



**TC05984**

**Appeal number: TC/2017/01586**

*INCOME TAX – Donaldson – self-assessment – return filed late – penalty –  
whether reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ADAM NIEDZWIECKI**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT**

**The Tribunal determined the appeal on Wednesday 28 June 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 14 February 2017 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 March 2017.**

## DECISION

### Introduction

- 5 1. This is an appeal against an individual tax return late filing penalty of £100, daily penalties of £900 and a six months late filing penalty of £300 for the late submission of the self-assessment return for the year 2014/15.
2. This appeal is on the basis that the appellant had a reasonable excuse for the late submission of the return.

### 10 Background

3. The appellant has been required to complete a self-assessment tax return since 2005 when he was appointed as a director of a company on 14 October 2004. He remained a director until the company was dissolved on 14 February 2017.
4. The appellant has successfully filed online since 2007/08.
- 15 5. The Notice to File for the year ending 5 April 2015 was issued to the appellant on 6 April 2015 and the filing date was 31 October 2015 for a paper return or 31 January 2016 for an electronic return.
6. As the return was not received by the filing date, HMRC issued a Notice of penalty assessment on or around 17 February 2016 in the sum of £100. HMRC issued  
20 a daily penalty reminder on 31 May 2016 and on 12 June 2016, the appellant wrote to HMRC requesting cancellation of the penalty.
7. He explained that for the period December 2012 to November 2014 he had been employed by the European Commission in Italy and from December 2014 until  
25 July 2015 he was in receipt of unemployment benefit. He was living on his savings in Poland. He argued that community tax had been deducted from his income. He had had no UK income. The implication was that he believed that no tax return was required.
8. On 4 July 2016, HMRC responded pointing out that a tax return was required and  
30 that the appeal could not be considered until the return was lodged. He was advised to complete the tax return online as soon as possible in order to minimise the penalties.
9. On or around 12 August 2016, the daily penalties and six months late penalties were issued to the appellant.
10. A 2014/15 paper return was submitted by the appellant on 31 August 2016 but it  
35 was returned to him because it did not meet the requirements of Section 8 Taxes Management Act (“TMA”) 1970. It has not been resubmitted and therefore no return has ever been filed.

11. On 3 October 2016, the appellant made a further appeal reiterating the original grounds of appeal and enclosing letters dated 19 July 2016 and 27 August 2016 which argued that there was “a bug” in HMRC’s software which prevented the submission of the tax return.
- 5 12. On 1 November 2016 HMRC responded refusing the appeal.
13. On 24 November 2016, the appellant requested a review of the decision on the basis that
- (a) Consistent technical issues in 2015 and 2016 had prevented him using the self-assessment tax return service.
  - 10 (b) He had ultimately completed the 2014/15 tax return by paper; and
  - (c) He now suspected that the reason for the problem was that his computer was running outdated software because he could not afford to buy up-to-date software.
14. HMRC upheld their original decision stating that:
- 15 (a) There was no evidence of a technical issue with the Government Gateway nor had there been any contact with the online service helpdesk.
  - (b) The online service record shows that the appellant successfully logged on to the online service on 18 July 2016 and 11 October 2016.
  - (c) There was no log of any attempts to log-on in January 2016; and
  - 20 (d) The appellant had not contacted HMRC until July 2016 with regard to the filing of the 2014/15 tax return notwithstanding the fact that the late filing Fixed Penalty Notice had been issued to him on 17 February 2016.
15. On 14 February 2017, the appellant notified his appeal to the Tribunal giving his grounds as:-
- 25 (a) He had had to complete a paper return because there were faults in the system.
  - (b) He was not sure if he had logged on to the service on 18 July 2016 but even if he had logged on he had not been to file anything because his computer ran outdated software.
  - 30 (c) He had been able to log in successfully on 11 October 2016 because he had a new computer. HMRC were unable to support his problems with Window Vista.
  - (d) He was not sure that he had to submit a UK tax return because he did not think he was subject to UK income tax; and
  - 35 (e) He had not contacted the online service helpdesk because that was difficult as he was not working in the UK.

## Legislation

16. The late filing penalty was imposed under paragraph 3 of Schedule 55 Finance Act (FA) 2009, the daily penalties under paragraph 4 and the six month late filing penalty under paragraph 5.

5 17. In summary, paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return.

18. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.

10 19. Paragraph 5 provides that if after a period of six months beginning with the penalty date, the return remains outstanding, then a penalty is payable which is the greater of 5% of any liability to tax or £300.

15 20. 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, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

20 21. That paragraph specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control and where the taxpayer relies on any other person to do anything then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

## Discussion and Decision

22. Was there any reasonable excuse? *Rowland v HMRC*<sup>1</sup> at paragraph 18 makes it clear that a reasonable excuse "... is a matter to be considered in the light of all the circumstances of the particular case".

25 23. There is no statutory definition of reasonable excuse but in my view the test articulated by Judge Medd in *The Clean Car Company Limited v CEE*<sup>2</sup> should be applied. Judge Medd said:-

30 "The test of whether there is a reasonable excuse is an objective one. In my judgement 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 in at the relevant time, a reasonable thing to do?"

35 The same principle applies to all taxpayers, whether traders or not. It would have been prudent to have submitted the return timeously in compliance with the provisions of Section 8 Taxes Management Act 1970.

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<sup>1</sup> 2006 STC (SCD) 536

<sup>2</sup> 1991 VTTR 234

24. Applying this test to the facts, the question is whether the appellant had acted reasonably.

25. The appellant knew that he had received a tax return. The face of that return made it clear that was required to lodge it and within the specified time limits otherwise penalties would be applied. The appellant may have been under the impression that his EU income was not taxable in the UK, and it is not, but he was a director of a UK company and was therefore required to file a tax return as he had in previous years.

26. The appellant has successfully filed online in the past and has filed the subsequent return for 2015/16 on 11 October 2016. There is no explanation for the ongoing failure to file the 2014/15 return.

27. It would appear that the appellant's first successful log in for 2014/15 was in July 2016 which was after the deadline for filing. His letter of 12 June 2016 relies solely on the fact that he was living and working outwith the UK. In response to HMRC's letter of 4 July advising him to file online he responded on 19 July 2015 stating that he had tried to file online as requested and had encountered two technical problems. HMRC have it logged that he successfully logged in on 18 July 2016. On the balance of probability that is the first time that he attempted to log in and it was well after the deadline.

28. It may be that his software was inadequate but that is not HMRC's responsibility. He could have filed on paper or used a different computer.

29. It is for the appellant to prove that he had a reasonable excuse and he has not done so.

30. Paragraph 16 of Schedule 55 FA 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. I find no reason to disagree.

31. HMRC's decision in that regard does not appear to be flawed.

32. Lastly, Parliament had laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are held to be proportionate.

33. The decision of the Upper Tribunal in *HMRC v Hok*<sup>3</sup> is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

34. The appeal is therefore dismissed and the late filing penalties are confirmed.

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<sup>3</sup> 2012 UKUT 363

35. 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 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.

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**ANNE SCOTT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 30 JUNE 2017**