TC07814

INCOME TAX – Schedule 55 Finance Act 2009 – fixed and daily penalties for failure to file a self-assessment return on time – mental illness and personal problems - whether taxpayer had a reasonable excuse for his default – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00940

BETWEEN

SIVANESAN PIRASANA **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 10 August 2020 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 12 February 2020 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 8 June 2020.

DECISION

Introduction

1. This is an appeal by Mr S. Pirasana ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraph 3, 4 and 5 of Schedule 55 Finance Act 2009, for his failure to file a self-assessment ('SA') tax return on time for the tax year ending 5 April 2018.

2. HMRC do not seek to defend the daily penalties imposed, although it is not clear to me on what basis it is conceded that they should be cancelled. In the circumstances however, I do not go behind the concession and the appeal duly succeeds in relation to the daily penalties of £900.

Background

3. The Appellant's return for 2017-18, was due if filed non-electronically no later than 16 November 2018.

4. The penalties for late filing of a return can be summarised as follows:

   (i) A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.

   (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.

   (iii) If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

   (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

5. The Appellant's return for 2017-18 was filed late and penalties of £100, £900 and £300 were imposed, under (i), (ii) and (iii) above.

Filing date and Penalty date

6. Under s 8(1G) TMA 1970 a non-electronic return must normally be during the three months period beginning with the date of the notice to file. In this case, a non-electronic return would have been due by 16 November 2018. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

Reasonable excuse

7. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

8. The law specifies two situations that are not reasonable excuse:

   (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

   (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

9. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

10. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. 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.

The background facts

11. The Appellant's 2017-18 return was issued on or around 9 August 2018. The Notice to file a return was sent by HMRC to the Appellant's home address of 98 Rutland Road, provided by the Appellant for correspondence.

12. On 30 August 2019 the Appellant's non-electronic return was received by HMRC. The return should have been filed by 16 November 2018, and was therefore over 9 months late.

13. The Appellant appealed to the Tribunal on 12 February 2020.

The Appellant's case

14. The Appellant's grounds of appeal are that he became depressed and as a result was unable to deal with his tax affairs. Accordingly, he had a reasonable excuse for the delay in filing his return.

HMRC's Case

15. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

16. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

17. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA tax return.

Reasonable Excuse

18. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

19. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

> "It has been said before in cases arising from default surcharges that 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?" [Page 142 3rd line et seq.].

20. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

21. If there is a reasonable excuse it must exist throughout the failure period.

22. The Appellant has not provided a reasonable excuse for his failure to file his tax return for the 2017-18 year on time, and accordingly the penalties have been correctly charged in accordance with the legislation.

23. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

24. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

25. In other contexts "special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

26. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

27. HMRC have considered the Appellant's grounds of appeal but his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

28. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

29. The notice to file was issued to Mr Pirasana's home address, as were the penalty notices. No suggestion has been made that the notices were not received and indeed some were responded to. None of them were returned to the Respondent marked undeliverable. I find that the notices to file were properly served and received by the Appellant.

30. Mr Pirasana has had scleritis from around 2011 causing him bilateral painful red eyes. It is not stated that there has been any associated loss of vision.

31. Mr Pirasana's wife underwent a hospital procedure on 28 March 2019. That was in relation to treatment for suspected infertility. The couple have been having difficulties conceiving during the relevant tax year and thereafter.

32. There is some suggestion in Mr Pirasana's letter that he submitted 'the account' at some point prior to 30 August 2019 but it did not seem to have been received because he received a letter to that effect. No information is given about when he had previously sent the return (if indeed that is the document to which he was referring), or when he received a letter stating that the return had not been received. Given that penalty notices were sent out on 9 August 2019 and the return was received on 30 August 2019, it seems reasonable to assume that the penalty notice prompted the return. Assuming that the postal service delivered the penalty notice within a few days of its issue, it would seem unlikely – if the return was already prepared - that it would then take almost three weeks for it to be resubmitted and reach the Respondent. In addition, if it had been sent prior to the March penalty notice then that notice would have prompted the Appellant to resend it earlier than August. I find that the return had not been sent previously.

33. The return was submitted on 30 August 2019. I accept that the return was not properly submitted on or around 16 November 2018. The return was submitted over 9 months after it was due.

DISCUSSION

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

35. I have concluded that the tax return for the 2017-18 tax year was not submitted until 30 August 2019. It should have been submitted by 16 November 2018. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

36. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event which prevents him or her from complying with an obligation which otherwise they would have complied with.

37. The Appellant tells me that he had depression. No timescale has been provided in relation to when he became unwell. Depression can cover a range of symptoms and a significant variation in functionality. Whilst many do not seek assistance with mental health difficulties, the fact that a person does not is indicative of the level of functional impairment being sustained. For example, were he unable to meet his monthly expenses, or unable to interact with his friends or family he is more likely to feel it necessary to seek help. Mr Pirasana and his wife were able to arrange fertility treatment and travel to India for the same at around the relevant time and no evidence of any treatment has been put before me. There is no suggestion on the papers that Mr Pirasana's depression led to any other functional impairment and I therefore do not consider that it is likely to have been causative of the failure to file. In addition, Mr Pirasana's default was ongoing from November 2018 to August 2019. During such a prolonged period a reasonable tax-payer struggling with depression would have sought assistance with his tax returns if he was unable to complete them himself.

38. Mr Pirasana's wife was not unwell as far as I am told and although fertility difficulties and fertility treatment are inherently stressful, they do not routinely prevent a person from continuing with their day to day activities.

39. Mr Pirasana undoubtedly has had longstanding eye problems, however, given the ongoing nature of those problems, if they impeded his ability to comply with his tax obligations

in any way I would have expected a reasonable taxpayer to put systems in place to ensure that the returns were completed on time.

40. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. I know little in relation to the Appellant's experience and so I am unable to conclude that there is anything about Mr Pirasana himself which would make his explanation reasonable. On the information before me, I conclude that Mr Pirasana does not have a reasonable excuse for the late filing of his return for 2017-18.

41. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

42. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Pirasana.

43. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which the Appellant relied upon was his personal circumstances. I have explained above why I do not consider that the same has been shown to provide him with a reasonable excuse for his late filing. For the same reasons I conclude that there are no special circumstances which would make it right for me to reduce the penalty which has been imposed. It is in no way unusual or exceptional for a taxpayer to be experiencing some level of depression and I have no evidence that Mr Pirasana's depression or his ongoing eye complaint caused significant functional impairment.

CONCLUSION

44. I therefore confirm the fixed penalties of £100 and £300 in relation to the 2017-18 tax year. The appeal is allowed in relation to the daily penalties of £900.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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 HUDSON

TRIBUNAL JUDGE

RELEASE DATE: 17 August 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

Finance Act 2009

46. 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.

47. 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).

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

Taxes Management Act 1970

53. Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.
(4A)Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).
(4B)The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.
(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.