

[2020] UKFTT 211 (TC)



TC07697

Appeal number: TC/2019/06059

***Income Tax – whether reasonable excuse for late filing penalties under section 56 FA2009 –
No – Whether special circumstances for reduction of penalties – No – Appeal Dismissed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

K Tulloch

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: DR K KHAN

The Tribunal determined this appeal on 6 April 2020 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 3 October 2019 with enclosures and HMRC Statement of Case submitted on 9 January 2020.

MATTER UNDER APPEAL

The matter before the Tribunal is an appeal against late filing penalties charged under Schedule 55, Finance Act (FA) 2009 in respect of the late filing of a Self-Assessment (SA) Individual Tax Return.

A copy of the 1st appeal to Tribunal is at folio 1-2. A copy of the 2nd appeal is at folio 27-28. The late filing penalties charged in the amount of £1300 are as follows:

Tax Year ending	Date penalty Created/issued	Description	Amount (£)
05/04/2018	26/03/2019	Individual late filing penalty	100
	09/08/2019	Daily Penalties	900
	09/08/2019	6-month Penalty	300
		Total	1300

BACKGROUND

1. SA is based on voluntary compliance. Taxpayers who are within the SA system must file their returns by the due date and pay the tax they owe by the date specified in law.
2. The filing date is determined by Section 8(10) TMA 1970 et seq. which states that for the year ended 5 April 2018 a non-electronic return must be filed by 31 October 2018 and an electronic return by 31 January 2019. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

FACTS

3. The full return for the year was issued to Mr Tulloch on or around 6 April 2018.
4. In accordance with Paragraph 3 of Schedule 55 FA 2009, as Mr Tulloch did not submit a return by the filing date, he was liable to a penalty of £100. HMRC issued notice of penalty assessment on or around 26 March 2019 in the amount of £100. The notice (SA326D) serves as a warning of the daily penalties so satisfies the requirement of Sch 55 FA 2009 para 4(1)(c). This view was confirmed in the Upper Tribunal decision *HMRC v Donaldson* (2014) UKUT535.
5. Pursuant to Paragraph 4 of Schedule 55 FA 2009, as the return had still not been received 3 months after the penalty date, Mr Tulloch was liable to daily penalties of £10 per day up to a period of 90 days. HMRC issued a notice of daily penalty assessment on or around 9 August 2019 in the amount of £900, calculated at £10 per day for 90 days.

6. Pursuant to Paragraph 5 of Schedule 55 FA 2009, as the return had still not been received 6 months after the penalty date, Mr Tulloch was liable to a penalty of £300. HMRC issued a notice of penalty assessment on or around 9 August 2019 in the amount of £300.

7. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2009.

THE APPEAL

8. On 2 May 2019 Mr Tulloch appealed under the terms of paragraph 20 Schedule 55 FA 2009 in respect of the penalties charged.

9. HMRC issued its view of the matter in a letter to Mr Tulloch upholding the decision to charge the penalty. This letter also offered a statutory review or the option to appeal to the First Tier Tribunal.

10. Mr Tulloch accepted an offer of a review.

11. HMRC issued its conclusion of review letter to Mr Tulloch which upheld the decision to charge the late filing penalty.

12. On 11 September 2019, Mr Tulloch lodged an appeal before the Tribunal. On 3 October 2019, he lodged a 2nd appeal with the Tribunal against penalties that had accumulated since his 1st appeal because his return had still not been submitted.

POINTS AT ISSUE

13. Whether the Appellant has a reasonable excuse for the late filing of the individual tax return for the period in question.

14. If a reasonable excuse exists, whether the return was received without any unreasonable delay once any excuse had ended.

BURDEN OF PROOF

15. The onus of proof is for the Respondents to show that the penalties have been correctly calculated. The burden then shifts to the Appellant to demonstrate that a reasonable excuse exists for the default.

STANDARD OF PROOF

16. The standard of proof is the ordinary civil standard which is on the balance of probabilities.

LEGISLATION & CASE LAW

17. Section 8 Taxes Management Act 1970
Schedule 55 Finance Act 2009 - paragraph 3, 4, 5 and 6
Schedule 55 Finance Act 2009- paragraph 1 (1), (4) & (5)
Schedule 55 Finance Act 2009 - paragraph 20
Schedule 55 Finance Act 2009 - paragraph 23
Schedule 55 Finance Act 2009 - paragraph 16
Schedule 55 Finance Act 2009 - paragraph 22
CH170600 What are special circumstances.

APPELLANT'S CONTENTIONS

18. He was not self-employed during this period of time but he was employed and all his taxes and national insurance was paid by the company so these late charges do not apply to his work circumstances. He said his employer (Pillars Construction) deducted and paid tax on his income and he was due a tax rebate on overpayment.

HMRC'S CONTENTIONS

19. HMRC records show the tax return has not been received to date but should have been delivered to HMRC by 31 October 2018 if paper or 31 January 2019 if electronic in accordance with Section 8(10) TMA 1970.

20. Paragraph 1 of Schedule 55 to FA 2009 provides that: -

1(1) A penalty is payable by a person ("P") where P fails to make or deliver a return..., on or before the filing date.

21. HMRC said that the return was not delivered by the filing date, and the Late Filing Penalty is therefore payable under paragraph 3 of Schedule 55 FA 2009. They also say that there is no reasonable excuse as the appeal should be dismissed.

DISCUSSION

22. Let us start by looking at the law.

23. Paragraph 23 of Schedule 55 FA 2009 specifically 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 there is a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended. Reliance on a third party and insufficiency of funds are not reasonable excuses.

24. There is no statutory definition of reasonable excuse, which "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).

25. A reasonable excuse needs to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. It is necessary to consider what a reasonable person, who wanted to meet their obligation would have done in the same circumstances and decide if the action of the person met that standard as outlined by Judge Medd in *The Clean Car Company* (LON 90 138X)

"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? Put in another way which does I think alter the sense of the question; was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?"

26. The legal position was considered in *Christine Perrin v Commissioners for HMRC* (12018] UKUT 0156 (TCC)). Whilst confirming at paragraph 70 of that decision that reasonable excuse should be judged objectively, Judge Herrington stated at paragraph 71

*"In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coates*)."*

27. And at paragraph 74:

"Where a taxpayer's belief is in issue, it is often put forward as either the sole or main, fact which is being relied on - e.g. 'I did not think it was necessary to file a return', or I genuinely and honestly believed that I had submitted a return'. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however, that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual SA returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

28. The excuse must be objectively reasonable taking into account the experience and attributes of the tax payer.

29. Whether a person has a reasonable excuse will depend on the particular circumstances in which the failure occurred and the abilities of the person who has failed. What is a reasonable excuse for one person may not be a reasonable excuse for another person. If there is a reasonable excuse it must exist throughout the failure period.

30. In order for Mr Tulloch's appeal to succeed, he must demonstrate that a reasonable excuse existed which prevented him from complying with his Income Tax obligations. HMRC have concluded, based on the evidence held, that no reasonable excuse exists for the late submission of the Individual tax return and the penalties were correctly charged in accordance with legislation.

31. HMRC refutes that he was not self employed during 2017-2018 and has evidence to show he was, specifically from 10 April 2017 to 1 November 2017. The evidence disclosed does show this period as a period of self employment by the Appellant. This meant he should complete a SA return. This information including dates was provided by Mr Tulloch himself. Any allowances should have been claimed via the SA return and he was told by HMRC to complete this from as early as 8 February 2018 and on 15 August 2018, 24 July 2018 and 25 September 2010. In the circumstances, the tribunal does not accept that the Appellant has a reasonable excuse.

SPECIAL REDUCTION

32. Under Paragraph 16 of Schedule 55, Finance Act 2009 provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances.

33. HMRC's policies on penalties are set out in the Compliance Handbook, and CH170600,

defines "special circumstances" as follows:

34. Special circumstances are either:

- i. uncommon or exceptional, or
- ii. where the strict application of the penalty few produces a result that is contrary to the clear compliance intention of that penalty law.

35. To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

36. In the case of *Barry Edwards v HMRC* [2019] UKUT 137 (TCC), it was confirmed that the Schedule 55 regime was proportionate and penalties are correctly due even in circumstances where there is no additional tax liability.

37. Mr Tulloch makes several statements about his circumstances in his appeal letters to support the view that he should not have been charged penalties under schedule 55 FA 2009. HMRC has considered Mr Tulloch's statements in light of paragraph 16(2) and found he was self employed in the relevant period which mean a SA return should have been completed.

38. Accordingly, HMRC have considered the circumstances described by Mr Tulloch that there is nothing uncommon nor exceptional, nor do they suggest that the strict application of the penalty law produces a result that is contrary to the clear compliance intention of the relevant law in his case.

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

40. The Tribunal finds that the decision not to reduce the penalties under paragraph 16 was not flawed and there are no special circumstances which would require the Tribunal to reduce the penalties.

CONCLUSION

41. The Tribunal finds:

42. That Mr Tulloch did not have a reasonable excuse lasting throughout the period for the late submission of his individual return for the period ending 5 April 2018.

43. There are no special circumstances which would allow the penalty to be reduced under Special Reduction.

44. The penalties imposed in the amount of £1300 were correctly charged in accordance with legislation and that the appeal be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

TRIBUNAL JUDGE: DR KAMEEL KHAN

RELEASE DATE: 5 MAY 2020