



**TC07700**

*Late filing and late payment penalties – reasonable excuse*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2013/03923**

**BETWEEN**

**Dr Paul Banks**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE RACHEL MAINWARING-TAYLOR  
MRS JO NEILL**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21  
January 2019**

**The Appellant represented himself**

**Sadia Shakeel of HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. The Appellant appeals against penalties charged for late filing of tax return and late payment of tax relating to the tax year ended 5 April 2011 and against a penalty for late filing of tax return for the tax year ended 5 April 2012.
2. The Appellant claimed reasonable excuse for late filing and payment due to ill health.
3. HMRC considered that the Appellant's illness did not constitute reasonable excuse for the relevant period.

### RELEVANT LEGISLATION

4. Section 8 of the Taxes Management Act 1970 (TMA 1970) gives the deadlines for filing tax returns as 31 October following the end of the relevant tax year for paper returns and 31 January following the end of the relevant tax year for electronic returns.
5. Section 59B TMA 1970 gives the deadline for payment of tax as 31 January following the end of the relevant tax year.
6. Schedule 55 of the Finance Act 2009 (Sch55) provides for penalties to be imposed where a tax return is filed late:
  - (1) A penalty of £100 is imposed if the return is not filed on time (Sch55 para3);
  - (2) If the return remains outstanding three months after the day after the filing date and HMRC decide a penalty should be payable and HMRC give notice of the penalty to the taxpayer, then a daily penalty of £10 for each day the return remains outstanding up to a maximum of 90 days (Sch55 para4);
  - (3) If the return remains outstanding six months after the day after the filing date a penalty equal to the greater of 5% of any liability to tax which would have been shown in the relevant return and £300 is imposed (Sch55 para5).
  - (4) If the return remains outstanding twelve months after the day after the filing date, further penalties are imposed, the quantum of which depends on whether the taxpayer has withheld information deliberately. Where the withholding of information is neither deliberate nor concealed a penalty equal to the greater of 5% of any liability to tax which would have been shown in the relevant return and £300 is imposed (Sch55 para6(5));
  - (5) Liability to a penalty under Sch 55 does not arise if the taxpayer satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure (Sch55 para23).
  - (6) The following do not constitute reasonable excuse under para 23:
    - (a) An insufficiency of funds unless attributable to events outside the taxpayer's control;
    - (b) Reliance by the taxpayer on another person unless the taxpayer took reasonable care to avoid the failure (para 23(2)(a) and (b)).
  - (7) Where the taxpayer has a reasonable excuse 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 ceased (Sch 55, para 23(2)(c))
7. Section 56 of the Finance Act 2009 (s56) provides for penalties to be imposed where tax is paid late.

- (1) A penalty of 5% of the unpaid tax is imposed if the tax remains unpaid 30 days after the date it was due ('the penalty date') (Sch56 para3(2));
- (2) A penalty of 5% of the unpaid tax is imposed if the tax remains unpaid five months after the penalty date (Sch56 para3(3));
- (3) A penalty of 5% of the unpaid tax is imposed if the tax remains unpaid eleven months after the penalty date (Sch56 para3(4));
- (4) Liability to penalties under Sch 56 do not arise in relation to a failure to pay tax if the taxpayer satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure (Sch 56, para 16).
- (5) The following do not constitute reasonable excuse under para 16:
  - (a) An insufficiency of funds unless attributable to events outside the taxpayer's control;
  - (b) Reliance by the taxpayer on another person unless the taxpayer took reasonable care to avoid the failure (para 16(2)(a) and (b)).
- (6) Where the taxpayer has a reasonable excuse 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 ceased (Sch 55, para 16(2)(c)).

#### **EVIDENCE**

8. HMRC provided evidence that the tax return and penalty notices had been correctly issued to the Appellant.
9. The Appellant gave evidence as to the reasons for the delay in filing the return and paying the tax.

#### **AGREED FACTS**

10. The Appellant's tax return for the year ended 5 April 2011 was due by 31 January 2012 if filed electronically. It was actually filed on 5 March 2013.
11. The Appellant's tax for the year ended 5 April 2011 was payable by 31 January 2012. It was actually paid on 21 January 2013.
12. The Appellant's tax return for the year ended 5 April 2012 was due by 31 January 2013 if filed electronically. It was actually filed on 5 March 2013.
13. HMRC provided evidence that the return and penalty notices had been issued to the Appellant and the Appellant agreed this to be the case.
14. HMRC issued penalties as follows:
  - (1) With respect to late filing of tax return for year ended 5 April 2011:
    - (a) £100 under Sch55, para 3 (late filing);
    - (b) £900 under Sch55, para 4 (daily penalties after three months);
    - (c) £300 under Sch55, para 5 (six month late filing);
    - (d) £9,524 under Sch55, para 5 (six month late filing less £300 imposed at same time);
    - (e) £300 under Sch55, para 6 (12 month late filing);
    - (f) £9,524 under Sch55, para 6 (12 month late filing less £300 imposed at same time).

- (2) With respect to late payment of tax for year ended 5 April 2012:
  - (a) £9,824 under Sch56, para 1 (30 days late payment);
  - (b) £9,824 under Sch56, para 3 (six month late payment).
- (3) With respect to late filing of return for year ended 5 April 2013:
  - (a) £100 under Sch55, para 3 (late filing).

#### **ISSUE**

15. The issue to be decided by the Tribunal is whether the Appellant had reasonable excuse for each of:

- (1) The late filing of his tax return for the year ended 5 April 2011;
- (2) The late payment of his tax due for the year ended 5 April 2011;
- (3) The late filing of his tax return for the year ended 5 April 2012.

#### **APPELLANT'S CASE**

16. The Appellant explained that he has a number of chronic health conditions, including chronic fatigue syndrome ('CFS') and depression, that impair his ability to function and deal with everyday tasks. He has suffered from these conditions for many years and for much of that time has been able to run a property business, keep accounts and file tax returns on time. However, on occasion he suffers acutely for fairly long periods and is unable to cope with many day to day activities.

17. The Appellant described in detail how his CFS affects him. At its worst it confines him to bed for what can be long periods. Whilst he might be able to get up occasionally and perform certain tasks, these will tire him out and result in more time confined to bed, and other tasks remain impossible for him.

18. A key feature of CFS is 'brain fog' resulting in an inability to concentrate. This leaves him unable to deal with paperwork and calculations at times when he may still be able to carry out more simple actions such as making phone calls or arranging urgent property repairs. Such tasks do not require the same level of concentration as paper-based activities.

19. The Appellant explained in detail how his illness has affected him in the past and particular events that have triggered acute episodes, including the deaths of his parents.

20. The Appellant explained that he had taken steps over the years to manage his illness and to enable him to be able to comply with his legal obligations and to run his business, particularly in the wake of difficult episodes. He had engaged an accountant and a bookkeeper. However, he had concluded that even with additional help he was unable to continue to operate his business after around 2007 and took the decision to sell up. Unfortunately, this had taken several years due to the financial crisis of 2008 and its impact on the property market.

21. The Appellant explained that he had suffered very poor health until around 2013 when it finally began to improve following the sale of his business and move out of London. In particular he described the effect of the 'brain fog' that had prevented him from filing his 2010/11 tax return on time. Despite engaging people to help, there were fundamental tasks he had to perform which he was unable to do until the 'fog lifted', but during that period he could still focus on less demanding matters such as arranging for property repairs to be carried out. He described focusing his limited resources of energy on carrying out the bare minimum necessary.

22. As soon as the 'brain fog' began to lift, the Appellant said he got on with filing the returns and paying the tax due.

23. The Appellant explained that he had been in contact with HMRC by telephone several times during the period when he was unable to manage his tax affairs. He said that they had simply advised him that he must file and pay as soon as possible, until in early 2013 someone he spoke to suggested he at least pay the tax based on estimated figures to avoid any further penalties for late payment. The Appellant said that he followed this advice immediately. He said he had not been aware of the possibility to pay based on estimated figures before and in no earlier phone call did HMRC tell him this was possible. He said had HMRC told him sooner he would have been able to do this, even in his debilitated state, and would have avoided the late payment penalties imposed.

24. With respect to the 2011/12 return, the Appellant explained that he had provided the information to his accountant in January 2013 but the latter had been unable to prepare the return for him by the deadline of 31 January due to burden of work for other clients and that the Appellant had therefore filed as soon as he possibly could when he did so on 5 March 2013.

#### HMRC'S CASE

25. HMRC said that whilst they were sympathetic to the Appellant's illness and the difficulties he had faced, this could not in the circumstances constitute reasonable excuse.

26. HMRC cited *Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18: there being no statutory definition of a reasonable excuse, it "is a matter to be considered in the light of all the circumstances of that particular case".

27. HMRC cited *Clean Car Company v The Commissioners of Customs & Excise* [1991] VATTR 234:

"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 test. 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 in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the questions: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

28. HMRC submitted that the actions of a 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 Taxes Acts. If a taxpayer could reasonably foresee an event, whether or not it is within their control, HMRC would expect them to take steps to meet their obligations.

29. HMRC cited *Morgan and Donaldson v HMRC* [2013] UKFTT 317 at para 105: "by definition [a reasonable excuse] must be both reasonable and causative. It cannot be an excuse for a default at all if it was not the cause of the default".

30. HMRC argued that if the Appellant was able to continue his role in the family business then he should have been able to comply with his obligations as a taxpayer. It was not reasonable for a taxpayer to choose to prioritise other aspects of his business over his duty to comply with tax laws (part of running a business). HMRC did not accept that the Appellant could be able to run his business whilst unable to file his tax returns. HMRC contended that the Appellant's ability to continue to work in the business in some capacity throughout the period showed that the Appellant was able to go through his day to day obligations where necessary.

31. HMRC argued that given the Appellant's health issues with CFS were ongoing, it would have been reasonable for him to put in place measures to ensure tax compliance despite his condition.

32. HMRC submitted that the Appellant had been in the Self Assessment system for long enough (since 1998 according to their records) to properly understand his obligation to file tax returns.

33. HMRC expressed sympathy for the Appellant's bereavements and depression and acknowledged that such factors could constitute reasonable excuse if they prevented a taxpayer from being able to file a tax return on time, but submitted that in this case the Appellant had not been able to demonstrate a causal link between these particular issues and his late filing of the 2010/11 or 2011/12 tax returns.

34. HMRC considered that there was no 'reasonable excuse' within the meaning permitted by the legislation in respect of the late filing of the 2011/12 tax return because this was effectively reliance on another person. Under Sch56 para 6(2)(b), reliance on another person cannot be reasonable excuse unless the taxpayer took reasonable care to avoid the failure. HMRC submitted that this was not the case here.

35. HMRC cited *Arnold & George Jeffers v HMRC* [2010] UK FT 22:

"The obligation to make a tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with e.g. the obligation to make the return on time can amount to a reasonable excuse. To be such a circumstance it must be something that could not reasonably have been foreseen. It must be something exceptional."

36. HMRC submitted that the accountant's failure to file on time was not outside either the accountant's or the Appellant's control and no exceptional circumstances prevented the agent or the Appellant from filing the return on time. As such the agent's failure to file on time was not a reasonable excuse.

37. HMRC noted that under Sch55, para 16(1), HMRC may reduce penalties if they think it is right to do so because of special circumstances. 'Special circumstances' is not defined in the legislation, save that 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 of another.

38. HMRC said they had considered the reasons given by the Appellant for late filing and do not think that a reduction of penalties below the statutory amount is merited in this case; HMRC considered the penalties to be appropriate in the circumstances.

#### **DISCUSSION**

39. The issue before the Tribunal is whether the Appellant had a reasonable excuse for the late filing of his 2010/11 tax return, the late payment of tax for 2010/11 and the late filing of his 2011/12 tax return.

40. The facts are not in dispute, rather the analysis of them and application of the law to them. The Appellant submits that his ill health prevented him from filing his 2010/11 return and paying the tax due and that his agent was unable to file his 2011/12 return on time and that these constitute reasonable excuse. HMRC acknowledges the fact of the Appellant's ill health and the agent's inability to file on time but does not consider that these amount to reasonable excuse.

41. Under Sch55, para 23(1) (for late filings) and Sch56, para 16(1) (for late payment):

“Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure”.

42. The Appellant has not satisfied HMRC, so it now falls to the Tribunal to consider if it is satisfied of the reasonable excuse, taking account of the evidence given.

#### **Late filing of 2010/11 tax return**

43. The Appellant has explained the nature of his illness and stated that as a result of it he was unable to concentrate sufficiently to complete accounts and file his tax return.

44. Having suffered from CFS several years he said he took steps to ensure he met his filing obligations, engaging variously an accountant, a bookkeeper and an assistant, but that even with this assistance he concluded he was not able to run his business, with everything it entailed and took steps to wind it up. It was during the period after he had decided to wind up the business, which took some time due to economic circumstances beyond his control, that he experienced ongoing acute bouts of CFS that he says prevented him from filing his return.

45. HMRC argued that the fact the Appellant was able to continue his role in the business meant his illness was not a reasonable excuse for late filing: if he could deal with some of his obligations, he could deal with all of them.

46. The Tribunal does not agree with this position. We have concluded from the evidence presented that the Appellant was not able to fulfil his role in the business. As he explained, it was for this reason he decided to wind it up. The fact that he was able to perform certain tasks such as making telephone calls does not mean he was able to deal with more complex matters. Based on his oral evidence, we accept his claim that he could not deal with his return due to prolonged ‘brain fog’ and that when he began to recover from this he got on with the process of filing the return as quickly as he could. The fact that he repeatedly telephoned HMRC indicates that he intended to comply with his obligations.

47. The Appellant has satisfied us that he had a reasonable excuse for the late filing of his 2010/11 tax return.

#### **Late payment of tax for 2010/11**

48. We consider that the Appellant’s illness prevented him from paying the tax due for 2010/11 on time.

49. The Appellant made an additional argument that HMRC failed to inform him of the option to pay the tax based on estimated figure on several occasions when he telephoned for assistance. The Appellant said he could in fact have paid the tax sooner had he realised that he could do so based on estimated figures. Whilst we have insufficient evidence to conclude that HMRC had a responsibility to inform the taxpayer of the full extent of his obligations in this way, we do consider that his illness was such that it prevented him from informing himself of this option.

50. The Appellant has satisfied us that he had a reasonable excuse for the late payment of his tax for the year 2010/11.

#### **Late filing of 2011/12 tax return**

51. The Appellant was, on the evidence he gave, able to deal with the process of bringing his tax affairs up to date before the 31 January 2013 deadline for filing his 2011/12 return. He gave as a reasonable excuse for the late filing of this return his accountant’s inability to prepare it in time due to demands of other clients.

52. As HMRC pointed out, reliance on someone else can only be a reasonable excuse if the taxpayer took reasonable care to avoid the failure (Sch55, para 23(2)(b)). Normal pressures of work do not constitute reasonable excuse.

53. The reason given for the accountant's failure to file is pressure of work during January. This seems to us to be normal work pressure experienced by accountants at that time of year. It seems that the reason for the accountant's late filing was that the Appellant provided the necessary information to him too late for the accountant to be able to prepare the return in time. It therefore cannot be said that the Appellant took reasonable care to avoid the failure.

54. The Appellant has not satisfied us that he had a reasonable excuse for the late filing of his 2011/12 tax return

#### **CONCLUSION**

55. For the reasons set out above:

- (1) the Appellant's appeal is allowed in respect of the penalties for late filing of the 2010/11 tax return and late payment of the tax for 2010/11; and
- (2) the Appellant's appeal is dismissed in respect of the penalty for late filing of the 2011/12 tax return.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

56. 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.

**JUDGE RACHEL MAINWARING-TAYLOR**

**TRIBUNAL JUDGE**

**RELEASE DATE: 7 MAY 2020**