



**TC07287**

**Appeal number: TC/2018/08214**

*INCOME TAX – self-assessment – late filing penalties – unaware return  
had not been filed – whether reasonable excuse – no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MATTHEW LINCOLN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 3 July 2019 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 20 December 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 February 2019.**

## DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the 2016-17 tax year on time.
2. The penalties that have been charged can be summarised as follows:
  - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018; and
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018
3. The appellant’s grounds for appealing against the penalties can be summarised as follows: [**Drafting note, grounds of appeal:** *You will need to amend as necessary to take into account the specific grounds of appeal, so not all of these will be relevant and some may need to be adapted:*
  - (1) [He argues that the relevant return was submitted on time.]
  - (2) [He argues that there were defects in the penalty notices that caused them to be invalid. **Note:** *A number of these arguments may be determined by the Donaldson decision – see below.*]
  - (3) [He argues that HMRC have failed to assess the penalty within the period permitted by paragraph 19 of Schedule 55 – *This is likely to be rare given that HMRC’s systems generate penalties automatically but it is included just in case the point is raised.*]
  - (4) [He argues that there was a “reasonable excuse” for any failure to submit the return on time].
  - (5) [He argues that, owing to the presence of “special circumstances”, the amount of the penalty should have been reduced.]
4. The appellant’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline, as the last day to appeal the latest of the penalties was 9 September 2018. The appellant appealed to HMRC on 2 December 2018. HMRC refused consent to bring a late appeal under s49(2)(a) of TMA 1970 and have opposed the appellant’s application to make a late appeal to the Tribunal. However, HMRC have now prepared a full Statement of Case which deals with the substantive appeal.
5. The appellant stated that he was not aware of the penalties until 23 October 2018. He appealed against the penalties on 2 December 2018, more than a month after the date on which he states he became aware of the penalties being due. Although this is a delay (on any measure) in comparison to the period allowed by statute for an appeal, HMRC have prepared a complete Statement of Case addressing the

substantive matter and so I do not consider that HMRC will be unduly prejudiced by the matter being considered in full. The appellant's application for permission to make a late appeal is therefore allowed.

### **Appellant's case**

6. The appellant's case can be summarised as follows:

(1) He completed his self-assessment return on 10 January 2018 and, as far as he was aware, the forms were submitted and no further action was required. He was awaiting a small refund, as indicated when he had completed his self-assessment. He now considers that a system issue may have caused the return not to be received.

(2) On 23 October 2018 he received a notice of late penalties. This was the first time he was aware that the penalties were accruing. He contacted HMRC who advised him to resubmit his return and appeal the penalties.

(3) He is a PAYE tax payer and has always previously completed his tax return on time.

(4) He does not check HMRC's online portal regularly as he is a PAYE tax payer and so has no need to check account balances.

### **HMRC's case**

7. HMRC submitted, in summary:

(1) The appellant had opted into HMRC's self-assessment digital service on 7 June 2016 and so his notice to file, and subsequent penalty notices, were issued to his secure mailbox on his HMRC online account. An email alert was also sent at the same time on each occasion, advising the appellant to check his online account for new messages.

(2) HMRC records do not show any evidence of a tax return being filed on 10 January 2018. They show only that a return was successfully submitted on 29 October 2018. HMRC has no access to a taxpayer's online account and can only see a tax return when it has been filed.

(3) To submit a return online, a taxpayer must read and agree a statement confirming that the information provided is complete and correct. When the return has been successfully submitted, the taxpayer will receive an onscreen message confirming receipt and a confirmation email sent to the address on records. HMRC submitted that, as the appellant had been filing tax returns for a number of years, he would be aware of the confirmation messages and should have been alerted to the fact that no return had been submitted when no confirmation message was received.

(4) HMRC submitted that it would be reasonable to expect a taxpayer to check that a confirmation message had been received, and that the appellant has submitted no evidence to show that he had filed his tax return in January 2018.

(5) HMRC also submitted that if the appellant had checked his email regularly the first penalty notice would have alerted him to the fact that his online submission had not been received and he could have remedied the position earlier.

(6) Although the appellant had not argued that special circumstances existed, HMRC considered whether any special circumstances existed which would merit a reduction in the penalties and concluded that the appellant's belief that the return had been submitted did not amount to special circumstances and that no such special circumstances existed.

### **Findings of fact**

8. HMRC's computer records show that a notice to file was issued to the appellant on 6 April 2017. The appellant has not disputed receiving that notice to file and I therefore find that the notice to file was correctly issued.

9. The appellant's tax return was filed online and was therefore due on or before 31 January 2018. Although the tax payer believed he had filed a return in January 2018 he accepted that the return had not been received by HMRC on that date and did not dispute that the return was submitted and received by HMRC on 29 October 2018.

10. HMRC's records show that penalty notices were issued to the appellant's secure mailbox on his self-assessment online account on the relevant dates, and an email alert sent to the email address on record on each occasion, and that the emails did not bounce back to HMRC as undelivered. The email address in HMRC's records is the same email address used by the appellant to submit his appeal to the tribunal and in subsequent correspondence. I find therefore that the penalty notices were correctly issued.

### **Discussion**

11. Relevant statutory provisions are included as an Appendix to this decision.

12. I have concluded that the tax return for the 2016-17 tax year was submitted on or around 29 October 2018. It should have been submitted by 31 January 2018. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

13. There is no statutory definition of "reasonable excuse"; it is an objective test to be considered in the circumstances of the particular case. The test is what a reasonable and prudent taxpayer intending to comply with their tax obligations, in the position of the appellant, would have done in the same circumstances (*Perrin* [2018] UKUT 0156 (TC)).

14. I consider that it is clear that the appellant made a mistake in January 2018 and did not successfully complete the filing of his tax return. He then did not check his online account when HMRC sent him email alerts notifying him that he had new messages, as he apparently believed he had no need to check the account as he pays

tax through PAYE. The appellant has not stated that he did not receive the email alerts and they were clearly sent to the same email address as that used for the appellant's appeal to this tribunal.

15. Applying the test in *Perrin*, I consider that a reasonable and prudent taxpayer, mindful of the need to comply with their tax obligations, would have checked their online account when receiving alerts from HMRC and so would have discovered their mistake earlier.

16. I agree with Judge Hellier in *Garnmoss* [2012] UKFTT 315 (TC) that the legislation does not provide shelter for mistakes, but only for reasonable excuses. That case concerned a VAT default surcharge, but I consider that the principle is applicable to other tax penalties.

### **Conclusion**

17. For the reasons set out above, I find that the appellant does not have a reasonable excuse for the late filing of his tax return. The appeal is dismissed and the penalties upheld.

### **Application for permission to appeal**

18. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

**ANNE FAIRPO**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 26 July 2019**

## **APPENDIX – RELEVANT STATUTORY PROVISIONS**

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

4—

- (1) P is liable to a penalty under this paragraph if (and only if)—
  - (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.
- (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).
- (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).

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

5—

- (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.
- (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.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

- (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 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (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.

(6) Paragraph 6A explains the 3 categories of information.

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

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.

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

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.

7. 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:

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.