



TC08027

INCOME TAX – penalty for failure to make returns – reasonable excuse – special circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/08341

BETWEEN

KHALID IBNAHATEN

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

The Tribunal determined the appeal on 5 February 2021 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 6 November 2019 (with enclosures), HMRC's Statement of Case and the bundle of documents prepared by HMRC.

DECISION

INTRODUCTION

1. This is an appeal against penalties that HMRC has imposed under Schedule 55 to the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns for the tax years 2015-16 and 2016-17 on time.

SUMMARY OF PENALTIES CHARGED

2. The penalties that have been charged and are under appeal amount to £3,200. That figure is made up of:

- (1) Two £100 late filing penalties under paragraph 3 of Schedule 55 imposed on:
 - (a) 24 March 2017 in relation to tax year 2015-16;
 - (b) 22 March 2018 in relation to tax year 2016-17;
- (2) Two £300 “six month” penalties under paragraph 5 of Schedule 55 imposed on:
 - (a) 17 September 2017 in relation to tax year 2015-16;
 - (b) 16 September 2018 in relation to tax year 2016-17;
- (3) Two £300 “twelve month” penalties under paragraph 6 of Schedule 55 imposed on:
 - (a) 29 March 2018 in relation to tax year 2015-16;
 - (b) 28 March 2019 in relation to tax year 2016-17; and
- (4) “Daily” penalties under paragraph 4 of Schedule 55 as follows:
 - (a) £900 in relation to tax year 2015-16 imposed on 17 September 2017;
 - (b) £900 in relation to tax year 2016-17 imposed on 16 September 2018.

PARTIES ARGUMENTS

Taxpayer’s arguments

3. Mr Ibnahaten’s adviser submits that:
- (1) The amounts of the penalties were “unreasonable”;
 - (2) “This is a simple case of disproportionate penalty. The appellant doesn’t have any ground acceptable by statute (as amended) for his failure to comply with the Tax Law”;
 - (3) “There is no compelling reason why he failed to file his tax return on time”;
 - (4) Slippages such as this are very common among “low earning uneducated manual workers” and there is “inadvertent ignorance” about compliance issues amongst such workers such that they are “ambivalent and not equipped enough to seek professional advice”, driven by a misunderstanding that all tax is collected through their employers.
 - (5) If he had been working through an employer rather than through the construction industry scheme, this would not have happened.

HMRC arguments

4. HMRC submits that:

- (1) the notices to file were issued validly on 6 April in each of the relevant years;
- (2) the tax returns were due (assuming electronic filing) on 31 January 2017 and 2018 respectively;
- (3) the tax returns were not received until 21 March 2019;
- (4) penalty notices for initial late filing, daily penalties, 6 month and 12 month penalties were validly issued in relation to the lateness of the returns;
- (5) the taxpayer has not shown that he had a reasonable excuse for the late filing;
- (6) the taxpayer does not have any special circumstances that would warrant reduction of the penalties; and
- (7) the penalties are not disproportionate (relying on the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 0131).

DISCUSSION

5. There are three issues for me to determine:

- (1) Whether Mr Ibnahaten filed his tax returns late;
- (2) Whether the penalties were validly charged by HMRC; and
- (3) If so, whether there is anything that should reduce the amount of the penalties, i.e. reasonable excuse or special circumstances (including proportionality).

Were the returns filed late?

6. Nothing in the evidence or submissions suggests that Mr Ibnahaten is challenging either the receipt of notices to file or that the returns were submitted late.

7. On the contrary, the statements made in the notice of appeal infer an acceptance that the returns were filed late and that there had been non-compliance.

8. HMRC included print outs from their computer systems that suggest notices to file were issued on 6 April 2016 and 6 April 2017 for the respective years. The print outs also record that the returns were filed on 21 March 2019.

9. Mr Ibnahaten's adviser's letter of 21 March 2019 states that the 2015-16 and 2016-17 returns are 'now filed online', which accords with HMRC's statement of case and computer records.

10. On this basis, we find, as a fact, that:

- (1) the notices to file were validly issued on 6 April in the relevant year;
- (2) the 2015-16 return was due (assuming electronic filing) on 31 January 2017;
- (3) the 2016-17 return was due (assuming electronic filing) on 31 January 2018;

(4) both returns were filed, electronically, on 21 March 2019.

11. Therefore, the returns were both filed over 12 months late.

Were the penalties validly issued?

12. Again, nothing submitted by or on behalf of Mr Ibnahaten suggests that he is challenging the validity or receipt of the penalty notices for late filing, 6 month late filing, 12 month late filing or daily penalties.

13. The law relating to the issuing of late filing penalties is set out as an appendix to this decision.

14. The penalty notices are not included in the bundle of documents.

15. HMRC submitted print outs from their computer records setting out the penalties issued (as detailed in the summary at paragraph 2 above).

16. Mr Ibnahaten's adviser, in a letter appealing the penalties to HMRC dated 21 March 2019, sets out the full £1600 penalties for each of the 2015-16 and 2016-17 tax years (as well as interest accrued to that date which is not relevant to this appeal).

17. We have therefore inferred from the computer records and the letters from Mr Ibnahaten's adviser and find as a matter of fact that the penalty notices were issued to Mr Ibnahaten.

18. In terms of law, we find that, since the failure to file continued for more than 12 months, the pre-conditions for issuing the penalties under paragraphs 3, 4, 5 and 6 of Schedule 55 had been met.

19. Therefore we find that the penalties were validly issued.

Did the appellant have a reasonable excuse

20. It is explicitly conceded that Mr Ibnahaten "did not have any ground acceptable by statute" for the late filing.

21. It is suggested that one of the reasons for allowing an appeal could be that if Mr Ibnahaten had been employed (and therefore within PAYE), this would not have happened. While that may well be true, this Tribunal is only in a position to consider the facts as presented and therefore the possible alternatives that may or may not have been available to Mr Ibnahaten in terms of his source of income are not relevant to the appeal at hand.

22. Further, no evidence has been submitted that would support a reasonable excuse.

23. For completeness we record that the observations of his adviser that "low earning uneducated manual workers" regularly make slippages such as this in their tax compliance due to their ignorance, misunderstanding of the regime or ambivalence towards their tax compliance cannot constitute a reasonable excuse for Mr Ibnahaten. As set out by the Upper Tribunal in paragraph 71 of *Christine Perrin v Commissioners for HMRC* [2018] UKUT 0156:

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 Coales*).”

24. Nothing submitted by or on behalf of Mr Ibnahaten relates to him as a particular taxpayer. The assertions by his adviser relate to a group of workers and not Mr Ibnahaten specifically and nothing has been provided to support the conclusion that Mr Ibnahaten himself in fact has these characteristics or attributes.

25. On this basis, we find that Mr Ibnahaten does not have a reasonable excuse.

Do any special circumstances apply?

26. While there is no specific reference to the phrase “special circumstances”, I take the submissions relating to proportionality to be a claim that special circumstances apply to Mr Ibnahaten and that the amount of the penalty should be reduced as a result.

27. I infer from the correspondence from Mr Ibnahaten’s adviser that it is asserted that the amount of the penalty is disproportionate to the amount of tax due (which was small or resulted in a tax refund).

28. HMRC submits that it has carefully considered the appellant’s case and concluded that no special circumstances applied to warrant reduction of the penalties. It does not identify proportionality as a matter that it considered in relation to special circumstances, rather referring to proportionality in its concluding paragraph on reasonable excuse. HMRC’s submission on proportionality is that, relying on the decision in *Barry Edwards* (detailed below), the penalties were proportionate.

29. In *Barry Edwards v HMRC* [2019] UKUT 0131, the Upper Tribunal considered the question of whether the proportionality of the late filing penalty regime could be considered as a special circumstance.

30. At paragraphs 84-87, the Upper Tribunal found:

“84....It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. ...

85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime 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.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the

purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.”

31. This Tribunal may, under paragraph 22(3) of Schedule 55, only alter HMRC’s approach to special circumstances if the decision of HMRC is flawed in a judicial review sense.

32. Since the Upper Tribunal have held that penalties imposed under Schedule 55 cannot be regarded as disproportionate in circumstances where no tax is due and that proportionality cannot therefore be regarded as a special circumstance; and no other submissions on special circumstances were made, I cannot interfere with HMRC’s conclusion that there are none.

DISPOSITION

33. Based on the findings set out above, we affirm HMRC’s decision on all the penalties under appeal and the appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

RELEASEDATE: 09 FEBRUARY 2021

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 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.