



TC07300

Appeal number: TC/2019/03393

INCOME TAX – self-assessment – late filing penalties – believed no longer required to complete returns and no correspondence received – whether reasonable excuse – no – whether initial late filing penalty was valid – no – whether special circumstances existed in relation to the other penalties – yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JANIS LOCMELIS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MS ELIZABETH BRIDGE**

Sitting in public at Nottingham on 3 July 2019

The Appellant appeared in person

Mrs Lines, presenting officer for the Respondents

DECISION

Introduction

1. This is an appeal against penalties in relation to the 2014-15 tax year that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return on time.

2. The appeal was also initially in respect of late filing penalties for the 2015-16 tax year. During the hearing it became apparent that the notice to file for that tax year had been sent to a former address of Mr Locmelis rather than that which he had most recently notified to HMRC. HMRC checked their records after the hearing, at our request, and established that his address had been changed on HMRC’s systems as a result of those systems having been incorrectly amended by an employer PAYE return in November 2015, without Mr Locmelis’ knowledge, after Mr Locmelis had correctly advised HMRC of his new address in September 2015. HMRC therefore stated that they would cancel the penalties for the 2015-16 tax year as they accepted that the notice to file for that year had not been correctly issued.

3. The penalties appealed can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 February 2016;

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 23 October 2018;

(3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 23 October 2018. It should be noted that HMRC did not argue that there was any deliberate withholding of information in relation to this penalty;

(4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 23 October 2018.

Appellant’ case

4. Mr Locmelis’ case was, in summary:

- (1) That he had not received a tax return form nor any reminder that his self-assessment was still live;
- (2) At the relevant times, he had lived at an address in London Road, Grantham until September 2015. He had then moved to his present address in Springfield Road, Grantham, and had notified HMRC of the change of address. He did not know why HMRC's records had been changed to revert to his London Road address from November 2015 to October 2018. At both addresses, he lived in a flat within the building but the post for the residents of all flats is left at the entrance to the building and not delivered separately for each flat. He had received PAYE correspondence sent by his employer during the relevant period.
- (3) He stopped being self-employed at some point during the 2014-15 tax year (although he also thought it might have been earlier, in 2013). He had given details to a secretary who dealt with all the paperwork and he thought she had completed a form online to say that he had stopped being self-employed. He also thought his self-employed status would close automatically when his employer started to pay taxes;
- (4) He believed everything was therefore in order, and an accountant at his employer said everything should be fine.
- (5) At that time his knowledge of English was very poor and he relied on other people to deal with his paperwork. He did not know how the tax system in the UK worked. His returns were done by a friend who knew a bit more about tax, as he was worried that he would have to pay money to HMRC if he got something wrong.
- (6) He did not dispute that his paper tax return for the 2014-15 tax year had been filed on 17 January 2019; he had tried to sort matters out as soon as he found out that the return was late but his first attempt to send in a return had been rejected by HMRC in December 2018 as incorrectly being completed.

HMRC's case

5. HMRC submitted, in summary:

- (1) A notice to file for the 2014-15 tax year was issued to Mr Locmelis on 6 April 2015, at the address on file (London Road).
- (2) As the return was not received by the filing date, a notice of penalty assessment was issued to Mr Locmelis on 17 February 2016 to the address on file (London Road).
- (3) On 25 April 2016 HMRC set Mr Locmelis' address as RLS as post had been returned unsent. HMRC did not hold an up to date address for Mr Locmelis until he changed employment and his new employer's PAYE return updated his address to the correct address (Springfield Road) in October 2018.
- (4) As the return was then over twelve months late, penalty notices were therefore issued for daily penalties, a 'six month' penalty and a 'twelve month' penalty on 23 October 2018.

(5) HMRC do not consider that Mr Locmelis has a reasonable excuse for the late filing of his tax return as the notice to file was issued correctly and so he should have been aware of his filing responsibilities.

(6) Although Mr Locmelis was not clear as to when he had ceased to be self-employed, Mr Locmelis' tax return for the 2014-15 tax year includes a declaration of taxable self-employment profits. In addition, as a notice to file was correctly issued to Mr Locmelis, he was liable to complete a self-assessment tax return regardless of whether or not he had been self-employed in that year, under s8 Taxes Management Act 1970.

(7) HMRC has no record of Mr Locmelis contacting HMRC to say that he had ceased to be self-employed. Online guidance confirms that a final tax return is required.

(8) Mr Locmelis' belief that his self-employment status would close when he became employed was not sustainable as he had completed tax returns in earlier years when he was both employed and self-employed.

(9) The fact that Mr Locmelis relied on others to assist with his tax affairs cannot amount to a reasonable excuse unless he can show that he took reasonable care to avoid the failures; no such reasonable care has been demonstrated.

(10) HMRC had considered whether special circumstances existed but considered that Mr Locmelis' belief that everything was in order and that HMRC did not have an up to date address for him did not amount to a reasonable excuse as the notice to file was issued correctly and the initial late filing penalty were issued before HMRC become aware that his address was not correct.

Discussion

6. Relevant law is included in the Appendix.

7. It was not disputed that Mr Locmelis' tax return for 2014-15 was filed late. The question that we need to decide is whether he had a reasonable excuse for the delay, or whether special circumstances exist which merit a reduction in the penalties.

8. We considered that Mr Locmelis was a credible witness and that he was attempting to deal with his tax affairs correctly, notwithstanding difficulties in communication in earlier years. He had, for example, kept HMRC informed of his changes of address and had completed earlier tax returns.

9. We find that the delay in filing in this case has arisen as a combination of factors: firstly, Mr Locmelis' incorrect belief that he did not need to complete a tax return, arising from advice (either incorrect or misunderstood) from others and, secondly, from his employer's incorrect updating of his address on HMRC's systems.

10. We find that the notice to file for the 2014-15 tax year was correctly issued, although Mr Locmelis does not remember receiving it.

Validity of the initial late filing penalty

11. HMRC accepted following the hearing that the notice to file for the 2015-16 tax year was not correctly issued as it was incorrectly addressed, even though it was sent before HMRC became aware that the address was no longer valid. We consider that it therefore follows that the late filing penalty notice, issued in February 2016, should also be regarded as not correctly issued as it was sent to the same incorrect address as a result of the employer's incorrect return in November 2015.

12. We therefore find that the initial late filing penalty was incorrectly issued and is therefore not valid.

Whether there was a reasonable excuse

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. 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 the position with HMRC or a qualified adviser. Mr Locmelis' reliance on an unqualified third party for advice was not sufficient to amount to a reasonable excuse for the late filing of his return.

15. Mr Locmelis' incorrect belief was, we consider, a genuine mistake. We 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 we consider that the principle is applicable to other tax penalties. That mistake was not, therefore a reasonable excuse for the late filing of the return.

Special circumstances

16. We have reviewed HMRC's conclusion in relation to special circumstances and consider that it is flawed as regards the question of Mr Locmelis' address, applying the test of the judicial review standard.

17. Mr Locmelis had advised HMRC of his correct address in September 2015. It was subsequently changed without his knowledge and in circumstances beyond his control in November 2015 and not corrected until October 2018. HMRC did not dispute that Mr Locmelis had no way of knowing that HMRC did not have his correct address during that time and received no correspondence from HMRC in that time.

18. Accordingly, we consider that it is not reasonable of HMRC to expect that Mr Locmelis would have been aware of his mistake and therefore been able to correct the position before HMRC's systems were updated with his correct address by a new employer in October 2018.

19. It is clear that, once Mr Locmelis became aware of the mistake, he corrected the error within a reasonable period of time. Notwithstanding the error that caused the return to initially be rejected, he attempted to comply in November 2018, having become aware of the mistake in late October 2018.

20. We consider that this amounts to special circumstances as we consider that the employer error with regard to Mr Locmelis' address is out of the ordinary run of events (per *Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152 and applies to Mr Locmelis personally, rather than arising generally out of the penalty legislation.

21. Under paragraph 22(3) Sch 55 we have power to reduce penalties where we find that HMRC's decision in relation to special circumstances is flawed and find that, in this case, the daily penalties, the six month penalties and the twelve month penalties should be reduced to zero as we consider that, if Mr Locmelis had become aware of the mistake earlier, he would have corrected that mistake before these penalties became due. We do not consider that special circumstances would have applied to the initial late filing penalty, had it been validly issued, as we consider that the return would have been late in any case as a result of Mr Locmelis' mistake.

Decision

22. Mr Locmelis' appeal is upheld. The late filing penalty of £100 for the 2014-15 tax year was not validly issued and so is not due; the remaining penalties relating to the 2014-15 tax year are reduced to zero given the special circumstances that exist in this case.

23. We are grateful to HMRC for their assistance following the hearing in establishing how the incorrect address on their systems arose and cancelling the penalties in relation to the 2015-16 tax year.

24. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 31 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.

1.