



TC06723

Appeal number: TC/2018/02125

INCOME TAX – penalties for late filing of tax return and late payment of income tax – whether or not taxpayer had reasonable excuse – held not

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NIKIT KOTHARI

Appellant

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

The Tribunal determined the appeal on 24 July 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 25 March 2018 and HMRC's Statement of Case, which was acknowledged by the Tribunal on 29 May 2018.

DECISION

1. This was an appeal against late filing penalties totalling £1,300 imposed on the appellant under paras 3, 4 and 5 Sch 55 Finance Act 2009 for the late filing of an individual tax return for the year 2015-16, and late payment penalties totalling £330 imposed under paras 3(2) and 3(3) Sch 56 Finance Act 2009 for the late payment of income tax due in respect of the year 2015-16.

Grounds of Appeal

2. Mr Kothari's grounds of appeal are set out in correspondence to HMRC and his Notice of Appeal and can be summarised as follows:

- (1) Mr Kothari is not self-employed. He works for BNP Paribas and his income tax is therefore deducted at source.
- (2) He did not receive the notice to file a tax return which HMRC say they issued on 6 April 2016.
- (3) He is a full time salaried person with no knowledge of tax codes and jargons.
- (4) He requested a UTR but did not receive it on time and therefore HMRC's slow processes are to blame for any delay.
- (5) HMRC did not notify him of the tax liability outstanding at 31 January 2017. The first notification he received regarding this liability was after September 2017 when he filed his claim for a tax refund, when they automatically deducted the tax they said was due.
- (6) He asked his payroll department and understands from them that HMRC did not provide them with the correct PAYE code.
- (7) He does not owe any tax to HMRC. He has met his tax obligations and HMRC was paid on time as his tax is deducted at source.
- (8) He does not know how to file a tax return because it was filed for the first time in 2011 by his employer's accountant (KPMG) and since then his salary has always been paid after deduction of tax.
- (9) He was not able to file the return on time because of the sad demise of one of his family members and had to fly back to his home country for that period.
- (10) Tax filing is an expensive process and he is not in a position to hire an expensive accountant. The only reason it was done in 2011 is because his employer paid for it.
- (11) He has written multiple letters regarding the fines imposed by HMRC. He has explained why one of the years' taxes were not filed on time and the fact that HMRC has pursued him after four years to impose a fine on a per day basis is totally unjustified. He will not be paying any fines. He has not received any

letter. He does not check his emails very often so it is better if communications are sent by normal letter.

5 (12) HMRC has no moral right to come back after years and charge a per day settlement amount. It only means that HMRC are inefficient and he does not see why he should pay for inefficiency.

(13) All his taxes have been deducted at source. There has been no tax default from his side.

(14) He confirms that all taxes in future will be filed on time, as were the latest ones.

10 **Facts**

3. The facts of the case according to HMRC are set out in their Statement of Case as follows:

15 (1) On 30 March 2016 Mr Kothari filed a SA1 form (registering for self-assessment and requesting a tax return). On this form Mr Kothari informed HMRC that he had income above £100,000 and requested a unique taxpayer reference number.

(2) The notice to file a tax return for the year 2015-16 was issued to the appellant on 6 April 2016.

20 (3) The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return.

(4) The appellant's non-electronic return for the year was received by HMRC on 8 June 2017.

25 (5) As the return was not received by HMRC by the filing date HMRC issued a notice of penalty assessment on or around 7 February 2017 in the amount of £100.

(6) As the return had not been received by HMRC three months after the penalty date HMRC issued a notice of daily penalty assessment on or around 11 August 2017 in the amount of £900, calculated at £10 per day for 90 days.

30 (7) As the return had still not been received by HMRC six months after the penalty date HMRC issued a notice of penalty assessment on or around 26 September 2017 in the amount of £300.

(8) Mr Kothari's tax liability for the year was £3,307.05, which was due to be paid on or before 31 January 2017.

(9) At the penalty date of 3 March 2017, £3,307.05 remained outstanding.

35 (10) Five months after the penalty date of 3 March 2017, £3,307.05 was still outstanding.

(11) The tax liability was finally paid in full on 25 September 2017.

(12) HMRC therefore issued penalty notices for the late payment of income tax on or around 26 September 2017 in the amount of 5% of the amount

outstanding at the penalty date, being £165.00, and 5% of the amount outstanding five months after the penalty date, being £165, giving a total penalty for late payment of £330.

5 (13) On 10 April 2017 Mr Kothari telephoned HMRC concerning his tax return. According to HMRC he was advised that he needed to complete a tax return because his income was above £100,000. The note of the telephone conversation indicates that a return for 2014/15 was issued at this time because this had not previously been issued. It makes no reference to reissuing a return for 2015/16, presumably because HMRC's system indicated that one had
10 already been issued.

(14) On 11 April 2017 Mr Kothari telephoned HMRC to inform them of a change of address from 142 Gloucester Place.

4. Mr Kothari states that he did not receive the notice to file a tax return and did not receive any letters from HMRC regarding the penalties or other amounts
15 outstanding until September 2017. Mr Kothari appears to have moved home on a number of occasions but once a taxpayer is registered on the self-assessment system it is his responsibility to notify HMRC of any change of address, and indeed, he seems to have done this on 11 April 2017.

5. HMRC's records show that they sent out the relevant notices to the most recent
20 address in their possession at the time which means that under the provision of s7 Interpretation Act 1978 the notices were properly served in accordance with the legislation. They then sent a number of reminders and penalty notices when the penalties started to accumulate and I find it hard to believe that so many notices and letters went astray in the post, but, importantly, I note that although Mr Kothari has
25 stated that he did not receive any letters or reminders from HMRC until September 2017, he did contact HMRC by telephone on 10 April 2017 to discuss his tax returns. This was a separate call from that on 11 April during which he notified HMRC of a change of address. I can only assume that the call on 10 April was in response to one of these penalty notices and I therefore find that, on the balance of probabilities, these
30 notices and letters were indeed properly served on the appellant and were received by him.

Legal framework

6. No penalty will be charged in respect of the late filing of a tax return if the appellant is considered to have a reasonable excuse for the late filing.

35 7. The expression "reasonable excuse" is not defined in the legislation but para 23(2) Sch 55 Finance Act 2009 does specify two situations that are not to be regarded as a reasonable excuse:

- (a) an insufficiency of funds, unless attributable to events outside the appellant's control, and
- 40 (b) reliance on another person to do anything, unless the appellant took reasonable care to avoid the failure.

8. In addition para 23(2)(c) Sch 55 provides that:

(c) where the person had a reasonable excuse for the failure but the excuse has ceased, he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

5 9. As stated above, the expression “reasonable excuse” is not defined in the legislation but has been the subject of a number of cases and was recently summarised very clearly in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) at para 81(3) as follows:

10 “The tribunal should decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the [First tier Tribunal] in this context, to ask itself the question
15 “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?””

10. Importantly, the test is whether or not the taxpayer’s behaviour is **reasonable** in his particular circumstances, and his knowledge and understanding of tax issues. No higher standard, and no lower standard, than that.

20 **Discussion**

11. At the heart of this appeal is Mr Kothari’s clear belief that he did not owe any taxes because he believed that his full liability had been deducted at source under the PAYE system. He did not therefore see any need to file a tax return. He was unfortunately wrong in this belief.

25 12. The PAYE system is a very efficient system, which manages to calculate correct tax liabilities for the vast majority of those within it. However, it cannot cope with salaries above £100,000 because the personal tax-free allowance, which is a vital element of the calculation of the tax code, is reduced, on a sliding scale, for incomes above that level. If a taxpayer earns £100,000 or less he receives the full tax-free
30 personal allowance, but for earnings above that amount the personal allowance reduces, such that with estimated earnings of £106,513, on which Mr Kothari’s tax code for 2015-16 was based, the allowance is reduced to £7,344, and by the time the taxpayer’s earnings exceed £120,000 the allowance would have been reduced to nil. This means that unless the PAYE code has been based on exactly the correct earnings
35 figure, incorrect tax will be deducted under the PAYE system. This appears to be what has happened in Mr Kothari’s case.

13. This is not of course the fault of Mr Kothari. It is a shortcoming in the system, and it is why HMRC insist that anyone earning more than £100,000 per annum must file a personal tax return. Otherwise they cannot calculate the correct amount of tax.

14. Mr Kothari has clearly been employed in the UK since 2011 and is therefore expected to be able to deal with his tax affairs competently, or, if he is unable to do so then he can reasonably be expected to employ someone to file a tax return on his behalf. Mr Kothari stated that he is not in a position to employ an expensive accountant, but if his tax affairs are as simple as they appear to be then it would be possible to employ an accountant to carry out this task at quite modest cost, and, given his level of income, I consider that it would be reasonable for him to employ an accountant to file his tax return on his behalf.

15. Importantly, in March 2016, Mr Kothari submitted a form SA1 informing HMRC that he earned more than £100,000 per annum and that he therefore needed to register for self-assessment and needed to file a tax return. He was clearly therefore aware of the requirement for him to file a tax return.

16. Mr Kothari has complained that HMRC did not tell him about the amount of tax outstanding at 31 January 2017. This would however have been impossible for them to do, because they did not have his income figures on which to base any such calculation. The UK self-assessment system is precisely what it says it is. It relies on the taxpayer to file a tax return and to pay his taxes in accordance with the figures calculated on that return. The taxpayer assesses himself. Until the return is filed therefore HMRC cannot be aware that there has been a shortfall in the amount of tax collected under the PAYE system.

17. Mr Kothari has stated that he was out of the UK for a period owing to the death of a family relative. This can indeed amount to a reasonable excuse for the late filing of a tax return in some circumstances, but Mr Kothari did not provide any further information about this absence such as dates or his relationship with the deceased. This absence of information was clearly set out in HMRC's statement of case, and Mr Kothari was given the opportunity to respond to this and to provide any supplementary information should he so choose, but he did not do so.

18. In subsequent correspondence Mr Kothari explained that the death in question was that of his grandmother, to whom he was very close. He has stated that she died in March 2017. Unfortunately this is significantly **after** the due date for the filing of an electronic return for 2015/16 of 31 January 2017 or that for a non-electronic return of 31 October 2016, and cannot therefore be considered as being a reasonable excuse for this failure.

19. Mr Kothari has also stated that he was out of the UK for some time following this very sad event, which may have further delayed the submission of his tax return. I note however that he contacted HMRC by telephone on 10 and 11 April 2017, which may indicate that he was back in the UK by this time.

20. Mr Kothari also expressed concern that HMRC were pursuing him after a delay of four years. However, the penalties relate to the tax year 2015-16, and were notified to him in 2017, only after his failure to file a return on time had happened. HMRC could not have applied the penalties earlier. I can only assume that Mr Kothari

believes that these penalties somehow relate to 2011-12 or 2012-13. They do not. They relate to 2015-16 and I do not see any evidence of HMRC delay in this regard.

21. He has finally claimed that HMRC are inefficient and that there has been no default on his part.

5 22. I can accept that HMRC's processes are on occasions quite slow, but they do have an enormous number of taxpayers with whom to deal, and I cannot see that they have been unusually inefficient in this case.

10 23. As regards the question of default on Mr Kothari's part I must regrettably come to the conclusion that there has been default on his part because he did not file his tax return on time and did not pay his tax on time. I fully accept that he genuinely believed that he had paid his full tax liability by way of deduction at source under the PAYE system, but unfortunately he was wrong in this belief. I cannot therefore find that Mr Kothari had a reasonable excuse either for the late filing of his tax return or for the late payment of the tax due.

15 24. Under the provisions of para 16 Sch 55 FA 2009 HMRC have the power to reduce penalties if they consider that there are "special circumstances". In their Statement of Case HMRC state that they have considered whether or not there are "special circumstances" in this case and have decided that there are not. I can only interfere with HMRC's decision regarding "special circumstances" if I believe their
20 decision to be fundamentally flawed, but unfortunately I can find no circumstances in this case which might qualify as "special" for the purposes of this provision and I cannot therefore find that HMRC's decision is flawed in this respect. I cannot therefore interfere with their decision.

Decision

25 25. For the above reasons therefore, I have decided that the appellant's appeal against the late filing penalties charged under paras 3, 4 and 5 Sch 55 Finance Act 2009 and the late payment penalties charged under paras 3(2) and 3(3) Sch 56 Finance Act 2009 should be DISMISSED.

30 26. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**PHILIP GILLETT
TRIBUNAL JUDGE**

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RELEASE DATE: 19 SEPTEMBER 2018