



TC05786

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Appeal number: TC/2013/04222

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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ZE ZOOK

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 11 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 19 June 2013 with enclosures, and HMRC's Statement of Case received by the Tribunal on or about 3 February 2017 with enclosures. The Tribunal wrote to the appellant on 7 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he 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
Garnmoss Ltd trading as Parham Builders [2012] UKFTT 315 (TC)
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
20 David Collis [2011] UKFTT 588 (TC)

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
25 taxpayers for the late filing of tax returns.

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.

30 Paragraph 4 provides:

"(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.

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 28 May 2012 when HMRC received
15 a non-electronic return. For some reason HMRC did not process the return until 25 June 2012.

6. 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
20 date of 1 November 2011, HMRC issued a notice of daily penalty assessment of £900 on or around 12 June 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 26 June 2012.

7. HMRC's approach to daily penalties was the subject of an appeal by Keith
25 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.

30 8. **History**

The appellant enrolled to use the Self-assessment service through the Government Gateway. On 9 January 2012 HMRC wrote to the appellant providing him with the required activation code and instructions on how to activate the service. The letter is clearly marked "Urgent – Use within 28 days"

35 9. On 23 January 2012 (ie 8 days before the latest day for filing an online return) the appellant wrote to HMRC. The letter states:-

"I am writing in connection with my online self-assessment tax return for 2011-2012. I have not been able to complete my form online due to cumbersome and inadequate support information and software in connection with completing the form. I have

spent all afternoon, trying passwords, plus the two hours time lapse required to log in, not to mention the countless hours spent on the phone, waiting to speak to someone, but to no avail.

5 It appears there is also a flaw in the pin code I have been issued as the fourth item from the top of my activation code is stated as alphabet 'L' but the word starts with 'N'. This letter is to inform you of my refusal to pay late payment fees.

10 Please send me the required forms to fill in the returns on paper. Just because countless of persons are able to use your current system is not necessarily a barometer that your system is efficient. I understand the core concerns around security but what you currently have in place is insufficient for the 21st century.....”

10. On 18 March 2012 the appellant wrote to HMRC. The letter states

“I am attaching (enclosing) a letter for your attention that I sent to you before the deadline for online submission closed.

15 As I did everything within my means, beyond reasonable doubt to complete it online, but could not, due to no fault of my own I would like the late fee cancelled.”

The appellant sent in an appeal but the box for completion of the date of submission has been erroneously completed by the appellant with a date which appears to be his date of birth.

His reasons for appeal were:-

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- a. I do not have the money.
 - b. Dialogue took place before the tax return was late with you.
 - c. The 'PIN' No. you sent was not received.
 - d. I am attaching documentation stating the late penalty was/is suspended.
- 25
- e. The funds requested is outrageous, considering £50 net profit was made. The proportion is obscene and a disgrace to any economic tax system.
 - f. If I am harassed further about this I shall file complaints to the required bodies as to how you are reducing my health.

30 11. HMRC responded to this on 17 April 2012. Their letter includes :-

“In your appeal you told me you that you completed your tax return online, however my records show that we did not receive the form. This may be because you did not complete the final stage of the online process.

If your tax return was completed online successfully we would have sent an e-mail confirming we had received your tax return.”

5 “I cannot consider your appeal whilst the tax return is still outstanding. Please can you try to complete your tax return online again, within the next 30 days. If you’re unable to do this please print and complete a tax return from our website at

If you do send us a paper tax return, please also complete and send us a *Unable to file using SA online – claim for reasonable excuse* form, to stop us charging you daily penalties”

12. On 9 May 2012 HMRC wrote to the appellant stating

10 “I refer to the enclosed Employment and Self Employment supplementary pages. Unfortunately I cannot accept these pages as the full Tax Return that was issued to you during April 2011 also needs to be completed.”

13. On 28 May 2012 HMRC received the Appellant’s 2010-2011 non-electronic tax return.

15 14. On 12 June 2012 HMRC wrote to the appellant advising that they had still not received his 2010-2011 tax return and therefore could not consider his appeal until it had been submitted. It appears that this letter was issued because the return received on 28 May 2012 had not yet been processed by HMRC.

20 15. On 23 July 2012 HMRC wrote to the appellant advising that the result of the review was that they did not consider that the appellant had reasonable excuse for not sending his tax return on time. They said that the appellant had completed tax returns previously and so should have been aware of the deadline dates. They offered a review.

25 16. HMRC say the appellant requested a Review of the decision on 25 July 2012 but refer to a Request for review of decision form SA634 which was included in the bundle of papers provided to the Tribunal. That form is dated 11 August 2012 and includes:-

“I did everything beyond reasonable doubt to avoid the late filing penalty.

30 1. Over 3 PIN codes were sent and I did not receive it until late Jan. (It is a communal post box).

2. The letter I sent dated 23 Jan. prior to the deadline explicitly explains why it was filed late.

3. There was an aberration between the PIN code and activation code you need to take responsibility for.

35 4. Calling your offices on 23rd Jan., being on the phone for over 2 hours and not being able to speak with a respondent is unacceptable.

5. Your system came up with glitches whilst I was using a Mac.”

17. On 28 September 2012 HMRC wrote to the appellant advising him that the result of the review was that the decision in the letter of 23 July 2012 should be upheld.

5 The letter included “As you have been registered under self-assessment for some time you should have been aware of the consequences of late filing. I note from the information you provided that 3 pin codes were sent out. You said that you did not receive it until late January. I have checked with our electronic business help desks who have confirmed you did not activate this code.

10 The letter confirmed that the review officer did not consider the reasons given by the appellant to be a reasonable excuse.

18. Appellant’s submissions

15 In the Grounds for appeal in the Notice of Appeal the appellant repeats submissions made in the correspondence detailed above and makes a number of submissions which relate to correspondence with HMRC which occurred after the deadline date and in some cases after submission of the return.

The Notice of Appeal also includes the following:-

“My dwelling has communal post entrance and in many ways this has been at the heart of the dispute as to why my 2010-2011 late filing occurred.”

20 “When I did eventually receive it (the PIN code) and was trying to file my tax online. There was an error with the code or glitch with the system in relation to my mac computer (despite me making use of different browsers) and I was unable to file them online in time.”

“There was confusion as to whether the return was filed online or offline”

19. HMRC’s submissions

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

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.

30 HMRC records show that the appellant submitted his online Self-assessment return on 28 May 2012. HMRC say that the Self-assessment return for the 2010-2011 year issued to the appellant clearly showed the due dates for filing the return online or in paper format. They say their records show that the appellant had filed his returns late for the previous three tax years.

20. 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, 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”.

10 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.

21. 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.

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

23. 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*.

24. 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*). They say the special circumstances must also apply to the particular individual and not general circumstances that apply to many taxpayers (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

25. Tribunal’s Observations

30 The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit Self-assessment returns on time. The return for the period 2010-2011 was due to be submitted by 31 January 2012 but it was submitted late on 28 May 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 26. What appears to have happened is that the appellant after some difficulty obtained an activation code for use in submitting his online return by the due date of 31 January 2012. He received this a few days before the deadline so he should have been able to submit his return on time. Unfortunately he made a mistake in entering the activation code. The appellant typed a letter ‘N’ when he should have typed ‘L’. It was a simple mistake which prevented the activation from going ahead.

5 In the case of Garnmoss Ltd trading as Parham Builders the Tribunal observed at paragraph 12 “*What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.*”

In this case the Tribunal considers that the appellant made a simple mistake which does not provide a reasonable excuse for his failure to submit his return by 31 January 2012.

10 27. This mistake, made before the deadline date of 31 January 2012, does not explain why the appellant did not submit his return until 28 May 2012. The appellant obtained a paper return but then only completed the Employment and Self Employment supplementary pages part of it. The appellant has offered no explanation as to why he initially only completed selected pages rather than the whole return.

15 28. The Tribunal agrees with HMRC that the appellant had sufficient time to submit his return. After the initial failure he could have tried again to submit the return himself in the period 23 January 2012 to 28 May 2012. In that period he could have telephoned or written to HMRC to explain his predicament and seek assistance. Any of these actions could well have either avoided or reduced the penalty.

20 29. The appellant expresses dis-satisfaction with the penalties system and with HMRC’s administration. In the Tribunal’s view none of these provide the appellant with a reasonable excuse for the late submission of his return.

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

30 31. 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 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 32. 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.

40 33. 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 34. 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.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

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RELEASE DATE: 13 APRIL 2017