



[2020] UKFTT 00142 (TC)

TC07635

Appeal number: TC/2019/09415

*INCOME TAX – penalties for failure to make return – late appeal – admitted
whether reasonable excuse or special circumstances – no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERTO MASETTI

Appellant

- and -

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

Respondents

**TRIBUNAL: G NOEL BARRETT
PRESIDING MEMBER**

Sitting in public at Taylor House 88 Roseberry Avenue London EC1R 4QU

On 24th February 2020

Neither the Appellant nor his representative were in attendance

**Miss Gemma Milner assisted by Miss Amy Biney of HM Revenue and Customs,
for the Respondents**

Preliminary Matters

1. The appellant's appeal is slightly late. HMRC's review decision was dated 13 November 2019 and the appellant should have appealed to the Tribunal within 30 days of that date. His appeal was in fact generated on the 17 December 2017, which is 4 days late.
2. Given that the appellant's appeal was made only just outside the thirty day time limit and that HMRC have in any event prepared the bundles and make no objection to the appeal being late, I confirm that I formally admit the appellant's late appeal.
3. As neither the appellant nor his representative was in attendance, the Tribunal wished to establish that proper notice of the hearing had been given.
4. I noted the correspondence dated 7 February 2020 on the Tribunal file giving notice that the hearing would be heard in person at Taylor House and not by video link and which had been posted to the appellant at his address in Leatherhead, which was the address the appellant had used on his appeal notice submitted in December 2019. There was no indication on the Tribunal file that this letter had been returned through the dead letter system.
5. I also noted the correspondence dated 7 January on the Tribunal file which again gave notice of the hearing and which again had been posted to the appellant at his address in Leatherhead. Again there was no indication on the Tribunal file that this letter had been returned through the dead letter system.
6. It is clear from the Tribunal file that a letter issued by the Tribunal just a day earlier on 6 January, addressed to the appellant acknowledging receipt of his notice of appeal, had reached him at his Leatherhead address, because the appellant had written to the Tribunal on 10 February acknowledging the same and expanding upon his grounds of appeal.
7. HMRC emailed Mr Fearn on 20 January 2020 advising him to submit documentary evidence in support of his client's reasonable excuse without delay.
8. On 24 January HMRC telephoned Mr Fearn and left a voicemail asking him contact them about the appeal.
9. I do not therefore understand why the appellant's accountant, Mr Stephen Fearn, was apparently confused when he emailed the Tribunal on 24 February, as to whether the hearing was proceeding in person at the hearing venue, or by way of video hearing.

10. In Mr Fearn’s email he invited telephone contact but despite the Tribunal Clerk trying to contact Mr Fearn on the telephone number he had provided, on two occasions on the afternoon of the hearing, the telephone simply transferred to voicemail.

11. In that same email Mr Fearn had indicated that “all relevant correspondence had been forwarded” to the Tribunal.

12. I decided in the circumstances in accordance with section 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that the appellant had been properly notified of the hearing and that it was in the interests of justice to proceed with the hearing in the appellant's absence.

DECISION

The Facts

13. The appellant is appealing against penalties which HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for failing to submit his self-assessment tax return for 2015/16, 2016/17 and 2017/18 on time.

14. The relevant dates and the penalties that have been charged can be summarised as follows:

2015/16 Return:- Filing Date 31 January 2017, Date Received 23 April 2019;
Days late – 812.

- (1) a £100, “30 day” late filing penalty under paragraph 3 of Schedule 55
- (2) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55
- (3) a “six month” £300 late filing penalty under paragraph 5 of Schedule 55
- (4) a “12 month”, £300 late filing penalty under paragraph 6 of Schedule 55

2016/17 Return:- Filing Date 31 January 2018, Date Received 23 April 2019;
Days late – 447.

- (1) a £100, “30 day” late filing penalty under paragraph 3 of Schedule 55
- (2) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55
- (3) a “six month” £300 late filing penalty under paragraph 5 of Schedule 55
- (4) a “six month” £39 tax geared late filing penalty under paragraph 5(2) of Schedule 55
- (5) a “12 month”, £300 late filing penalty under paragraph 6 of Schedule 55
- (6) a “12 month”, £39 tax geared late filing penalty under paragraph 6(5) of Schedule 55

2017/18 Return:- Filing Date 31 January 2018, Date Received 23 April 2019;
Days late – 91.

- (1) a £100, “30 day” late filing penalty under paragraph 3 of Schedule 55
- (2) “Daily” penalties totalling £20 under paragraph 4 of Schedule 55

Grounds of Appeal

15. The appellant’s grounds for appealing against the penalties can be summarised as follows:

- (1) The appellant says that he has “severe mental health problems, which surfaced in 2016 and which culminated in him burying his head in the sand”
- (2) His business was at its maximum capacity at this time and its levels of activity have reduced substantially since that time further adding to his health issues.
- (3) It was not until late 2018 that the appellant started his recovery and made a conscious effort to bring his tax affairs up to date.
- (4) The appellant does not argue that he was late with his returns and his tax payments
- (5) He argues against the severity of the financial penalties as his actions were not deliberate although he admits there was a lack of reasonable care on his part due to his health issues
- (6) Whilst he appreciates the legislation on late filing penalties he would expect the facts of each case to be reviewed individually.
- (7) He has made all attempts to bring his returns up to date and pay the historical tax due.
- (8) The current penalties together with his current tax liability would seriously jeopardise the health recovery he has made.

HMRC’s Burden of Proof

16. HMRC must establish that the penalties are properly founded and have been properly notified to the appellant.

17. I note that the appellant confirms in his Notice of Appeal “that he does not argue the fact that he was late with his returns and tax payments” and in his earlier letter of 13 May 2019 to HMRC that he “fully appreciates that deadlines have been missed”

18. Although the appellant later submits, in his letter to the Tribunal dated 10 February, that some of the penalties had been calculated incorrectly, and had been overstated, it appears that the appellant was confused as to the difference between tax geared penalties and fixed penalties and thus the appellant's submission is incorrect.

19. Having heard from Miss Milner, reviewed the records as to the notices within the bundle of documents and reviewed the legislation, I am satisfied that all the penalties have been properly levied against the appellant and properly notified to him.

The Appellant's Burden of Proof

20. Having established this, the burden of proving either a reasonable excuse or some other special circumstances, (in order to mitigate the penalties) rests with the appellant, the standard of proof being the normal civil standard ie on the balance of probabilities.

Findings of Fact

Findings of fact - Reasonable Excuse

21. There are a number of issues in relation to the appellant's appeal which concern me and which have a direct effect on whether or not the appellant has or has not successfully shown either a reasonable excuse or some other special circumstances.

22. The first of these is that the appellant has not provided to the Tribunal any medical evidence whatsoever in order prove his "severe mental health problems", nor has he provided any details of the treatment he received for these problems, nor details of any medication which may have been prescribed to him.

23. Secondly the appellant does not provide any evidence as to how his medical condition prevented or compromised him from running his everyday business affairs and/or attending to his taxation obligations.

24. Indeed and contrary to this, the appellant's turn-over from his business increased substantially from £43,851 in 2015/16 to £71,030 in 2016/17 and still only fell back to £55,990 in 2017/18. To my mind even if the appellant had severe mental health problems they were not impacting on his ability to run his business and equally should not therefore have impacted upon his ability to attend to his taxation affairs timeously.

25. I do not accept that it was reasonable for Mr Masetti to choose to put his "head in the sand" in regard to his taxation affairs, whilst seemingly, at the same time, being able, despite any underlying medical condition, to be able to conduct other aspects of his business life satisfactorily.

26. Thirdly the appellant says that he began his recovery in "late 2018".

27. I note that the appellant's accountant filed form 64-8, a Notice of Acting, with HMRC on 22 November 2019 and so presume that the appellant must have been well enough to properly instruct Mr Fearn sometime prior to that date.

28. Despite this, the appellant's returns for 2015/16 and 2016/17 were not filed for several more months, until 23 April 2019 and his return for 2017/18 was not filed until 2 May 2019.

29. Schedule 55 para 23 makes it clear, that where a reasonable excuse for a failure has ceased, the failure then needs to be remedied without unreasonable delay.

30. Unfortunately the appellant provides no explanation or account for the delay in filing between "late 2018" and April/May 2019.

31. The appellant does refer in his letter of the 10 February 2020 to his father passing away at the end of 2019 and to needing to visit him in Italy on several occasions "over the last few years". Whilst not wishing to appear unsympathetic to this, I do not accept that "several trips over a few years" provide a reasonable excuse for the appellant not filing his tax returns on time.

Findings of fact - Proportionality

32. Finally the appellant raises the question that the penalties themselves are too harsh, which I take to mean disproportionate, either as to the length of the delay in filing, or the amount of tax at stake.

33. This Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. The tribunal has power to reduce a penalty where there is a reasonable excuse and also if HMRC's decision on special circumstances is flawed.

34. The penalties are for late filing and are designed to encourage compliance. The 1 month 6 and 12 month and daily penalties for late filing are not tax geared. Indeed unless or until the appellant filed his Tax Returns, HMRC could not know whether or not the appellant had any tax liabilities.

35. It is clear to me that the penalties imposed by Schedule 55 FA 2009 are wholly within the margin of appreciation which is conferred on Parliament for devising a suitable penalty regime. There is nothing disproportionate about any of the penalties that have been imposed in this case.

36. The jurisdiction of the tribunal in relation to proportionality was considered by the Upper Tribunal in *HMRC v Boshier*, [2013] UKUT 01479 (TCC). For the reasons set out in that decision I do not consider that this Tribunal has any separate jurisdiction to set aside or reduce penalties on the grounds of proportionality.

Findings of fact - Special Circumstances

37. I note that HMRC properly considered where there were any circumstances which warranted a special reduction of the penalties and concluded there were none.

38. I find that HMRC properly considered all they ought to have considered and did not consider anything they ought not to have considered when reaching their decision in their review.

39. Nor do I find that there is anything out of the ordinary or exceptional or abnormal in regard this appeal, such as to amount to any special circumstances which would warrant a reduction of the penalties.

The Law

Relevant statutory provisions are included as an Appendix to this decision.

40. A reasonable excuse was stated in *Rowland v HMRC*[2006] STC (SCD 536 at paragraph 19 as:-

“a matter to be considered in the light of all the circumstances of the particular case”

41. The meaning of the term “reasonable excuse” was considered in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, where Judge Medd QC said:

“The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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?”

42. The objective nature of the test was confirmed in *Nigel Barrett v HMRC* [2015] UKFTT 0329 where Judge Berner said:

“The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.”

43. In *Mark Palmer Edgecumbe v HMRC* [2017] UKFTT 409 (TC) para 29 it was said:-

“ If there is a reasonable excuse it must exist throughout the failure period and once the excuse ends the failure should be corrected without undue delay”

44. In *Clarks of Hove v Bakers Union* [1979] 1AER 152 it was accepted in regard to special circumstances that they must:

“ be something out of the ordinary”

In *Crabtree v Hinchcliffe* [1973] 3 AER 967 it was confirmed that in order for circumstances to be special they must: -

“be exceptional, abnormal or unusual”

Decision

45. I have concluded for the reasons that I have already provided, that Mr Masetti does not have a reasonable excuse for the late filing of his tax returns for the tax years 2015/16, 2016/17 and 2017/18

46. I have further concluded that there are no special circumstances which warrant any reduction of the penalties

47. I therefore dismiss the appeal and allow the penalties in the sum of £3,398

Application for permission to appeal

48. 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.

G. Noel Barrett

TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 12 MARCH 2020

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.