



TC06371

Appeal number: TC/2016/04566

INCOME TAX – penalties for the late filing of 2011-12 return – Schedule 55 to the Finance Act 2009 – taxpayer brought into self-assessment due to PAYE underpayment – whether the taxpayer had a reasonable excuse – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARC CAPUANO

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
ANTHONY HENNESSEY**

**Sitting in public at the Tribunals Service at Eagle Building, 215 Bothwell Street,
Glasgow on 31 January 2018**

No attendance or representation for the Appellant

Mr Greg Morran, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. The appellant, Mr Capuano, appeals against the penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ('Schedule 55') for a failure to submit the 2011-12 self-assessment return ('SA return') on time.
2. The penalties that have been charged can be summarised as follows:
- 10 (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 October 2014.
- (2) Daily penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 14 April 2015.
- (3) a £300 six-month penalty under paragraph 5 of Schedule 55 imposed on 14 April 2015.
- 15 (4) a £300 twelve-month penalty under paragraph 5 of Schedule 55 imposed on 13 October 2015.

Hearing in Appellant's absence

3. The Tribunal was satisfied that a notice of the hearing was sent to the appellant's correspondence address as noted on the Notice of Appeal. The appellant
20 was also given notice that the Tribunal has the discretion to proceed with the hearing in his absence. Having considered the grounds of appeal as stated in the Notice, the Tribunal considers that the case the appellant seeks to make is sufficiently clear. We also have regard to the overriding objective of the Tribunal's procedure rules, which is to deal with matters fairly and justly, which includes avoiding delay. For these
25 reasons, we heard the appeal in the appellant's absence.

Application to make a late appeal

4. The appellant has made an application to make a late appeal on his Notice of Appeal. HMRC do not oppose the application. The consideration of reasonable
30 excuse for the appeal being made out of time is essentially similar to that for the delay in filing his return. For this reason, we have decided to grant permission for the late appeal and to consider the substantive appeal.

Legislation and case law

5. Section 8 of the Taxes Management Act 1970 ('TMA') places a statutory
35 obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer. Section 8(1D) provides for the due dates of filing, whereby a paper return is due by 31 October, and an electronic return is due by 31 January in the following tax year.

6. Paragraph 3 of Schedule 55 provides for a penalty of £100 if a return is not received by the filing date.

7. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.

8. Paragraphs 5 and 6 provide for a fixed penalty of £300 if the return remains outstanding at six and twelve months after the filing due date.

9. 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 an appeal, the Tribunal) that they had a reasonable excuse for the failure, and the failure was remedied without unreasonable delay after the excuse had ceased.

10. Paragraph 23 specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control, and where the taxpayer relies on any other person to do anything, then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

The Facts

11. The appellant had three separate part-time employments in the year 2011-12, and under each employment, he received the full personal allowance against his earnings, which totalled £9,222.89.

12. As a result of the personal allowance having been allocated against his overall taxable earnings more than once, there was a net shortfall in PAYE deducted of £349 in 2011-12.

13. The PAYE underpayment could have been collected by adjusting the coding notice for the following year, or settled as a one-off payment. For whatever reasons which are not on file, HMRC's review letter stated that the PAYE underpayment could not be 'coded out'.

14. Consequently, the appellant was served a paper return to file for 2011-12 on 30 June 2014. As the return was issued outwith the normal self-assessment cycle, it was due for filing 3 months and a week after the date of issue, which was 7 October 2014.

15. The return was eventually filed electronically with HMRC on 31 March 2016, which was almost 18 months after the return filing date.

16. The Tribunal notes that the appellant was also late in filing his return for 2010-11, and had incurred the maximum penalties in relation thereto of £1,600. The penalties for 2010-11 have been cancelled by HMRC on review, and is not a matter before the Tribunal.

17. For the year 2013-14, there would seem to be late filing penalties accruing too, and from the Self-Assessment Statement for the appellant, £1,300 penalties have accrued as at 16 January 2018. These penalties have also been removed by HMRC.

18. The penalties for 2011-12 are left standing and are under the current appeal.

5 19. HMRC's records show the appellant's history of addresses, starting from 20 May 2010, and the latest address starting from 21 December 2015, and was still current at the date the Notice of Appeal was lodged on 24 August 2016.

20. The paper return was served on 30 June 2014, and the period of delay in filing the 2011-12 return was from 7 October 2014 to 31 March 2016. The matter of PAYE arrears, however, would probably have arisen in the period after the end of the tax year when the underpayment first transpired.

21. Correspondence to the appellant to collect the PAYE underpayment would probably have been served after July 2012 when the data could be collated from the employers' annual returns submitted on or around 19 May 2012 for the said year.

15 22. The address record shows the appellant residing at the following addresses at the material times:

(1) From 17 October 2011 to 21 August 2012 – Netherdale Kirkvale Court, Newton Mearns Glasgow;

(2) From 22 August 2012 to 18 February 2015 – Gilmour Street Glasgow;

20 (3) From 19 February 2015 to 20 December 2015 – (different number) Gilmour Street;

(4) From 21 December 2015 to date – Bartland Place, Glasgow.

The appellant's case

25 23. The reasons in support of the application for the late appeal, and his grounds of appeal for the substantive matter are summarised as follows:

(1) That he moved house in the year 2011-12 and that was why he did not receive any letters or else he would have paid the original £349.20.

30 (2) He tried to get information from HMRC on how to 'fix the situation'; that he was 'messed about and not told how to rectify the situation'. After 'countless phone calls', he was informed to fill in a tax return for 2011-12, and appealed the penalties.

(3) That he did not receive a letter until late 2014; the penalties for 2013-14 and 2011-12 were removed.

35 (4) Don't understand why HMRC have removed the penalties for the two years but left 2011-12 standing.

(5) That he had no knowledge of any tax owed and could not have settled it any sooner.

(6) That he works for an employer and has never been self-employed and has ‘never had to deal with paying [his] own tax’, as it is deducted by the employer.

HMRC’s case

5 24. For HMRC, Mr Morran submitted that the addresses held on HMRC’s records for the material times were the addresses where the relevant documents had been served. There is no record of any post having been returned as undelivered.

Discussion

10 25. The main question for the Tribunal is whether or not the appellant had a reasonable excuse for the late submission of the return. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse 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 [18]).

15 26. The test of reasonableness as articulated by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234, whilst it specifically refers to a VAT registered trader, is applicable to all taxpayers:

20 ‘The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

25 27. Applying this test to the facts, the question is whether the appellant was a reasonable taxpayer who has taken appropriate steps to ensure that he filed his return timeously.

28. In the absence of an oral hearing, the Tribunal has inferred certain facts from the papers for considering whether the appellant had a reasonable excuse for the delay in filing her SA return. In particular, the Tribunal has regard to the following facts:

30 (1) The appellant’s tax affairs would appear to have been dealt with through PAYE and had no occasion to file a return. The appellant was therefore a ‘first-time filer’ when it came to the 2011-12 return (or the 2010-11 return which probably would have been sent at the same time outwith the normal cycle). His awareness of what is entailed in filing a return was limited, if not non-existent.

35 (2) We note the appellant moved from Netherdale Kirkvale Court to Gilmour Street on 22 August 2012. As noted earlier, the correspondence notifying the appellant of the underpayment and of the method to settle the outstanding liability would have been sent after July 2012.

5 (3) The appellant maintains that the correspondence to notify him of the PAYE underpayment did not reach him at the correct address. Consequently, he was unaware and unable to deal with the PAYE underpayment in a more expedient manner. It would seem that the appellant was brought into the SA regime somewhat unnecessarily because of the PAYE underpayment of £349.20. Had he been aware of the alternative to settle the underpayment, and had contacted HMRC in time to rectify the situation, he could have avoided being served a notice to file a return for 2011-12, (and probably 2010-11 and 2012-13).

10 (4) The appellant had repeatedly tried getting help from HMRC to find out what was required of him to rectify the situation. He had little success in being able to obtain the necessary information or assistance. In the absence of any particular details that could have been gathered in oral evidence as regards how the communication difficulties could have directly caused delay in filing a return, the Tribunal is prepared to consider the appellant's circumstances in more general terms against the background of the public announcements made in relation to HMRC's delivery of customer service.

15 (5) In December 2012, the UK National Audit Office raised issues about the poor customer service delivery by HMRC. In March 2013, the House of Commons Public Accounts Select Committee criticised HMRC for its 'unambitious and woefully inadequate' response to the report by the National Audit Office.

20 (6) It was reported that only 50% of the calls to HMRC were answered in the period between April and June 2015. The performance was described as 'staggeringly bad' by the cross-party committee of MPs in June 2015. That was the second time that HMRC had been severely criticised by MPs within the week after the Public Accounts Committee accused HMRC of 'failing UK taxpayers'.

25 (7) In June 2015, the Chief Executive of HMRC had offered apologies to 'all those customers who have struggled to get through to us', and some £45 million was allocated to improve customer service.

29. The appellant's experience of frustrated attempts to contact HMRC would seem to fit into the period of 'staggeringly bad' delivery of customer service between December 2012 to June 2015.

35 30. Without the knowledge and former experience in filing an SA return, the appellant quite understandably turned to HMRC for help. The taxpayers are supposed to be 'customers' of HMRC receiving a service too, but the service that could be expected by the appellant from HMRC failed to deliver at the material time. Viewed in this light, the appellant's delay in filing the return was excusable. The Public
40 Accounts Committee criticised HMRC of 'failing UK taxpayers' in 2015, over two years after the National Audit Office's report of December 2012. The appellant would seem to be one of the taxpayers who had been failed by HMRC in this respect.

Decision

31. The appeal is accordingly allowed.

32. The late filing penalties in relation to the self-assessment return for 2011-12 in the total sum of £1,600 are discharged.

5 33. 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 10 '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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**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 6 March 2018