand what you have to do and when you have to do it.*" Given the circumstances, although no criticism of HMRC is intended, it is difficult to understand why the Appellant's explanation was not accepted, and why she was not informed that it was possible for her to apply for the Notice to File to be withdrawn and the penalties cancelled.

59. In my view, special circumstances have been shown. HMRC have addressed the question whether there were special circumstances, but have found none. However the circumstances giving rise to the £480 penalty, and the £100 penalty, were clearly unusual and out of the ordinary run of events. Although HMRC would not have known of the Appellant's error until after she contacted them following the issue of

the £100 penalty, there would seem to have been at that time no reason why the notice to file and that penalty could have been withdrawn. HMRC should have taken the initiative to withdraw the notice to file and to cancel any penalties assessed in accordance with paragraph 17A Schedule 55 FA 2009. Their failure to do so means that they failed to take into account something which they should have done and there was also an error of law in not applying s 8B TMA.

60. The Tribunal therefore finds that HMRC's decision was flawed when considered in the light of the principles applicable in proceedings for judicial review and the penalties under appeal should be reduced to nil under the Special Reduction regulations.

61. The appeal is therefore allowed and the £480 late filing penalty cancelled.

62. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 SEPTEMBER 2017