



TC05999

Appeal number: TC/2014/06197

INCOME TAX – penalty for failure to make returns – taxpayer intending to file electronic return by 31 January deadline did not do so in time – later filed paper return – HMRC penalties based on failure to file paper return by 31 October in previous year – Taxpayer had reasonable excuse for failing to file paper return on 31 October on basis was intending to file electronic return but reasonable excuse ceased once electronic filing deadline passed – was reasonable excuse treated as continuing on basis taxpayer had remedied failure without unreasonable delay? - yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR A BUIVYDAS

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

The Tribunal determined the appeal on 5 July 2017 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 13 November 2014 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 7 January 2015 further Statement of Case acknowledged on 20 March 2017 and the Appellant's Reply dated 19 April 2017.

DECISION

1. The appellant, Mr Buivydas, who is self-employed, is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit his 2012-13 annual self-assessment return on time.

2. The penalties charged were:

- (1) a £100 late filing penalty under paragraph 3 of Schedule 55
- (2) a £300 “six month” penalty under paragraph 5 of Schedule 55
- (3) “daily” penalties totalling £900 under paragraph 4 of Schedule 55.

3. The appellant’s appeal is against the “six month” and “daily” penalties, the amounts of which total £1200. His appeal to HMRC and his notification to the tribunal complied with the relevant statutory time limits. His grounds of appeal, as set out in the Notice of Appeal and in the subsequent correspondence of his agent (Community Advice Centre Ltd.), raise a number of matters.

4. In their letter of 15 July 2014, the appellant’ agent seeks withdrawal of the penalties of £1200, stating that Mr Buivydas was trying to run his business, that he pays all tax when due and is always on time with paper work. His 2013-14 self-assessment had already been filed online. The £1200 was very harsh – the request in relation to filing was made after 31 January 2014 due to a misunderstanding between the appellant and agent. The agent maintained the return was filed in in March 2014. They challenged in particular the imposition of the 6 month penalty arguing that the difference in time was 5 months from October and 2 months from January.

5. In their reply dated 19 April 2017 to HMRC’s paper case submission the agent says they took all required steps to fill the self-assessment in on time. The agent says they created his self-assessment account in January before the deadline and tried to request codes before the deadline. They say they submitted a paper version of the self-assessment in February 2014 but this was received by HMRC in May 2014 which they say is 4/5 months after the paper deadline and they cannot understand why they have been charged a 6 month penalty fee. It is submitted that under English law the date when the letter is submitted is deemed received. It is said they sent a letter with the self-assessment in February 2014 which meant only a 4 months late filing penalty should apply. I address the various arguments in the discussion section below of this decision but before doing that it is helpful to set out the factual background.

Background and findings of fact

(1) A notice to file a return for the year ending 5 April 2013 was issued to Mr Buivydas on 6 April 2013. The due date under the relevant legislation for a paper return was therefore 31 October 2013 and 31 January 2014 for an electronic return. No paper return or electronic return was submitted by the respective relevant due dates. Mr Buivydas’ paper return was received by HMRC on 12 May 2014.

5 (2) There is an issue between the parties as to when the paper return was submitted and in particular whether it was submitted before 1 May 2014 which I discuss further below. The appellant's agent says a paper return was submitted to HMRC in February 2014. HMRC say they have no record of a 2013 paper return being received by HMRC in February 2014 (and the first they have heard of this argument was in the appellant's appeal to the Tribunal).

10 (3) As the return had not been received three months after the penalty date HMRC issued a notice of daily penalty assessment on or around 17 June 2014 in the amount of £900 calculated at £10 per day for 90 days. On or around the same date HMRC issued a notice of penalty for £300 as the return still had not been received 6 months after the penalty date.

(4) On 7 April 2014 the appellant's agent wrote to HMRC enclosing a signed authority and stating:

15 "Mr Buivydas' return for the year ended 5 April 2013 was not sent in time due to a lost User ID, password and e-mail address for us to be able to do Request to send out the duplicate Self Assessment Online User ID. We would like to confirm that we have personally filled tax return form for Mr A. Buivydas and it is ready to submit it."

20 (5) The letter went on to explain that the agent had contacted the previous accountant but they did not have the necessary information and were not aware what happened to it. The agent also stated they had tried to obtain a new User ID password for Mr Buivydas but the system was not allowing them to process the request. HMRC were asked to send Mr Buivydas a User ID so the procedure for retrieving the password in order to submit the self-assessment to HMRC could be followed.

(6) On 25 June 2014 the agent appealed against the penalties that had been imposed and explained again that they had tried to use the online system but had not been able to.

30 (7) In the agent's letter of 22 July 2014 it is mentioned that a Self-Assessment was sent in March 2014.

Discussion

6. The relevant statutory provisions are included as an Appendix to this decision.

35 7. There is no dispute that the paper return which was received by HMRC in May 2014 was submitted after the due date of 31 October 2013 for non-electronic returns. The question of whether, as is suggested a paper return was submitted in February/March 2014, is relevant because it affects the amount of daily penalties and also whether it was proper to impose the 6 month late filing penalty.

40 8. Given the content of the letter written later by the agent on 7 April 2014 enclosing a signed authority indicating that a paper return was ready to be filed, and the lack of any reference to a return having been previously submitted, I find it unlikely that a paper return was filed on or before April 2014 as suggested. While the agent's letter of 19 April 2017 refers to letters being deemed as received when they are sent under the law (which I understand as referring to s7 of the Interpretation Act

1978) this does not assist because I am unable on the evidence before me to make a finding of fact that the return was indeed sent in February/March 2014.

9. Although not considered by the parties' submissions I have considered the issue of whether a return was submitted after 7 April 2014 but in sufficient time thereafter that it was received or deemed received before 1 May 2014. Again the relevance of the submission date is that it would affect the amount of daily penalties and liability to the 6 month penalty.

10. I have considered on the one hand the agent's letter of 7 April 2014 indicating an intention to submit a paper return and on the other HMRC's record showing the return was not received until 12 May 2014 as well as the absence of any other evidence from the appellant e.g. a covering letter for the return, or any other details of when it was posted.

11. The content of the agent's letter (which requested HMRC to provide a User ID) suggested it was hoped this would arrive enabling an electronic filing to be pursued and is not inconsistent with a situation where the paper return would not necessarily have been submitted straightaway pending a response from HMRC. The fact HMRC's record does not show receipt until 12 May 2014 coupled with the normal operation of post (where even second class post would normally be delivered in less than 12 days) points to it being more likely than not in my judgment that the return was submitted at some point on or after 1 May 2014.

12. I therefore find that the tax return for the 2012/13 tax year was submitted on or at some point after 1 May 2014. The due date for that return under the relevant legislation (s8 TMA 1970) was 31 October 2013. A return filed on after 1 May 2014 was therefore 6 months late or more.

13. As to the appellant's argument that the delay was less than 6 months when taken from 31 January 2014 it must be appreciated that the due dates for returns are fixed by the legislation and that they are different depending on whether the return is filed electronically or not. The penalty legislation does not allow the period of delay for a return filed on paper to start to run from the due date for electronic returns (or the other way round); the due date for paper returns was 31 October 2013 and that is when the penalty time period for paper returns started.

14. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the daily and 6 month penalties imposed are due and have been calculated correctly.

35 **Reasonable excuse?**

15. The legislation does not define what counts a reasonable excuse. Whether someone has a reasonable excuse depends on the particular circumstances of the case. It is important to recognise that the "failure" to which reasonable excuse relates is the failure to submit the return by the due date. This means the relevant facts and circumstances are those which relate to the period before the due date (31 October 2014 for paper returns).

16. While the appellant does not allude to this directly their submissions intimate a concern that they have been liable for a 6 month penalty because they ended up filing a paper return when they had intended to file an electronic return. It is unfortunate that the parties' representations have not specifically been focussed on whether there was a reasonable excuse for a failure to file the return on 31 October 2015 because that is the due date on which the penalty is predicated. The matter is prone to confusion because of HMRC's choice to automatically calculate penalties by reference to the due dates for the type of return that is eventually received irrespective of the actual intentions and circumstances of the taxpayer in relation to what sort of return they were planning to file. This means that even if a taxpayer never intended to file a paper return by the 31 October deadline, if he or she ends up filing a paper return (perhaps due to difficulties filing an electronic return), the system assumes they had intended to file a paper return and their penalty will be calculated by reference to earlier paper deadline rather than the later deadline for electronic returns.

17. The relevant question, is whether there was a reasonable excuse for the appellant not filing a paper return on 31 October 2014 up until the date the return was actually filed. The appellant's subsequent conduct indicates that in the period prior to 31 October (and for that matter) the reason they failed to file a paper return was because he fully intended to file an electronic return by the deadline. That was in my judgment a course open to him and was a reasonable excuse for not filing a paper return. But that excuse ceased when no electronic return was filed by the deadline.

18. It should be noted that paragraph 23(2) (c) provides that:

“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.”

19. The question then is whether from 1 February 2014 when the excuse ceased the taxpayer remedied the failure without unreasonable delay. Given his intention to file electronically by the deadline it was not unreasonable in my view for the appellant to take steps to find out how he could file electronically and in my view the appellant demonstrated that his agent was making reasonable efforts to pursue this avenue up until their letter of 7 April 2014. Allowing for possibility that HMRC would respond favourably it was not unreasonable up to that point to think the appellant might still be able to file an electronic return but to line up a paper return as a contingency. I find that in the circumstances of this case the appellant remedied the failure to file without unreasonable delay after the excuse had ceased.

Proportionality

20. The conclusion above is sufficient to dispose of the appeal. The remainder of this decision sets out my observations on the further issues that would remain to be considered if I were wrong in that conclusion. The appellant has argued that the penalties charged are very harsh pointing out also that the timeframe between the paper filing date and the electronic filing date is less than 6 months. These arguments amount to a challenge to the penalties on the basis that the penalties are disproportionate. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do

not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

Special circumstances

21. As is clear from the legislation the tribunal can only reduce a penalty if
5 HMRC's decision in respect of the application of paragraph 9 of Schedule 55 is
flawed when considered in the light of the principles applicable in proceedings for
judicial review. This will be the case if HMRC: failed to consider its discretion,
considered something which was irrelevant, failed to consider something relevant, or
came to a decision it could not reasonably have reached. HMRC's submission
10 indicates they specifically considered the exercise of the discretion available to them.
I do not consider their decision was flawed in the sense above and there would
therefore be no basis for the tribunal to impose a special reduction if I were wrong in
my conclusion on reasonable excuse above.

Conclusion

15 22. The penalties were correctly charged and calculated. The appellant has
demonstrated he had a reasonable excuse for the failure to submit the return by the
due date and that he acted without unreasonable delay in filing the return once the
excuse ceased. HMRC's decision to impose the penalties under appeal is cancelled
and the appellant's appeal against them is allowed.

Application for permission to appeal

20 23. This document contains a summary of the findings of fact and reasons for the
decision. A party wishing to appeal against this decision must apply within 28 days
of the date of release of this decision to the Tribunal for full written findings and
reasons. When these have been prepared, the Tribunal will send them to the parties
25 and may publish them on its website and either party will have 56 days in which to
appeal. 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.

30 **SWAMI RAGHAVAN**
TRIBUNAL JUDGE

RELEASE DATE: 11 JULY 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. Paragraph 1(1) provides “a penalty is payable by a person (“P”) where P fails to make or deliver a return...on or before the filing date”. Paragraph 1(4) defines “filing date” as the date
5 by which the return is required to be made or delivered to HMRC.

2. Section 8 of the Taxes Management Act 1970 sets out the obligation to file a return when required to do so by a notice given by HMRC. It stipulates that the due date for non-electronic returns is 31 October in the year following the year of assessment and 31 January in the year following the year of assessment for electronic
10 returns.

3. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

- 15 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
 - 20 (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).
- 25 (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
30 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.
- 35 (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 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

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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 12 months beginning with the penalty date.

10 (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—

15 (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—

20 (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—

25 (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—

30 (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—

35 (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.

6. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

40 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.

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(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,

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(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.

15 7. 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.

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(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.

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(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.

30 8. 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.

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(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.

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(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

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(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.

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