



Neutral Citation: [2023] UKFTT 00041 (TC)

Case Number: TC08696

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/00372

Income tax – fixed and daily penalties for late filing of self assessment return – inability to cope with on-line notification, reliance on agent – whether reasonable excuse – no – appeal refused

Heard on: 14 November 2022
Judgment date: 11 January 2023

Before

**TRIBUNAL JUDGE VIMAL TILAKAPALA
MEMBER REBECCA NEWNS**

Between

THOMAS CRUISE

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: The Appellant appeared in person

For the Respondents: Mr John McCabe, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and the remote platform the Tribunal video hearing system. The documents to which we were referred were included in a hearing bundle and a statement of reason was submitted by the Respondent.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. This is an appeal against penalties charged under Schedule 55 of the Finance Act 2009 (**FA 09**) for the late filing of a self-assessment tax return for the tax year 2019/2020.
4. The penalties under appeal (the **Penalties**) are:
 - (1) an initial late filing penalty of £100 issued on 9 March 2021;
 - (2) daily late filing penalties amounting to £900 issued on 17 August 2021; and
 - (3) a 6 month late filing penalty of £300 issued on 17 August 2021.

THE FACTS

5. On 19 January 2020 Mr Cruise signed up to HMRC's online services (also referred to as the paperless contact scheme).
6. The terms of the paperless contact scheme provide for HMRC to issue to a taxpayer's secure online mailbox created by the scheme, statutory notices, decisions, estimates and reminders relating to a taxpayer's tax affairs and tax credits. The terms also provide for items made available in this way by HMRC to have the same legal effect as those items sent by post.
7. On or around 23 April 2020 Mr Cruise was issued a notice to file a tax return for the tax year ended April 2020 (the **Notice to File**). This was sent by e-mail to the secure mailbox in Mr Cruise's online Personal Tax Account (**PTA**).
8. At the same time as the Notice to File was issued to the online PTA, HMRC sent an email alert to the verified email address provided by Mr Cruise for the paperless contact scheme. The email alert was standard one notifying Mr Cruise that a new message from

HMRC about self assessment had been sent to his HMRC online account and that he needed to sign into that account to view it.

9. HMRC's digital computer records show that both the Notice to File and the email alert were duly sent (although the records do not contain a copy of the actual email sent).
10. On 24 April 2020 HMRC's computer records show that the online PTA message was read.
11. The filing dates for Mr Cruise's 2019/2020 tax return were 31 October 2021 (for a non electronic return) or 31 January 2022 (for an electronic return). No tax return was however submitted by Mr Cruise by those dates.
12. On or around 15 March 2021 HMRC issued a notice of penalty assessment of £100 under paragraph 3, schedule 55 Finance Act 2009 (**FA 09**) to the secure mailbox in Mr Cruise's online PTA (the **First Penalty Assessment**). This is confirmed by HMRC's digital computer records.
13. At the same time as the First Penalty Assessment was issued, HMRC sent a standard email alert to Mr Cruise's verified email address notifying him about a new message in his HMRC online account. This is also confirmed by HMRC's digital computer records (although the records do not contain a copy of the actual email sent).
14. On 17 August 2021 HMRC issued a notice of penalty assessment of £300 under paragraph 5, Schedule 55 FA 09 (a 6 month late filing penalty) and a penalty assessment of £900 under paragraph 4 of Schedule 55 FA 09 (representing a daily penalty of £10 for 90 days) to the secure mailbox in Mr Cruise's online PTA. This is confirmed by HMRC's digital computer records (the **Second Penalty Assessment**).
15. At the same time as the Second Penalty Assessment was issued HMRC sent a standard email alert to Mr Cruise's verified email address notifying him about a new message in his HMRC online account. This is also confirmed by HMRC's digital computer records (although the records do not contain a copy of the actual e-mail).
16. On 9 October HMRC's digital computer records show that the first and second online notices of the First Penalty Assessment and Second Penalty Assessment in the PTA were read.
17. On 18 October 2021 Mr Cruise appealed under paragraph 20, Schedule 55 FA 09 in respect of the First and Second Penalty Assessments.

18. On 3 November 2021 HMRC responded to Mr Cruise upholding the decision to charge the Penalties. This letter also offered Mr Cruise the option for a statutory review or appeal to the First-tier Tribunal.
19. On 11 November 2021 Mr Cruise accepted the offer of an independent HMRC review.
20. On 4 January 2022, HMRC issued their conclusion of review letter to Mr Cruise, upholding the decision to charge the Penalties.
21. On 17 March 2022 Mr Cruise lodged his appeal to the Tribunal.

The Law

22. The relevant key statutory provisions are included as an Appendix to this decision. In summary, the position is as follows.
23. HMRC is entitled to require a taxpayer to file a self-assessment tax return by sending a notice to the taxpayer. Where a notice is sent, the tax return is due by 31 October after the end of the tax year if filed in paper form or by 31 January in the year after the end of the tax year in question if filed online (section 8, Taxes Management Act 1970).
24. Schedule 55, FA 09 provides a system of penalties where a self-assessment tax return is filed late. There is an initial penalty of £100 if the tax return is not filed by the deadline. HMRC may charge a daily penalty of up to 90 days if the tax return is more than three months late. If the tax return is more than six months late, there is a further penalty of a minimum of £300.
25. A taxpayer is not liable to a penalty if they have a “reasonable excuse” for the failure to make the return. Reliance on another person to do anything is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. If the taxpayer had a reasonable excuse but that excuse has ceased, the taxpayer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased. HMRC have discretion to reduce penalties if there are special circumstances justifying a reduction.
26. The onus of proof is on HMRC to show that the penalties have been properly levied on the taxpayer. The burden then moves to the taxpayer to demonstrate that a reasonable excuse exists for the default.
27. The standard of proof is the ordinary civil standard which is the balance of probabilities.

The Submissions

28. Mr Cruise is seeking cancellation of the Penalties. His grounds of appeal as set out in his notice of appeal are that:

- i. The details of the tax that needed to be paid and the fines that were accruing were not sent to his home address but were sent electronically to a company he believed had been closed down in March 2020.
- ii. He was not given any notice that later filing penalties were accruing until he received a letter in October 2021 which showed the amount owed and details of the penalties charged.
- iii. HMRC have not provided proof that they contacted him prior to October 2021 other than electronically, and he would not have checked his as he believed that the company had been closed.
- iv. He employed an accountant to ensure that his books were filed and did not realise that he would be held to account for any errors made.

29. HMRC is seeking for Mr Cruise's appeal to be dismissed and submit, in summary, that:

- i. The Penalties are correctly charged in accordance with the law.
- ii. Mr Cruise does not have a reasonable excuse for the late filing of his tax return for 2019/2020.
- iii. Their decision in relation to their being no reduction for special circumstances is not flawed.

DISCUSSION

30. It is necessary first to determine whether Mr Cruise had an obligation to file a self assessment return. This is dependent on the issue to him of a "notice to file" a return. It is then necessary to determine whether the penalty notices were issued to Mr Cruise following a failure to submit that return.

31. Mr Cruise had registered as an individual for HMRC's online service and had not withdrawn from it. Since registering he had also made no changes to his details, in particular the email address which he provided to HMRC for correspondence and which had been duly verified.

32. The trial bundle shows that a Notice to File for 2019/2020 was sent to the secure mailbox in Mr Cruise's online PTA on or around 23 April 2020 and that an email alert was

also sent to his verified email address notifying him that there was a new message in his PTA for him to view. HMRC's digital computer records show issue of the Notice and the related email alert and that the PTA message was read on 24 April 2020.

33. We are satisfied that the Notice to File was duly issued to Mr Cruise notwithstanding that it was sent electronically rather than in paper form. This is the purpose of the online tax service and what is provided for in the Electronic Communications Regulations 2003 (see the Appendix to this decision).

34. The First and Second Penalty Notices (issued on or around 15 March 2021 and 17 August 2021 respectively) were sent to the secure mailbox in Mr Cruises online PTA in the same way as the Notice to File, and email alerts were also sent to his verified email address. As with the Notice to File, HMRC's digital computer records confirm issue of both notices and related email alerts and that both PTA messages were read on 9 October 2021. We are satisfied that the First and Second Penalty Notices were duly issued to Mr Cruise.

35. We also find as a matter of fact that Mr Cruise had not submitted his tax return at the time of the Second Penalty Notice (indeed we were not sure whether it had been submitted at the time of the hearing).

36. We find, therefore, that the penalties in this case have been properly levied unless there is any provision in Schedule 55 FA 09 which might apply to relieve them.

37. There are two relieving provisions in Schedule 55. The first is Paragraph 23, which provides that liability to penalties under the Schedule does not arise in relation to a failure to file a return if the taxpayer satisfies HMRC, or, on appeal, the Tribunal, that there is a "*reasonable excuse*" for the failure. The second is Paragraph 16, which provides that, if HMRC think it right because of "*special circumstances*", they may reduce any penalty under the Schedule. In this HMRC's discretion can be challenged at the Tribunal only if their decision is "flawed" in the light of the principles applicable in proceedings for judicial review (see Paragraph 22 of Schedule 55).

38. Paragraph 23 does not elaborate on the meaning of the term "reasonable excuse" beyond stipulating that, in relation to any failure to file a return: (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control; (b) where the taxpayer has relied on any other person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure; and (c) where the taxpayer has a reasonable excuse for the failure but the excuse has ceased, the taxpayer is to

be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceases.

39. It is clear from the decided cases in this area, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise [1991] VATTR 234*, that the test to be applied in determining whether or not an excuse is reasonable is an objective one.

40. The question to determine is whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

41. For Paragraph 16, there is no legislative guidance on what might constitute “special circumstances”. It is however clear that the decision as to whether “special circumstances” exist is a matter for HMRC to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223*. The Tribunal cannot consider the relevant facts again and determine whether or not it agrees with the conclusion reached by HMRC. Instead, it needs to consider whether, in reaching that conclusion, HMRC have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. Provided that is not the case, HMRC’s decision can be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon its own consideration of the relevant matters.

42. Bearing the above description of the relieving provisions in mind, our views on the application of the relieving provisions to Mr Cruise’s circumstances are as follows.

Reasonable Excuse

Lack of knowledge of the need to submit a return or of the Penalties accruing

43. Mr Cruise’s primary submission is that he did not know that tax needed to be paid or that fines were accruing as the relevant details (the Notice to File, the First and Second Penalty Notices and the related email alerts) were not sent to his home address but to the email address of his company (Cruise Management Ltd.) which he thought had been closed down in March 2020.

44. He also appears not to have appreciated the difference between his personal tax return and Cruise Management's corporation tax self-assessment return.

45. As we have already found, Mr Cruise had registered for HMRC's online services and had not de-registered from those services. The fact that he failed to check his Personal Tax Account or open on a timely basis the email alerts that were sent to him at his verified email address does not in our view constitute a reasonable excuse.

Confusion between personal tax return and the return for Cruise Management Ltd.

46. Mr Cruise's confusion as to the tax return for Cruise Management Ltd. and his personal tax return is also not in our view a reasonable excuse. This is in part a consequence of Mr Cruise not reading his emails or checking his PTA which made clear what his return obligation was and what the Penalties relate to.

47. We note also in this regard that Mr Cruise had submitted a self-assessment return for 2018/2019 and should, therefore, have had some awareness of how the self-assessment tax system operated.

No proof of delivery of non-electronic contact

48. Mr Cruise also argues that HMRC have not provided proof that they contacted him prior to October 2021 other than electronically. Given that Mr Cruise had opted for HMRC's online services and as HMRC have been able to provide their digital computer records showing issuance of the relevant notices and email alerts we do not consider this argument to be viable in relation to whether Mr Cruise has a reasonable excuse.

Employment of an accountant

49. Mr Cruise points out that he employed an accountant to prepare his tax return for Cruise Management and this is another reason why he was unaware of his need to file a personal tax return. We found this reasoning to be confusing. However, irrespective of the confusion it is clear as a matter of law that where a taxpayer has relied on any other person to do anything that cannot be a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. Mr Cruise has not provided any information to the Tribunal sufficient for us to determine either what he instructed his accountant to do in relation to his personal tax return or the extent to which he took any care to appreciate what the accountant was doing. We cannot therefore consider this to be a reasonable excuse.

50. In reaching our views we have had regard to the principles of the *Clean Car* case which require us to take into account, in determining whether or not there is a reasonable excuse, the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time.

51. While we have some sympathy for Mr Cruise's situation, we do not consider that any of his submissions form the basis of a reasonable excuse for his failure to file his self-assessment return on time. In our view none of his submissions meet the test outlined in the *Clean Car* case – i.e. was this something which a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself at the relevant time, to do. We consider that it was incumbent on Mr Cruise to read the notices and email alerts sent by HMRC and to take steps to ensure that he complied with his filing obligations.

Special Circumstances

52. It is necessary to also consider under Paragraph 16 whether the penalties should be reduced as a result of there being any “special circumstances”, HMRC having determined that there were none. As noted above, we are not permitted to reach our own view on that issue but merely to determine whether the view reached by HMRC was unreasonable in the sense set out in the *Wednesbury* case. In that regard, we confirm that we do not consider the HMRC view to be unreasonable.

DECISION

53. We find that the Penalties which are the subject of this appeal have been properly imposed and we therefore uphold them and dismiss Mr Cruise's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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 20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55, FA 09.
2. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.
3. 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).

4. 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.

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,
 - (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.
8. The Income and Corporation Taxes (Electronic Communications)

Regulations 2003 SI 2003/82 (E Comms Regs 2003) – which contains the following
Regulation 5 - Effect of delivering information by means of electronic communications

- (1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act or the Management Act if, but only if, all the conditions imposed by—
- (a) these Regulations,
 - (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
 - (c) any specific or general direction given by the Board,
- are satisfied.
- (2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied.
- This is subject to paragraphs (3) and (4).
- (3) The Board may by a general or specific direction provide for information to be treated as delivered upon a different date (whether earlier or later) than that given by paragraph (2).
- (4) Information shall not be taken to have been delivered to an official computer system by means of electronic communications unless it is accepted by the system to which it is delivered.

Regulation 6 - Proof of content

- (1) A document certified by an officer of the Board to be a printed-out version of any information delivered by means of electronic communications under these Regulations on any occasion shall be evidence, unless the contrary is proved, that that information—
- (a) was delivered by means of electronic communications on that occasion; and
 - (b) constitutes the entirety of what was delivered on that occasion.

- (2) A document purporting to be a certificate given in accordance with paragraph (1) shall be presumed to be such a certificate unless the contrary is proved.

Regulation 9 - Proof of delivery of information and payments

- (1) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, to have resulted in the making of a payment or the delivery of information—
- (a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has been recorded on an official computer system; and
 - (b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has been recorded on an official computer system.
- (2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the making of a payment, or the delivery of information—
- (a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has not been recorded on an official computer system; and
 - (b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has not been recorded on an official computer system.
- (3) The time of receipt of any information or payment sent by an authorised means of electronic communications shall be presumed, unless the contrary is proved, to be that recorded on an official computer system.

**VIMAL TILAKAPALA
TRIBUNAL JUDGE**

Release date: 11th JANAURY 2023