



TC07845

INCOME TAX – penalty for failure to make returns- Schedule 55 Finance Act 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09568

BETWEEN

NICK HONEYBUN

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE FIONAGH GREEN
RAYNA DEAN**

The hearing took place on 28 August 2020 and, with the consent of the parties, the form of the hearing was by remote video platform. A face to face hearing was not held because of covid precautions and it was decided that a remote hearing was appropriate. It was directed that the hearing should be by remote hearing. It was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Mr Richard Smith accountant for the Appellant

Miss Annabel Williams litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Honeybun 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 tax year 2017 - 2018 on time. The appeal was notified to HMRC within 30 days of the penalty assessment.
2. The penalties that have been charged can be summarised as follows:
3. Tax Year 2017 – 2018
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55
 - (2) “Daily” penalties totalling £830 under paragraph 4 of Schedule 55
4. Mr Honeybun accepted that the late filing penalty was correct but disputed the daily penalties.
5. HMRC’s position was that the penalties were correctly imposed. Mr Honeybun did not have a reasonable excuse for the late filing. There were no special reasons and that the penalties were proportionate.
6. The Tribunal decided that that the penalties were correctly imposed and that Mr Honeybun did not have a reasonable excuse for the late filing. The Tribunal decided that there were no special reasons and that the penalties were proportionate.

The Appeal Submissions -

7. Mr Honeybun’s grounds for appealing against the penalties can be summarised as follows:
 - (1) He genuinely believed that he had filed the return in 2018 but was prepared to accept that he had not done so and did not take issue with the £100 late filing penalty
 - (2) He had not received the reminder letters. HMRC failed to communicate with his accountants P J Molloy & Co Limited and they did not receive the reminder letters.
 - (3) No tax was due and the daily penalties were excessive, not proportionate and in breach of his human rights
8. HMRC’s submissions can be summarised as follows:
 - (1) The 2018 self-assessment return was not delivered by the filing date and the penalties are payable
 - (2) There is no reasonable excuse

(3) There are no special circumstances and the decision was not flawed

(4) The penalties are not disproportionate

The Law

9. 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.

1. 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).

2. 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.

3. 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.

4. 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 subparagraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

The evidence

10. The Tribunal was provided with a bundle of documents of 149 pages and supplemental bundle of 69 pages from HMRC, which included correspondence and emails between HMRC Mr Smith and P J Malloy Accountants who had previously prepared Mr Honeybun’s self-assessment returns. Mr Honeybun provided oral evidence and was cross-examined by Miss Williams.

Findings of fact

11.

1. On the basis of the evidence provided, the Tribunal finds the following facts.

2. The Tribunal was satisfied that notice to file was sent to Mr Honeybun to the address of 60 Victoria Avenue BH9 2RP. The address is his mother's address and he used this as he 'moved around a bit' and he had been living at his mother's address. It was the address he chose to use for correspondence.

3. The filing date for the return was 31 October 2018 for a non-electronic return or 31 January 2019 for an electronic return.

4. Mr Honeybun's electronic return was received on 22 July 2019 which was 172 days late.

5. Mr Honeybun did not submit a return by the filing date of 31 January 2019 and he is liable to a penalty of £100. Mr Honeybun had 'got it into his head' that he had handed the documents required for his return to his accountant. Mr Honeybun accepts that the return was late and that the penalty is correctly due and payable. It is not the usual practice for Mr Honeybun to submit the return himself and all previous returns had been submitted by his agent.

6. HMRC issued a notice of penalty assessment on or around 26 March 2019 in the amount of £100 to his address of 60 Victoria Avenue BH9 2RP. The notice gave warning of the daily penalties and satisfies paragraph 4 (1) (c) of Schedule 55 of the Finance Act 2009.

7. The return had still not been received 3 months after the penalty date and Mr Honeybun is liable to daily penalties of £10 per day. HMRC issued a 30 day daily penalty reminder on 4 June 2019 to the address of 60 Victoria Avenue BH9 2RP. HMRC issued a 60 day penalty reminder on 2 July 2019 to the address of 60 Victoria Avenue BH9 2RP.

8. The return was received on 22 July 2019 and triggered the notice of daily penalty on 23 July 2019 in the amount of £830 calculated at £10 per day for 83 days to the address of 60 Victoria Avenue BH9 2RP.

9. We therefore concluded that the tax return for the 2017 – 2018 tax year was late. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

10. Mr Honeybun's agent appealed against the penalties that had been charged..

11. Mr Honeybun was legally obliged to file a return when the notice to file was issued. The notice to file, the notice of penalty assessment and the notices of daily penalties were sent to the address of 60 Victoria Avenue BH9 2RP. The address is an address which Mr Honeybun uses for his correspondence and he calls in to visit his mother for a cup of tea and to collect his post approximately every fortnight. He half expected that copies of correspondence and notices from HMRC would also go to his accountant. No correspondence or notices were returned to HMRC. The notice to file, the notice of penalty assessment and notices of daily penalties were effectively served by the provisions of section 115 Taxes Management Act 1970 and section 7 of the Interpretation Act 1978. There were no defects in the penalty notices.

12. HMRC did not send copies of the notices to Mr Honeybun's accountants PJ Molloy & Company which may be a matter of complaint. The agents were authorised agents. The agents had previously submitted the returns and there had been good compliance. The obligation as a taxpayer to file a return is Mr Honeybun's obligation. The return was not received by the filing deadline of 31 January 2019 and HMRC issued a SA326D notice of penalty assessment on or around 26 March 2019 to the address on record. The notice serves as a warning of the daily penalties and satisfies the requirement of Schedule 55 Finance Act 2009 para 4 (1) (c).

13. The Tribunal considered if there was an excuse put forward which was capable of being a reasonable excuse, or if one of the statutory exclusions in paragraph 23(2) of Schedule 55 prevented an excuse from being a reasonable excuse.

14. The Tribunal noted the decision of the Upper Tribunal in [Perrin v HMRC \[2018\] UKUT 156 \(TCC\)](#) which sets out guidance that the Tribunal should follow when evaluating "reasonable excuse" arguments. HMRC sometimes express the view that a "reasonable excuse is normally an unexpected or unusual event that's either unforeseeable or beyond your control". There are some echoes there of Scott LJ's dissenting judgment in *Stephoe*. The majority of the Court of Appeal in *Stephoe* considered that an event did not have to be "unforeseeable or inescapable" in order to constitute a "reasonable excuse".

15. The Tribunal decided that there was no reasonable excuse which prevented Mr Honeybun from complying with his Income Tax obligations. There was no excuse put forward by Mr Honeybun which was capable of being a reasonable excuse. Mr. Honeybun did not check with his accountant that the assessment had been filed. Mr Honeybun did not check with his accountant that any copy correspondence or notices were received and acted on by them. Mr Honeybun spoke to his accountant in January 2019 when he said to them that he believed he had filed the return which was not correct. No checks were made

16. HMRC did consider the question of special circumstances set out in paragraph 22 (4) of Schedule 55. HMRC considered whether the decision to impose the penalties were so demonstrably unreasonable as to be irrational or perverse such that no reasonable authority could ever have come to that decision. HMRC considered whether there were any uncommon or exceptional circumstances or a result that was contrary to the clear compliance intention of the penalty law and decided that there were no special circumstances. Mr Honeybun was in the self-assessment process and had not filed a return as required to do so by the notice. The failure continued after the notice of the penalty assessment was sent and after the warning of further penalties and no special reduction applies. The Tribunal decided that the decision to impose penalties was not flawed and there are no special circumstances which allow the penalties to be reduced.

17. Mr Honeybun raised an issue regarding proportionality because he had no tax liability for the relevant tax year. As noted at paragraph 16 of this decision, this Tribunal does, in certain circumstances, have the power to reduce a penalty because of the presence of "special circumstances". In *Barry Edwards v HMRC [2019] UKUT 0131 (TCC)*, the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a

relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty. It follows that we have concluded that the mere fact that Mr Honeybun had no tax liability for the relevant tax year does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of special circumstances. There is no breach of Mr Honeybun's human rights.

18. The appellant's arguments that there were defects in the penalty notices, and in the procedure that HMRC followed when issuing them, were considered, and rejected, by the Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761. Since we are bound by that decision, we have no alternative but to reject those arguments.

Conclusion

The Tribunal finds that the £100 penalty for the late filing was correctly charged and also accepted by Mr Honeybun. The penalties imposed in the amount of £830 were correctly charged in accordance with the legislation. The penalties are affirmed and the appeal 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.

**FIONAGH GREEN
TRIBUNAL JUDGE**

Release date: 16 September 2020