



TC06887

Appeal number: TC/2018/02242

Income tax - fixed and daily penalties for late filing of self-assessment returns for four years – application for permission to appeal out of time - Appellant had suffered family and financial problems necessitating returns to his native Poland – whether reasonable excuse continuing throughout default period - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARIUSZ MACIEJEWSKI

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER JOHN WILSON**

**Sitting in public at Bradford Tribunal Service, Phoenix House, Rushton Avenue,
Bradford on 6 August 2018**

The Appellant in person

Vicki Anne Wood, Officer of HMRC, for the Respondents

DECISION

The Appeal

- 5 1. This is an appeal by Mariusz Maciejewski ('the Appellant') against penalties totalling £3,400 imposed by the Respondents ('HMRC') under Paragraphs 3,4,5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax returns for the tax year ending 5 April 2011, 2012, 2013 and 2014 ('the default years').
- 10 2. The appeal was made outside the 30 day time limit within which penalties must be appealed. The Appellant therefore applies for permission to appeal out of time. HMRC object to the application.

Background

- 15 3. The Appellant's 2010-11 return, if filed electronically, was due on 15 February 2012. The returns for the other default years were due no later than 31 January in the year following each tax year. In summary:
- The Appellant's 2010-11 return was received on 21 February 2012, six days late, and showed a tax liability of £3,215.28.
 - 20 • The Appellant's 2011-12 return was received on 9 April 2015, two years and two months late and showed a zero tax liability.
 - The Appellant's 2012-13 return was received on 9 April 2015, one year and two months late and showed a zero tax liability.
 - 25 • The Appellant's 2013-14 return was received on 9 April 2015, two months late and showed a zero tax liability.
4. The penalties for late filing of a return can be summarised as follows:
- 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.
 - 30 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.
 - 35 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.

5. A Penalty of £100 was imposed for each of years 2010-11 and 2013-14 under paragraph (i) above; penalties of £100, £900 £300 and £300 were imposed for each of years 2011-12 and 2012-13 under paragraphs (i) to (iv) above.

6. The Appellant's appeal is against all the penalties.

Filing date and Penalty date

7. Under s 8(1D) TMA 1970 a non-electronic return must normally 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.

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

Reasonable excuse

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 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.

10. The law specifies two situations that are not reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

11. 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).

12. 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.

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

The background

14. The notice to file for the year ending 5 April 2011 was issued to the Appellant on 6 April 2011. The filing date was 15 February 2012.

5 15. The notices to file for the other default years were issued to the Appellant on 6 April for each tax year. The filing date was 31 October for a non-electronic return or 31 January in the following year for an electronic return.

16. The Table below shows the number of 'days late' in respect of each year's return and the penalties imposed.

Date	Tax Year	Event	£ penalty	Days Late		
31/01/2012	2010/11	Return Due		0		
21/02/2012	2010/11	Penalty	100	21		
31/01/2013	7011/12	Return Due	300	366		
12/02/2013	2011/12	Penalty		0		
14/08/2013	2011/12	6 month penalty	300	183		
14/08/2013	2011/12	Daily penalty	900	183		
25/02/2014	2011/12	12 month penalty	300	378		
31/01/2014	2012/13	Return Due		0		
18/02/2014	2012/13	Penalty	100	18		
18/08/2014	2012/13	6 month penalty	300	199		
18/08/2014	2012/13	Daily penalty	900	199		
24/02/2015	2012/13	12 month penalty	300	389		
31/01/2015	2013/14	Return Due		365		
18/02/2015	2013/14	Penalty		383		
15/02/2018		Late Appeal	Days Late	2177	1799	1446

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17. Section 31A TMA 1970 requires that appeals against a penalty are made within 30 days. On 15 February 2018 the Appellant (via his agent) submitted a late appeal to HMRC against all the penalties.

15 18. On 2 March 2018 HMRC wrote to the Appellant's agent rejecting the late appeal because it was out of time.

19. On 23 March 2018 the Appellant (via his agent) lodged an out of time appeal with the Tribunal. The grounds of appeal were (paraphrased and so far as relevant to the appeal) :

20 "A series of events and personal circumstances have seriously hindered my ability to comply with my tax liabilities, and manage my private affairs. The difficulties began around the start of 2010, when a series of events within my family in my home country

of Poland led to several disruptions in my everyday life, and required me to dedicate more time and financial support back home. This culminated in the death of my father on the 14 May 2010.

5 It was at this point that I began to lose the ability to manage my private affairs, causing the majority of the penalties to be incurred. The death of my father due to it being a suicide, invalidated not only his insurance policy but also required that his personal debts be transferred to his heirs as part of the inheritance package. This required me to travel to Poland numerous times in order to settle court actions with the aim of renouncing the inheritance. I therefore incurred further financial difficulties in these
10 trips around the time of 2011.”

The Appellant in his grounds of appeal then describes a distressing dispute with his landlord regarding unsuitable living accommodation. At the appeal hearing the Appellant said that he received all the penalty notices but just ignored them. He said “I had so many debts caused by my late father, I couldn’t cope.”

15 *Relevant statutory provisions*

Taxes Management Act 1970

20. Section 8 - 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
20 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

25 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

30 (b) where the notice under this 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
35 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.]

5 (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 this 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.

10 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this 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.

15 (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

20 (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-

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

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

(2) Every return under this 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.

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

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

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

5 (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.

(5) In this section and sections 8A, 9 and 12AA of this 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.

Schedule 55 Finance Act 2009:

10 21. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

22. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

23. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

15 24. 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 this paragraph if (and only if)-

- 20 (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.

25 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

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

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

35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

- 40 (2) The penalty under this paragraph is the greater of-
(a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

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

(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.

27. Paragraph 20 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 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.

28. Paragraph 23 contains a defence of “reasonable excuse” as follows:

(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.

HMRC's Case

29. The application for permission to bring a late appeal is made pursuant to rule
5 20(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

30. HMRC objects to the application and contends that the Tribunal should not exercise its discretion to allow the Appellant's application to appeal out of time. There has been a lengthy delay; the appeals against the penalties are between six years for the first default year and three years for the last default year, out of time.

10 31. Mr Justice Morgan in *Data Select Limited and the Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 187 (TCC) said [at paragraph 34},

15 "As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) Is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? (5) What will the consequences for the parties of a refusal to extend time?"

32. What is the purpose of the time limit? The purpose is to ensure that both the taxpayer and HMRC have finality and certainty.

20 33. How long was the delay? The length of the delay varies between over six years to over one year. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UK I JT 254 (TCC), the Upper Tribunal refused permission for a late VAT appeal to proceed. At paragraph 96 the Tribunal noted:

25 "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

.. That permission to appeal out of time should only be granted exceptionally meaning that it should be the exception rather than the rule and not granted routinely."

30 34. HMRC therefore submit that the Appellant's delay cannot be considered anything but serious and significant.

35. Late filing penalties for the default years are due in accordance with Schedule 55 FA 2009, even if the Appellant had no tax to pay.

35 36. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information and warnings of penalties were clearly shown on the notice to file issued to the Appellant for each of the default years.

37. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure his tax returns were filed by the legislative date and payment of any tax due made on time.

5 38. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. 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.

10 39. The notice to file issued to the Appellant in each default year included generic information relating to the penalty regime, in order to encourage customers to file their return on time.

15 40. HMRC issued to the Appellant a late filing fixed penalty notice on 21 February 2012 in respect of his late 2010-11 return, informing him that he had been fined because the tax return had not been received and to submit his tax return to prevent further penalties being charged.

41. In each year HMRC issued 30 day daily penalty reminder letters to the Appellant and these would have informed him that his tax return was still outstanding and to send it to HMRC to prevent further penalties.

42. Notices of reminder and penalties notices were issued for all the default years.

20 43. 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.

Special Reduction

25 44. 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 save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

30 45. In other contexts "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).

35 46. HMRC have considered the particular circumstances put forward by the Appellant and the fact that he only had a tax liability for one of the four years. These are not special circumstances which would merit a reduction of the penalties below the statutory amount.

47. 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
5 HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

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

10 *Conclusion*

49. The Appellant's appeal to the Tribunal is inordinately out of time.

50. As HMRC say, the Tribunal should grant permission to appeal out of time only exceptionally and based on compelling reasons showing why an appeal could not have been made in time, or at least within a reasonable time after the 30 day time
15 limit.

51. We accept that the Appellant had family problems and had to make frequent visits to Poland. We also accept that the circumstances he describes must have been very distressing.

52. However, in considering whether to grant permission to appeal out of time, a
20 number of factors must be taken into consideration including the length of the delay in bringing the late appeal, the reasons why the delay occurred and the merits of the appeal.

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

30 54. Is there a good reason for the delay? The Appellant received numerous penalty assessments between February 2012 and February 2014. In addition, he would have received periodic statements showing each penalty as and when it was issued.

55. The Appellant has not offered any reason why he could not have sought help to file his returns and submit an appeal sooner than 23 March 2018, more than six years
35 after the first default year penalty.

56. The Appellant was able to maintain his day-to-day business and manage his other affairs throughout most of the default years.

57. HMRC sent numerous late filing penalties to the Appellant which should have acted as a prompt to him that his returns had not been received.

58. The Appellant had filed his 2010-11 return, albeit 6 days late, and would have been aware of the filing dates. He has not produced any evidence to show why he could not have appointed an agent or put in place measures to ensure the timely submission of his tax returns for years 2011-12 to 2013-14.

59. The Appellant has not produced any evidence to show why he was unable to file or make arrangements for the timeous filing of returns for 2011-12, 2012-13 and 2013-14.

60. We take into account and accept HMRC's submissions as set out in paragraphs 30 to 49 above, which address the lateness of the appeal, the grounds of the appeal, and special circumstances.

61. The late filing penalties have been charged in accordance with legislation and no reasonable excuse has been shown for the Appellant's failure to file his tax returns on time.

62. We find that there are no special circumstances which could allow the penalty to be reduced under Special Reduction regulations.

63. Having taken into account the length of delay in bringing the appeal out of time and the merits of the appeal, the application to appeal out of time is refused and the late filing penalties are confirmed.

64. 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: 19 DECEMBER 2018