



**TC06090**

Appeal number: TC/2014/03244

*INCOME TAX – paragraph 23(2)(b) schedule 55 Finance Act 2009 –  
penalty for failure to make returns – was reliance on a third party a  
reasonable excuse? – No – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VITO ZEPINIC**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ROBIN VOS**

**The Tribunal determined the appeal on 22 August 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 6 June 2014 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 22 February 2017.**

## DECISION

### **Background**

1. The appellant, Dr Zepinic appointed an accountant to deal with his tax return for the year ended 5 April 2012. Unfortunately, the accountant failed to submit the tax return and so the return was only received by HMRC on 23 September 2013 after a new accountant had been appointed.
2. This was well after the statutory deadline for submitting the return and, as a result of this, HMRC charged late filing penalties totalling £1,769.

### **Scope of the appeal/late appeal**

3. The penalties which have been charged consist of an initial late filing penalty of £100, a daily penalty for 90 days at £10 per day totalling £900, a minimum penalty of £300 due to the tax return being more than six months late and a further tax related penalty of £469 also based on the tax return being filed more than six months late.
4. Dr Zepinic's notice of appeal only appeals against the tax related penalty of £469. That appeal was submitted on time.
5. However, HMRC have treated the appeal as also being an appeal against all of the other penalties. Logically this is right as Dr Zepinic's appeal is on the basis that he has a reasonable excuse for the failure and, if he does, he is not liable to any penalties.
6. However, if the appeal is also against these additional penalties, the appeal to the Tribunal is out of time as it should have been made by 21 November 2013 but was only received by the Tribunal on 6 June 2014.
7. HMRC say that they do not object to the late appeal.
8. Bearing this in mind and given that the issues in relation to an appeal against the tax penalty and an appeal against all of the other penalties are the same, I am happy to give permission for Dr Zepinic's appeal against the other penalties to be made out of time and without all of the formalities required by the Tribunal rules.

### **Filing self-assessment tax returns**

9. In accordance with s 8 Taxes Management Act 1970, Dr Zepinic's self-assessment tax return for the year ended 5 April 2012 was due by 31 January 2013 as it was submitted online.
10. Schedule 55 to Finance Act 2009 ("schedule 55") contains a penalty regime which applies if a self-assessment tax return is submitted after the deadline. There is an automatic penalty of £100 if the return is late. HMRC may impose a daily penalty of £10 for up to 90 days if the return is more than three months late. There is a further

automatic penalty of the greater of £300 and 5% of the tax due if the return is more than six months late. There is also an automatic penalty (not relevant in this case), again of a minimum of £300 if the return is more than 12 months late.

5 11. There is no liability to a penalty if the taxpayer satisfies the Tribunal that he has a reasonable excuse for his failure to file the tax return on time. Reliance on another person to do something is only a reasonable excuse if the taxpayer took reasonable care to avoid the failure.

10 12. HMRC also have discretion to reduce a penalty if they believe that there are special circumstances which make it right to do so. The Tribunal can only make a reduction for special circumstances if it concludes that HMRC's decision on this issue is "flawed" in a judicial review sense.

### **Relevant facts**

15 13. Dr Zepinic engaged Tony Jason at Aaron Zimble Associates to prepare his tax return for the year ended 5 April 2012. He wrote to Mr Jason in November and December 2012 to provide information needed for the tax return and to forward correspondence from HMRC reminding him of the filing date for his tax return.

14. As the tax return had not been filed by the 31 January 2013 deadline, HMRC assessed a penalty of £100 for the late filing of the tax return on 12 February 2013 and sent a notice of the penalty assessment to Dr Zepinic.

20 15. Dr Zepinic wrote to Mr Jason on 5 March 2013 asking him to "resolve this problem".

16. HMRC sent Dr Zepinic a 30 day daily penalty reminder letter on 4 June 2013 and a 60 day daily penalty reminder letter on 2 July 2013.

25 17. Dr Zepinic made a number of phone calls to Mr Jason in relation to these notices and was reassured that everything was in hand.

18. On 1 August 2013, Dr Zepinic wrote again to Mr Jason asking to meet with him to sort everything out as, despite Mr Jason's assurances, he had not heard anything from Mr Jason or from his office.

30 19. On 8 September 2013, Dr Zepinic appointed a new accountant, Mr Fernandez, who submitted Dr Zepinic's tax return on 23 September 2013.

### **Dr Zepinic's case**

35 20. This case has been stayed behind the decision in *Donaldson v HMRC* [2016] EWCA Civ 761. That case dealt with a number of technical arguments relating to HMRC's computer based process for charging penalties in respect of the late filing of tax returns. Dr Zepinic has not raised any of the issues dealt with in that case and in any event, the Court of Appeal found that the penalty notices were valid despite the apparent defects.

21. Instead, Dr Zepinic's only ground of appeal is that he has a reasonable excuse for his failure to submit his tax return on time due to the problems with his previous accountant.

22. In support of this, Dr Zepinic's current accountant refers to *J R Hanson v HMRC* [2012] UK FTT 314. In that case, the First Tier Tribunal allowed an appeal against penalties imposed under schedule 24 to Finance Act 2007 in respect of an inaccuracy in the taxpayer's return on the basis that the inaccuracy had been caused by the taxpayer's accountant and the taxpayer had taken reasonable care to avoid the inaccuracy.

#### 10 **HMRC's case**

23. HMRC remind the Tribunal that the test as to whether there is a reasonable excuse is an objective one. The question is what a responsible taxpayer, intending to comply with his obligations, would have done in the circumstances.

24. Whilst accepting that Dr Zepinic was let down by his accountant, HMRC's view is that Dr Zepinic was well aware of his obligation to file a tax return by 31 January 2013 and that this remains his responsibility, even though he may have appointed an accountant. They take the view that the responsibility for ensuring that the tax return is received by HMRC on time cannot be transferred to an accountant or another third party.

25. HMRC also note that there is no supporting evidence which shows what Mr Jason's response was to Dr Zepinic's letters. They also suggest that Dr Zepinic should have contacted HMRC to explain the difficulties he was experiencing with his accountant.

26. As far as the *J R Hanson* case is concerned, HMRC argue that this is irrelevant as it dealt with a penalty imposed for an inaccurate tax return as opposed to a penalty imposed for the late filing of a tax return.

#### **Decision**

27. The question as to the circumstances in which reliance on an accountant to file a tax return can provide a reasonable excuse for failure to file the tax return on time has been considered recently by the First Tier Tribunal in *Cerriann Jackson v HMRC* [2017] UKFTT 0436. That case contains a useful review of a number of previous cases decided by the Tribunal which deal with this point.

28. The main case which is relied on by the Tribunal is the decision of the former President of the First Tier Tribunal, Sir Stephen Oliver QC in *Jeffers v HMRC* [2010] UKFTT 22.

29. *Jeffers* was an appeal against penalties imposed for the late filing of tax returns under the previous regime contained in the Taxes Management Act 1970. That regime also contained an exception where the taxpayer had a reasonable excuse for

not delivering the return although, unlike schedule 55, it made no reference to reliance on third parties.

30. The Tribunal in *Jeffers* concluded [at 17] that:

5                   “The Code (i.e. part X of TMA) does not qualify the expression  
‘reasonable excuse’ by, for example, ruling out reliance on  
another to perform a task such as making a tax return. The  
obligation to make the tax return on time is nonetheless the  
taxpayer’s. It remains his obligation regardless of the fact that he  
10                   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 circumstances it must be something outside the control of  
15                   the taxpayer and his agent or something that could not  
reasonably have been foreseen. It must be something  
exceptional.”

31. The subsequent cases referred to in *Jackson* (and indeed the Tribunal in *Jackson* itself) appear to have taken the view that this statement continues to apply in the context of “reasonable excuse” for the purposes of schedule 55.

20 32. I am not however persuaded that this is necessarily right. Paragraph 23(2)(b) of  
schedule 55 specifically refers to a taxpayer’s reliance on another person to do  
something and states that this is not a reasonable excuse unless the taxpayer has taken  
reasonable care to avoid the failure. The implication of this is that, as long as the  
taxpayer has taken reasonable care to avoid the failure by the third party, this will  
25 provide a reasonable excuse whether or not the circumstance is outside the control of  
the taxpayer’s agent, could not reasonably have been foreseen or is exceptional.

33. The question in my mind therefore is whether Dr Zepinic took reasonable care  
to avoid the failure by his previous accountants to submit the tax return on time. The  
onus of proof is on Dr Zepinic to show, on the balance of probabilities, that a  
30 reasonable excuse exists.

34. I do not consider that the four letters provided by Dr Zepinic’s previous  
accountants in support of the appeal show that he took reasonable care to avoid the  
failure to submit the tax return late. For example, there is no evidence of any  
communication between Dr Zepinic and his previous accountants between 29  
35 December 2012 and the filing deadline of 31 January 2013, nor any evidence that Dr  
Zepinic sought confirmation from his previous accountants that the tax return had in  
fact been filed.

35. A reasonable taxpayer would know that, even if the tax return was to be filed by  
an accountant, the taxpayer still had to approve the tax return before it could be  
40 submitted. Assuming Dr Zepinic had not received the tax return for approval prior to  
31 January 2013, I would have expected him to ask his previous accountants what the  
status was.

36. I accept that it appears that Dr Zepinic was rather more proactive in chasing his former accountants in the period June – August 2013 but, by then, the tax return was already four months late. In the circumstances, I would have expected Dr Zepinic to be much more vigorous in chasing his accountant during that four month period rather than writing the single letter in March 2013 which has been provided.

37. I do not therefore accept that Dr Zepinic did take reasonable care to avoid his previous accountant's failure to submit the tax return on time. This means that Dr Zepinic does not have a reasonable excuse for the failure.

38. HMRC have considered whether there are any special circumstances which would justify a reduction in the amount of the penalties. They have taken account of the problems with the previous accountant but do not believe that this merits a reduction in the penalties.

39. As stated above, the Tribunal can only interfere with HMRC's decision if it is "flawed" in a judicial review sense. HMRC have clearly taken into account the relevant factors and the conclusion they have reached is one which is reasonable in the circumstances. This is not therefore something which the Tribunal can revisit.

**Conclusion**

40. Dr Zepinic does not have a reasonable excuse for the failure to file the tax return on time.

41. The Tribunal cannot reconsider the question as to whether there are any special circumstances justifying a reduction in the penalties.

42. Dr Zepinic's appeal therefore fails and the penalties are affirmed.

43. 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.

**ROBIN VOS  
TRIBUNAL JUDGE**

**RELEASE DATE: 4 SEPTEMBER 2017**