[2018] UKFTT 547 (TC)

TC06717

Appeal number: TC/2018/02782

INCOME TAX – penalties for late delivery of income tax returns – whether (a) failure to notify chargeability, (b) failure to register for self-assessment even though a director and (c) failure to notify HMRC of change of address disqualify appellant from having a reasonable excuse for the failure.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALEXANDER STEELE **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 3 September 2018 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 16 May 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 22 June 2018.

1. This is an appeal by Mr Alexander Steele ("the appellant") against three penalties, each of £100, for failure to file a tax return for 2013-14, 2014-15 and 2015-16 by the same date, 9 November 2017

Facts

2. HMRC computer records show the issue on 2 August 2017 to the appellant of tax returns in paper form for the tax years 2013-14, 2014-15 and 2015-16. Those records show the due date for delivering the returns as 9 November 2017.

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3. HMRC's address records included in the bundle record the appellant as having had the same address in Lancashire since 2004, and this is the one they say they sent the returns to.

4. HMRC records show the issue of three notices on 14 November 2017 informing the appellant that a penalty of £100 had been assessed for each failure to file the returns by the due date.

5. The records show that HMRC received the three returns electronically on 29 January 2018.

6. On 30 November 2017 the appellant appealed to HMRC against the penalties. In his letter he referred to letters of 15 August 2017 and the notice of penalty assessments dated 14 November 2017 which had been unopened until his return to his parents' home, he having been working in South Wales all summer.

7. He was, he said, a chef paid a monthly salary through PAYE and had never completed a tax return or been asked to before. He believed returns were filed online and he did not have the knowledge to do so.

8. He had a property from which he got a little rent but he had expenses as well and had made very little profit. He believed that income of this sort under a certain amount did not have to be declared.

9. On 5 February 2018, in three separate letters, HMRC rejected the appeals as they said that the appellant had shown no reasonable excuse for the failure to file on time. The onus, they said, was on him to keep his address details up to date, and the tax returns he had submitted show that he met the criteria[1] as "a Company Director". They informed him that he could provide further information, request a review or notify his appeal to the Tribunal.

10. On 28 February 2018 the appellant provided further information. He said he was a director in name only as he is part owner of the business. He was a director of a very small restaurant, not an executive of a large plc. He attached an extract from HMRC's website which said that you must contact HMRC if you have profits from property rental and you must report your profits if HMRC ask you to. The only year he made a profit was 2016-17 when the profit was £24: it was unfair to charge him £300 in penalties.

11. On 26 March 2018 HMRC wrote to the appellant with the conclusion of a review which they had carried out[2]. The conclusion was that the penalties were upheld. In the course of the (single) letter, the review officer repeated that it was the appellant's responsibility to keep his address details up to date or to make redirection arrangements and said that the notice to file clearly states that if you can't file online you can print a copy of a paper return and complete that.

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[1] Criteria for what is not said.

[2] No review had been requested or offered.

12. The review officer addressed the question of special circumstances but concluded that there were none. The officer said that they had considered what the appellant had put forward in his letters.

13. On 24 April 2018 the appellant notified his appeals to the Tribunal.

The law

14. The law imposing these penalties is in Schedule 55 Finance Act ("FA") 2009 and in particular paragraph 3 (initial penalty of £100). The penalties are assessed if a person failed to deliver a return which they had been required by notice to deliver by the date given by s 8 Taxes Management Act 1970. The penalties may only be cancelled, assuming they are procedurally correct, if the person had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed. The Appendix contains further relevant parts of Schedule 55 FA 2009.

Grounds of appeal & HMRC's response

15. The grounds of appeal are as set out at §§7 to 9 and 11.

16. HMRC say in response that:

(1) HMRC have no record of correspondence having been returned undelivered by Royal Mail, so they contend that the forms[3] were received by "Mr A Steele" according to s 7 Interpretation Act 1978 ("IA 78").

(2) HMRC will not accept pressure of work, lack of information or ignorance of basic law to be a reasonable excuse for late filing[4]. No such excuse exists in this case.

17. A lot more was said in the statement of case about the appellant's responsibilities and I address these contentions below, so do not repeat them here.

Discussion

18. Before considering the rival arguments I make some further findings of fact based on documents in the bundle.

The notices to file

19. HMRC's statement of case ("SoC") says that notices to file in the form of SA 316s were issued to the appellant. They include in the bundle what purport to be copies of the notices addressed to the appellant and dated 3 August 2017. These copies do inform a recipient that if they cannot file online because they don't have access to a computer or the internet, they can go to a local library to print a copy of a paper return from the website.

20. However this suggestion that SA 316 notices were sent is contrary to what is said on HMRC's computer records as a "Return Summary" which says that the "Return Issued Type" was "Full Return" (ie a paper copy of a return which contains on page TR2 a notice to file). In many other "Return Summaries" I have seen in the course of

[3] Which forms is left unstated.

[4] The statement of case adds a degree of stringency which was not present in the letters of 5 February which said "we will not *normally* accept" [my emphasis] the matters mentioned here.

dealing with appeals against late filing penalties, the "Return Issued Type" is "Notice to File". The date given for issue on the Return Summary is 2 August, not 3 August as on the copy SA 316s.

21. The SoC also says that the "notices to file" were issued on 2 August 2017 and refers me in that context to the Return Summary records.

22. It seems to me that the compiler of the SoC has misinterpreted the Return Summary records, and assumed that a notice to file was given. Where the copies of the SA316s came from, why they show the appellant's name and address and why they are dated 3 August is a mystery.

23. I consider that it is more likely than not that paper returns were issued to the appellant, as stated on the computer records, and I so find as fact.

Notifying property income to HMRC

24. The extract which the appellant attached to his letter of 28 February 2018 is from the GOV.UK website and is headed "Income Tax when you let your property: work out your rental income."

25. It says:

> "You must contact HMRC [a website address ending contact/self-assessment] if you have taxable profits from the property you rent.
>
> If you've not told us about your property rental previously, you need to do so by 5 October following the tax year you had taxable rental profits.
>
> If you're also employed and your rental profits are small enough, you can ask HMRC to deal with your profits by adjusting your PAYE code.
>
> You must report your profits on a Self Assessment tax return if HMRC ask you. We're likely to do this if your income is:
>
> - £2,500 to £9,999 after allowable expenses
> - £10,000 or more before allowable expenses"

26. From his statements I find that the appellant's "income … after … expenses (that is after all what "income" means in a property business) was less than £2,500 in each year, and that his gross receipts (if that is what "income … before … expenses" means) were less than £10,000. He does not then meet HMRC's SA criteria in any relevant year in relation to this income. He may however have failed to notify his chargeability under s 7 Taxes Management Act 1970 ("TMA") in relation to 2016-17, but s 7 TMA does not apply if a person has received a notice to file before the end of the notification period which is 5 October 2017. I find below that the appellant did receive such a notice after 2 August 2017 and most likely before 5 October, so if it were necessary I would hold that he had no liability to notify his property income at all in any of the years in question here or in 2016-17.

Directorships & responsibilities of directors

27. HMRC enclosed an extract from the Beta website of Companies House which shows that the appellant was appointed as a director of Honeybeach Ltd, resigning in May 2016. He gives his occupation as "chef". The address for him at Companies House is also that in HMRC's records. I find as fact that the appellant was a director of a limited company in the relevant years.

28. HMRC exhibited a printout from GOV.UK headed "Running a limited company". It is not part of HMRC's website and contains a lot of material from the Companies Act 2006. Under "Directors' responsibilities" it says that a director must "register for Self Assessment and send a personal Self Assessment tax return every year"

29. In a box in bold it says "You may be fined, prosecuted or disqualified if you don't meet your responsibilities as a director."

30. I find as fact that this is what the webpage says. Whether it is a correct statement of law is another matter which I deal with later.

Did the appellant fail to deliver the returns in time?

31. If the returns for 2013-14, 2014-15 and 2015-16 were issued on 2 August 2017, then the last date for delivering them is given by s 8(1G) TMA which says

> "… 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 three months beginning with the date of the notice."

32. The date *on* the notice [my emphasis] would have been 2 August 2017. If that was the date *of* the notice then 3 months from that date is 2 November 2017. But the date for delivery in HMRC's records is 9 November 2017. This is explicable only on the assumption that the date *of* the notice is the date it was given to the recipient (in the sense that was when he received it) and that HMRC is allowing a period of 7 days for the notice to reach the appellant, sent as it will be by second class post.

33. I find as a fact that the appellant did not personally receive the notices in his hands until sometime after 14 November 2017 when he returned to his parents' house. HMRC say however that he is deemed to have received them by s 7 IA 78.

34. For s 7 IA 78 to deem receipt, HMRC must show that on the balance of probabilities the returns were properly addressed, prepaid and posted to the appellant. HMRC have shown the address on file for the appellant at the time and the record of issue. HMRC say that as the returns were not returned by Royal Mail they must have been delivered. I do not accept that, but because the appellant has admitted that the returns were awaiting him unopened in the house which was his last known address as far as HMRC knew, then I consider that the returns containing a notice to file were deemed served on the appellant.

35. Does it matter when? Deemed service is capable of rebuttal only if it is time critical (the second leg of s 7 IA 78). I have previously said, obiter[5], that a notice to file is not time critical, but in a s 8(1G) TMA case I can see that it can be. The three month period depends on the date of service, if HMRC's assumption in granting the 7 day extension is well founded in law. If service was on a date after 29 October 2017, the returns were not late. But s 7 says that in a time critical case service is deemed to happen in the ordinary course of the post. Royal Mail say on their website that second class post is usually delivered in 2 or 3 working days after posting: even allowing for some hold ups in HMRC and for an unusual case of delay in Royal Mail, it is more

[5] *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) at fn. 5 from [76]

likely than not that the returns were delivered to the appellant's address before 29 October 2017.

36. I therefore find that the notices to file were given to the appellant and that he failed to file them within the deadline given by s 8(1G) TMA.

Were the notices to file given for the right purpose?

37. A return under s 8 TMA is required for the purpose of establishing the person's income and the tax payable on that income. In *David Goldsmith v HMRC* [2018] UKFTT 5 (TC) ("*Goldsmith*") I held that where a return is issued only for the purpose of enabling HMRC to enforce a debt due to them, in that case an underpayment of income tax under the PAYE system, the notice to file it is invalid.

38. I did note with some interest what the SA 316s exhibited by HMRC actually say on this issue. They open by saying:

> "We're sending you this letter because you owe tax from your Pay As You Earn (PAYE) income or we've looked at your circumstances and need you to complete a Self Assessment tax return.
>
> If you owe tax from your PAYE income, we'll have previously explained that if you didn't pay the tax you owe, we'd collect it through self-assessment. As you've still not paid, you need to complete a tax return. We will not be sending you a paper return so please file your return online."

39. Although it is not relevant to this case, the wording of this notice is wholly consistent with the view I expressed in *Goldsmith* that a notice sent to a person with a PAYE underpayment well after the initial issue date (and the normal filing date) is sent only for the purpose of collecting the tax underpaid. The two types of person required to file a return in accordance with the notice on the SA 316 are A (the PAYE case) *or* B (the case where information about income is needed).

40. In this case there is no evidence in the bundle to suggest that collection of an underpayment shown on a P800 is the reason the notices were sent to the appellant. In PAYE underpayment cases HMRC produce the notes showing when voluntary payment letters ("VPLs") are issued and details of the P800 figures are given. There is nothing here to suggest that happened in this case. And so there is nothing to suggest that the returns with a notice to file were issued for an invalid purpose.

Did the appellant have a reasonable excuse for not filing them in time?

41. The test here is whether what the appellant did, or omitted to do, is objectively reasonable for a person in the circumstances of the appellant. HMRC say that a prudent person would have made arrangements to have any post from HMRC forwarded or otherwise brought to his attention.

42. But the appellant's circumstances were these. He had been for many years a person whose only contact with HMRC was as an employee whose tax was determined through the PAYE system. Why would he have been expecting to be asked to file three years' tax returns within three months of receiving them? HMRC have provided no information, not even SA Notes or the equivalent for PAYE-only taxpayers, to show *why* they decided in 2017 that he should be brought within the self-assessment system at the time they did so decide. This was not a case where a PAYE underpayment had arisen and a series of VPLs sent.

43. HMRC however say that he should have known since 2009 that he was under an obligation to register for self-assessment and to make returns. I need to address exactly what HMRC said on this subject, which is this.

(1) Companies House records show Mr A Steele was appointed a director of Hollybeach Ltd on 14 May 2008. He should have therefore registered for self-assessment 6 months from the end of the tax year in which the tax liability arises. Notification should have been received on or before 5 October 2009. The six month time limit ensures that the customer can be sent a tax return in sufficient time to complete it within the normal cycle for the year.

(2) One of the appellant's responsibilities as a director regardless of whether it's a very small restaurant or a large PLC is to register for self-assessment and send a self-assessment return each year. The information regarding this is on "the GOV.UK website". HMRC expect a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts to have made themselves aware of their[6] responsibilities as a director.

(3) SA316 notices to file were issued to the appellant to the address on record. It is the appellant's responsibility to keep his address details up to date or make redirection arrangements.

44. As to §43(1) it is indeed true that the appellant became a director of a limited company. But I fail entirely to see why the next sentence follows as a matter of logic or law from this first one. It seems to me that HMRC's compiler of the statement of case, Mrs D Waldron, cannot ever have read s 7 TMA[7]. The obligation on a person who has not been served with a notice to file a return before 6 October after a tax year is to notify HMRC of their chargeability to tax if they are chargeable. There is nothing in s 7 TMA which places any special obligation on a person because they are a director of a company. The obligation is general but does not apply where a person's income falls within any of the exceptions. The first exception, which will apply to those directors who are in receipt of fees or earnings under a contract of employment, is for people whose income consists of income subject to PAYE, either directly because it is PAYE earnings or indirectly because it is coded out.

45. The second exception which may well apply to directors is for dividends where for tax years before 2016-17 the person is not liable at the dividend upper rate or dividend additional rate.

46. Thus a director whose income consists only of PAYE earnings and dividends chargeable at the ordinary rate or lower is under no obligation to notify HMRC of their chargeability to income tax. There is no such legal concept as registering for self-assessment, except possibly for Class 2 or 4 National Insurance Contributions neither of which is relevant here.

47. Mrs D Waldron (and other compliers of these statements of case) is confusing the obligation under s 7 TMA with HMRC's self-imposed and self-selected criteria for issuing a notice to file. That they are not the same thing is clearly demonstrated by the appellant's extract from the GOV.UK webpage about income from property. The

[6] HMRC say "his" here, as if only men can be prudent taxpayers or have responsibilities.

[7] She is certainly not alone in this.

obligation to notify chargeability is absolute for this type of income: there is no exception. HMRC's list of criteria however says that HMRC will only issue a notice to file if the income is above certain thresholds. There are similar thresholds for other types of income. One criterion used by HMRC is that income exceeds £100,000, whatever its type. That is not in s 7 TMA. Someone whose only income is £5,000,000 all subject to PAYE is not obliged to notify chargeability under s 7. Another criterion is being a director of a company other than a non-profit organisation. That is not in s 7 TMA. A director may have income which is only within the s 7 exceptions. There is nothing to prevent HMRC issuing a notice to file to such a person, but they are not failing to notify.

48. If the appellant's only income from 2008-09 to 2015-16 was within the exceptions then he was not failing to notify. If he was in fact failing to notify, then of course HMRC can start a check into his tax position and issue a s 29 TMA assessment.

49. As to §43(2) it will be apparent that I consider that the material on the GOV.UK website is wrong and should be removed. No one should be expected to make themselves aware of what is not a correct statement of the law.

50. It also follows that a person in the appellant's position, entirely taxed under PAYE and without being required to notify chargeability, had no responsibility to tell HMRC of his address details, unless required by some other tax legislation.

51. Under regulation 36 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("PAYE regulations") an employer, when ceasing to employ a person, is required to include in a P45 Part 1 at item 13 the employee's address (if known) to HMRC.

52. Under regulation 42 of the PAYE regulations an employer, when starting to employ a person who gives the employer a P45 Parts 2 and 3, is required to include in any P45 Part 3 given to HMRC the employee's address (regulation 42(7)(f)).

53. Under regulation 46 of the PAYE regulations an employer, when starting to employ a person who does not give the employer a P45, is required to include in any P46 given to HMRC the employee's full address including postcode (regulation 46(1B)(e) and 46(3)(f)). Equivalent provisions apply for pensioners (regulation 54A(3)(k), 55(4)(k), 56(2)(a), 57(3)(k) and 58(45)(k))

54. Under regulation 73 of the PAYE regulations where an end of year return is made an employer must deliver information (on form P14) including the employee's address, if known (regulation 73(4)(b).

55. Where RTI applies the only obligations are on the employer to give address information under paragraph 37 Schedule A1 of the PAYE Regulations where an employee is taken on.

56. These obligations are all on an employer. Nothing in the PAYE regulations therefore requires an employee to inform HMRC of their address.

Was there then a reasonable excuse for the failures?

57. In my view there is then a reasonable excuse for the failure to file the returns by 9 November 2017. The appellant could have no reason to suppose that he would be

required to make tax returns at all, let alone going back to 2013. Nor did he have any obligation to inform HMRC of any change of address.

Special circumstances?

58. HMRC have addressed the question whether there were special circumstances, but have found none. Because of my decision I do not need to address this issue but had I needed to I would have been inclined to say that HMRC's decision was flawed because they did not take into account, or give proper weight to, the fact that the appellant was, unusually, required to file three years' returns at once, so that any failure to file would give rise to penalties of £300 for the initial failure and potentially of £4,800 for a continuing failure. Where returns are, as normal, issued annually a person has the opportunity to file on time and the possibility of failure to do so leading to penalties arises in relation to one return a year. Here the same failure led to triple the penalties, capable thus of being as draconian as those castigated by the House of Lords in *Hinchy v CIR* (1960) 38 TC 625.

59. In *Welland v HMRC* [2017] UKFTT 870 (TC) Judge Barbara Mosedale held at [138] that where a person became liable to three penalties for failure to file three returns under s 12ZB Taxation of Chargeable Gains Act 1992 in a single year, the second and third penalties should be reduced to nil under paragraph 16 Schedule 55. I would have held that for similar, but not identical, reasons the penalties here should be reduced to £100.

Decision

60. Under paragraph 22(1) Schedule 55 FA 2009 I cancel each of the three penalties of £100.

61. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 September 2018

APPENDIX

Schedule 55 FA 2009

1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

…

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

SPECIAL REDUCTION

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.

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

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.

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

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 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.