



TC05758

Appeal number: TC/2013/02357

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INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns – No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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STEPHEN JOHN TOMPKINS

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AIIT**

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The Tribunal determined the appeal on 5 April 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 which was undated but received by the Tribunal on 3 April 2013, and HMRC's Statement of Case received by the Tribunal on 31 January 2017 with enclosures. The Tribunal wrote to the appellant's agent on 1 February 2017 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received.

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DECISION

1. Introduction

5 This considers an appeal against penalties totalling £1,300 imposed by the respondents (HMRC) under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment (SA) tax return for the tax year 2010-2011.

2. Legislation

Finance Act 2009 Schedule 55
10 Taxes Management Act 1970, in particular Section 8(1D)

3. Case law

Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967
Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152
15 Keith Donaldson v HMRC [2006] EWCA Civ 761
HMRC v Hok Ltd. [2012]UKUT 363 (TCC)
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
David Collis [2011] UKFTT 588 (TC)
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4. Facts

Schedule 55 of the Finance Act 2009 (“the Schedule”) makes provision for the imposition by Her Majesty’s Revenue and Customs (“HMRC”) of penalties on taxpayers for the late filing of tax returns.

25 If a person fails to file an income tax return by the “penalty date” (the day after the “filing date” i.e. the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

Paragraph 4 provides:

30 “(1) A person is liable to a penalty under this paragraph if (and only if)–

(a) The 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

35 (c) HMRC give notice to the person 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).

Paragraph 5 of the Schedule provides

(1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

5 (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

10 The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

15 5. In this case in respect of the tax year ended 5 April 2011 HMRC issued a notice to file to the appellant on 6 April 2011. The filing date for a non-electronic return was 31 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant failed to submit its tax return until 26 November 2012. As the return was not submitted by the latest filing date of 31 January 2012 HMRC issued a notice of penalty assessment on or around 14 February 2012 in the amount of £100. As the return had still not been received 3 months after the penalty date of 1 February 2012, HMRC issued a notice of daily penalty assessment of £900 on or around 7 August 2012, calculated at £10 per day for 90 days. As the return still had not been received 6 months after the penalty date HMRC issued a notice of penalty assessment of £300 on or around 7 August 2012.

25 6. HMRC's approach to daily penalties was the subject of an appeal by Keith Donaldson which culminated in a decision of the Court of Appeal. The Tribunal has read that decision and considers that its conclusions whilst informative have negligible effect on the matters considered in this appeal save that the absence of the correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice.

7. History

30 On 25 August 2012 the appellant forwarded to HMRC an Appeal against penalties form SA370

The appellant wrote

35 "I have not been able to get my accounts done in time because my company in the beginning of 2011 was in financial trouble, we owed money to our accountants who would do no more work until payment received, then in July our bank took away our overdraft facility from us making cash flow an even greater problem, in October we were still unable to pay accountants and we owed other outlets and decided the best way forward was to go into liquidation. All our accounts went to our liquidator, then I did not get my books and wage slips till February, by that time I had no work and was unemployed so again had no money for accountants. I have only had work for the last

couple of months and have only just had enough money to pay accountants to file my tax return. This is why I am making an appeal.”

On 18 September 2012 HMRC wrote to the appellant saying that they could not consider the appeal until they had received the appellant’s tax return.

5 On 15 January 2013 HMRC wrote to the appellant saying they had now considered the appeal. They said

“I do not agree that you have a reasonable excuse because if you were not able to pay an accountant to submit your return you should have completed the return yourself, You received your paperwork back from the liquidator in February but you did not
10 submit your return until November 2012. You should have asked the liquidator for access to your paperwork so that you could fill in your return. In any event you could have filed your return as soon as you received your paperwork back.

On the second page of the letter there appears the following

“HMRC’s view is that a reasonable excuse will only apply when an unexpected or
15 unusual event, either unforeseeable or beyond your control has prevented you from sending your return in on time.” and

“Your overdue tax return

Your tax return for 2010-11 is still overdue. Please complete and return this to us as soon as possible,”

20 The letter offered a review.

8. On 30 January 2013 the appellant requested a review.

On the review form he said

“I was not feeling the best during this time. I was losing my business was unemployed with no money and was feeling very depressed. I had never filled in a tax return
25 before and I am not the best with this type of paperwork and that is why I have always used an accountant. I did ask for my paperwork to be returned but the liquidator had sent it off to be put in their storage area so I had to wait to get it back. I have always tried to pay my tax on time and would have done on this occasion but due to the
30 circumstances I have listed above I would appreciate it if you would look at this again. I have since found work and I am paying my tax every two to three weeks as and when I am paid and hopefully will not be in this situation again.

Also I have received other paperwork saying no further action was going to be taken for this matter can you look into this”

9. On 12 March 2013 HMRC advised the appellant of the conclusion of their review
35 which was that the decision to charge the penalties was correct.

The letter included

“The online return submitted, which was due by 31 January 2012, was received on 26 November 2011. Therefore it was late and penalties were chargeable.”

5 The Tribunal notes that there is an error here by HMRC as they received the return on 26 November 2012.

The letter also included

“You explained your reasons for not filing your return on time, but in my view they do not amount to reasonable excuse.

10 Not having enough money to pay your accountant is not seen as a reasonable excuse for not submitting your return on time.

The fact that your company went into liquidation and all business related paperwork was held by the liquidator is also not seen as a reasonable excuse for the whole period that your tax return remained outstanding. You could have completed your tax return by the online filing date of 31 January 2012 and then requested an amendment to your
15 2010-2011 return when your actual income was known.

10. Appellant’s submissions

The Appellants submissions are included in the above paragraphs.

In the Grounds for appeal in the Notice of Appeal the appellant stated “I am appealing this decision due to the fact at the time of the deputed tax return my business had
20 failed. I was feeling very depressed as I was out of work had no money, I never fill my own tax paper work in as I have a problem filling in your forms, so always used accountants. Our accountants were owed lots of money by us when the business finished and I did not have any money for them to do my tax return, as soon as I did I got them to do it (they would not do it until I paid them upfront). My paperwork for
25 them to complete my tax return had be given over to my liquidator who had then put it into storage so I also had to get these back. Also I did not know a tax return could be part filled in and sent in and then amended I am not an accountant and matters of tax baffle me, I am sorry to say. I feel it is very harsh amount of money to be fined for
30 filing my paperwork late and due to now working for an employer hope never happens again.”

11. HMRC’s submissions

In addition to the submissions detailed in the above paragraphs HMRC make the following submissions

35 HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the appellant to ensure his 2010-2011 tax returns was filed by the legislative date.

HMRC records show that the appellant submitted his online SA return on 26 November 2012. HMRC say that the SA return for the 2010-2011 year issued to the appellant clearly showed the due dates for filing the return online or in paper format.

5 12. In respect of reasonable excuse HMRC say that they consider 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 Tax Acts. The decision depends on 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,
10 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”.

HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

15 13. HMRC say that the appellant had from the end of the 2010-2011 tax year on 5 April 2011 until 31 January 2012 in which to arrange for the completion of his return. HMRC consider this is sufficient time under most circumstances.

14. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.

20 15. HMRC say the penalties are not disproportionate. They say that in order for a national measure to be considered disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

25 16. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

17. Tribunal’s Observations

30 18. The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit SA returns on time. The return for the periods 2010-2011 was due to be submitted by 31 January 2012 but it was submitted late on 26 November 2012. Penalties totalling £1,300 are therefore due unless the appellant can establish a reasonable excuse for the delay as referred to in Paragraph 23(1) Schedule 55 Finance Act 2009.

35 19. The Tribunal is aware that the phrase “an unexpected or unusual event, either unforeseeable or beyond your control” used by HMRC in their letter of 15 January 2013 in response to the initial appeal is taken from the dissenting judgement of Scott LJ in the case of *Salevon Ltd*. It being from the dissenting judgement the Tribunal considers it inappropriate for HMRC to use it to consider whether the appellant had a
40 reasonable excuse in this case. In addition HMRC’s response was confusing in that it

said on page 1 “you did not submit your return until November 2012 but then on page 2 said “Your tax return for 2010-11 is still overdue”

20. The Tribunal notes that the appellant was feeling very depressed because of the liquidation of his business and because he had no money. Whilst the Tribunal has
5 some sympathy with the appellant it can only consider that provides a reasonable excuse if it is supported by medical evidence. No medical evidence has been provided.

21. The Tribunal agrees with HMRC that the appellant had sufficient time to submit his return. He could have tried to submit the return himself. He could have could have
10 completed an estimated tax return by the online filing date of 31 January 2012 and then requested an amendment to his 2010-2011 return when his actual income was known. He could have telephoned or written to HMRC to explain his predicament before the deadline date for filing.

22. Legislation states that lack of funds is not considered a reasonable excuse.

15 23. Lack of ability to complete a tax return is also not considered a reasonable excuse. It is open to a person to get help or contact HMRC if they have difficulty.

24. The appellant mentions other paperwork which he suggests says no further action was going to be taken. The statement was not specific as to date and a copy of the paperwork was not provided to the Tribunal. HMRC did not comment upon it
20 although they were requested by the appellant to do so. Without more precise information the Tribunal was unable to consider this further. The onus is on the appellant to provide documents he wants the Tribunal to consider.

25. The appellant claims that the level of the penalties is harsh. The Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power
25 to amend them unless they are incorrectly imposed or they are inaccurately calculated.

26. In HMRC v Hok Ltd the Upper Tribunal at paragraph 36 said “...The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In
30 particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of the perception that it is unfair.”

35 27. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded there are none. The Tribunal sees no reason to disagree.

28. The Appellant has not established a reasonable excuse for the late submission of his tax return for the period 2010-2011. The Tribunal has no power to amend the level of the penalty which is laid down in legislation. Therefore the appeal against the late filing penalties of £1,300 is dismissed.

5 29. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

RELEASE DATE: 7 APRIL 2017