



TC06494

Appeal number: TC/2015/07172

INCOME TAX – penalty for failure to make returns timeously – whether properly imposed – yes – whether reasonable excuse – yes for 2010/11 for all but the 12 month late penalty – no for 2011/12 and 2012/13 – special circumstances – implied consideration – no – 12 month late penalty 2010/11 confirmed and penalties imposed for 2011/12 and 2012/13 confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MISS SHARON HAMILTON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Monday 19 February 2018

Alan Burke, for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

DECISION

1. The appellant appeals against penalties imposed on her in respect of her failure to file self-assessment tax returns for the years 2010/11, 2011/12 and 2012/13 timeously. The penalties that HMRC scheduled in the Bundle, are as follows:-

| Year | Appealable Decision | Amount | Date notice issued |
|-------------|------------------------------|---------------|---------------------------|
| 2010/11 | Late filing penalty | £100 | 05/06/2012 |
| | Daily penalty | £900.00 | 04/12/2012 |
| | 6 month late filing penalty | £300.00 | 04/12/2012 |
| | 12 month late filing penalty | £300.00 | 04/06/2013 |
| 2011/2012 | Late filing penalty | £100 | 12/02/2103 |
| | Daily penalty | £900.00 | 14/08/2013 |
| | 6 month late filing penalty | £300.00 | 14/08/2013 |
| | 12 month late filing penalty | £300.00 | 25/02/2014 |
| 2012/13 | Late filing penalty | £100 | 18/02/2014 |
| | 6 month late filing penalty | £300.00 | 30/06/2014 |

In the letter of appeal dated 16 July 2014 addressed to HMRC, the appellant's agent referred to penalties of £1,600 in each of years 2010/11 and 2011/12 and £400 in 2012/13. No dates were provided.

2. Those were the penalties discussed in the course of the hearing and they total £3,600. The Notice of Appeal referred to total penalties of £4,200 but made it explicit that the appellant had found HMRC's correspondence confusing (see paragraph 22 below).

3. The appellant's appeal dated 16 July 2014 was out of time for all of the penalties in 2010/11 and 2011/12. It was also out of time for the late filing penalty for 2012/13 but not the 6 month late filing penalty.

4. At the hearing Mr Mason conceded that although the appellant's appeals to HMRC under Section 31A Taxes Management Act 1970 ("TMA") had been made outside the statutory deadline and HMRC had initially refused consent to an extension of that deadline, HMRC no longer objected to the late appeals. I therefore gave

permission for the appeals to be notified late and that on the basis that HMRC had effectively given consent under Section 49(2)(a) TMA.

5. However, on reviewing the Bundle in detail for the purpose of writing this decision I noted that the paperwork was less clear than it had appeared in the hearing.

5 a. The two self-assessment Statements produced at Folio D at pages 8 and 9 did not include the 6 month late penalty for 2012/13.

b. The screen prints at Folio D at pages 5 and 6 showed that all of the penalties for 2010/11 and 2011/12 appeared to have been cancelled or reduced to nil on 2 March 2017.

10 c. However, the self-assessment notes at Folio D at page 11 for 2 March 2017 state “Penalties cancelled in error so reinstated”.

d. The screen print at Folio D at page 7 for 2012/13 shows a late filing penalty of £100 imposed on 18 February 2014 and a daily penalty of £300 imposed on 3 June 2014.

15 e. The self-assessment statement produced by HMRC at Folio D at page 9 shows daily penalties for 2012/13 of £300 created on 3 June 2014. That statement although printed in 2018, is dated 26 June 2014.

20 f. I also noted that on 3 December 2014, HMRC stated that they had upheld their decision dated 3 June 2014 to charge daily penalties for 2012/13. That penalty had not been appealed in time. The late filing penalty in the same amount of £300 dated 30 June 2014 had been appealed on time.

6. On the balance of probability I find that the allegedly cancelled penalties have been reinstated. If not, then they are not relevant to this appeal.

25 7. Looking at the totality of the evidence it would seem that HMRC had confused the daily penalties issued on 3 June 2014 and amounting to £300 with the 6 month late filing penalty also amounting to £300 and issued on 30 June 2014. It is only the latter that was appealed in time.

30 8. On the balance of probability there were daily penalties of £300 imposed on 3 June 2014 and a 6 month late filing penalty issued on 30 June 2014. So the total penalties imposed for 2012/13 amounted to £700.

7. It was the explicit intention of the parties at the hearing that all extant penalties should be the subject matter of the appeal. I have had due regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and have in mind the need to act proportionately and to avoid delay.

35 10. I have therefore decided that the appeal should be taken as being in respect of all late filing penalties for 2010/11, 2011/12 and 2012/13. The total is therefore £1,600 in each of the first two years and £700 in the last year. I also extend the time for appealing the daily penalties of £300 imposed on 3 June 2014 and that for the same reasons as the other penalties since had Mr Mason been alerted to the existence of
40 those penalties he would have conceded the position, as with the other penalties.

The Facts

9. The appellant left the UK in 2001 and has been living and working in the United States since that time. She is a defence litigation lawyer.
- 5 10. She had a property in the UK which was looked after by a letting agency and it has never given rise to any liability for tax in the United Kingdom.
11. In January 2012 the appellant filed her non-resident landlord application for that property. HMRC noted her address in California and on 23 February 2012 issued a tax return for the tax year 2010/11. The due date for filing was 1 June 2012.
- 10 12. The tax return for 2011/12 was issued on 6 April 2012 and the due date for filing a paper return was 31 October 2012 and an electronic return on 31 January 2013.
13. The 2012/13 tax return was issued on 6 April 2013 and the due date for filing a paper return was 31 October 2013 and an electronic return on 31 January 2014.
- 15 14. At some unknown date, the appellant contacted Bolland & Burke from the USA and arranged to visit them to give instructions in regard to her tax affairs when she visited Edinburgh for a wedding. She did so on 28 April 2014. On her return to the USA she sent them the necessary details for the returns.
15. All three tax returns were filed electronically on 30 May 2014.
- 20 16. It is not disputed that the appellant had received the returns in the USA, that penalty reminder letters and penalties were issued and that the returns were filed late.
17. The returns were filed by her agents who appealed the penalties on 16 July 2014 on the basis that the appellant had a reasonable excuse for the late filing (see paragraph 1 above).
- 25 18. HMRC responded on 6 October 2014 enclosing a number of letters pointing out that the late appeals for late filing in all three years were not accepted. As far as daily penalties were concerned, in respect of the first two years HMRC indicated that they did not accept that she had a reasonable excuse for late filing but pointed out that they might change their view depending on the outcome of the *Donaldson* litigation. The penalties were confirmed but suspended in the interim. Bizarrely, in respect of 30 2012/13, HMRC indicated that they did not accept that she had a reasonable excuse for late filing but did not mention *Donaldson* and simply confirmed the daily penalties.
- 35 19. On 15 October 2014 the appellant's agent requested a review of those decisions. On 3 December 2014, HMRC upheld the original decision on the 2012/13 penalties and reiterated that the other appeals were out of time and no action had been taken by the appellant. Of course action had been taken. The appellant had lodged late appeals.

20. On 10 December 2014, the appellant's agent responded pointing that out and enclosing the request for review. Bizarrely, HMRC responded simply stating that there was no new information.

5 21. On 19 November 2015, HMRC stated that the only review had been in respect of the 2012/13 penalties and that there were no decisions on the other penalties. That was not correct.

22. The appellant appealed to the Tribunal on 4 December 2015 correctly pointing out that HMRC's correspondence, and in some cases the lack of it, was confusing and that the only option was to appeal all the penalties.

10 23. As indicated above the parties reiterated at the hearing that they wished all extant penalties to be considered.

24. It is not disputed that the returns were late and that the penalties were imposed as a result. The only issue between the parties was whether the appellant had a reasonable excuse for the late filing.

15 **The appellant's arguments on reasonable excuse**

25. The appellant and her husband separated in August 2008. In 2010 her husband resumed residence in the same town as the appellant but declined to progress the divorce. He retained two law firms and filed a personal injury suit for spousal abuse against the appellant for \$7.75 million.

20 26. From June 2011 to December 2011, the appellant represented herself in both the divorce and that case. In January 2012 she retained a family lawyer to represent her in the divorce action whilst she continued to defend herself in the other case. In the course of 2012, the appellant's home went into foreclosure and her car was repossessed. However, in August 2012, she was awarded a judgement in her favour
25 in the spousal abuse case with costs of \$2,000. The divorce was finalised in December 2012.

27. In 2013 she worked a great deal of overtime in order to repay friends and family who had lent her money. She also faced difficulties within her law firm.

30 28. The emotional impact of the divorce caused her to overlook many important issues such as submission of the tax returns.

29. She had no experience of the UK self-assessment regime.

30. There was no loss of tax.

35 31. It was reasonable for her to wait until she could meet an accountant and get everything organised. Matters proceeded promptly thereafter. The tax returns had been on her list of matters to be dealt with when she came to the UK.

32. HMRC have waived penalties for numerous of the agent's other clients who had faced far less substantial difficulties. HMRC were not treating her fairly.

33. It was ludicrous for HMRC to penalise her for working excessive hours to raise necessary funds rather than address the issue of her outstanding tax returns.

5 **HMRC's arguments**

34. Whilst acknowledging that the divorce would have been a difficult period for her, it had been finalised in December 2012. The other litigation had concluded successfully during the summer. The filing date for 2011/12 was after both litigations had concluded and the filing date for 2012/13 was some 14 months later.

10 35. HMRC recognised that she had chosen to work extended hours following the divorce to pay back loans etc but argued that she had devoted herself to her work and prioritised that over her obligations in terms of the Taxes Acts. Further where a taxpayer is able to maintain continuous employment it is reasonable for HMRC to expect that tax returns should be submitted.

15 36. The delay from December 2012, at the latest, was excessive and there has been no reasonable excuse offered for that delay.

The legislation on reasonable excuse

37. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

20 "23—

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

(2) For the purposes of sub-paragraph (1)—

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(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

Reasons for decision

30 *Reasonable excuse*

38. As reasonable excuse is a defence it is not for HMRC to prove that the appellant did not have a reasonable excuse. It is for her to prove that she did and that she filed the returns without unreasonable delay once the excuse ceased.

39. Reasonable excuse is not defined in the legislation. Not every excuse is a reasonable excuse. I agree with Judge Berner in *Barrett v HMRC*¹ at paragraph 154 where he said:

5 “The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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 40. The appellant was able to file the non-resident application in January 2012 so was patently attending to her affairs at that juncture when both litigations were ongoing.

15 41. However, she faced a perilous position in mid-2012, with a massive law suit nearing conclusion and at the same time with her car repossessed and foreclosure on her home. The law suit settled in August but the divorce was not finalised until December 2012. I accept that she has established a reasonable excuse for the failures in respect of 2010/11 giving rise to the late filing penalty of £100, the daily penalties of £900 and the 6 month late penalty of £300 and those penalties which were issued on 5 June 2012 and 4 December 2012 are not confirmed.

20 42. The 12 month late filing penalty for that year was issued on 4 June 2013 by which time the first late filing penalty for 2011/12 had already been issued almost four months previously. It is not in dispute that the remaining penalties and the reminder letters continued to be issued to the appellant on a regular basis and indeed the tax returns had been issued to her.

25 43. As can be seen from paragraph 23(2)(c) of Schedule 55 (paragraph 37 above) the returns had to be filed without unreasonable delay after the reasonable excuse has ceased. I have found that the reasonable excuse established for the first three penalties was the inordinate stress caused by the litigations whilst they were ongoing. That ceased in the one case in August 2012, but I have allowed the period until the divorce settled in December 2012.

30 44. Including the emotional impact of the divorce, do any of the other factors argued for the appellant amount to a continuing reasonable excuse in the period after December 2012?

35 45. Whilst I do accept that although the divorce, and indeed the other litigation, will have had an emotional impact on her, after they settled, the evidence is clear that she worked a great deal of overtime to raise money. However, I also note that she stated that that overtime related to a case where the verdict was issued in May 2013 which was before the 12 month penalty for 2010/11 was issued or indeed most of the other penalties.

¹2015 UKFTT 329 (TC)

46. The appellant was holding down a demanding job. The submission states that the divorce had “engaged most of her time since 2008”. Its conclusion should have therefore meant that there should have been fewer pressures on her.

5 47. She is clearly an intelligent professional woman. She must have been able to focus on her professional life. It is for her to establish a reasonable excuse. The statement that there had been “a palace coup in her firm” without any supporting information does not suffice to establish a reasonable excuse but in any event, the implication was that it too was in or before the spring of 2013.

10 48. Can lack of experience of the tax system amount to a reasonable excuse? That is tantamount to saying that ignorance of the law is a reasonable excuse. I agree with Judge Mosedale in *Qualapharm v HMRC*² where she said:

15 “... as a matter of policy such ignorance [of the law] cannot amount to a reasonable excuse. Ignorance of the law cannot be a reasonable excuse as that would result in the law favouring persons who choose to remain in ignorance of the law over those who sought to know the law in order to obey it.”

49. Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed.

20 50. The appellant’s absence from the UK cannot excuse ignorance of the law. She retained property in the UK and therefore must observe UK law in respect thereof.

51. Did the appellant act reasonably? The appellant knew that she had received tax returns, and indeed penalties and penalty reminders. The face of those returns made it clear that she was required to lodge the returns and within the specified time limits otherwise penalties would be applied.

25 52. I accept that she did not need to employ an international firm of accountants in San Francisco but she did ultimately contact Scottish accountants from the USA. In the 21st century I do not accept Mr Burke’s argument that she needed to physically meet with the accountant in order to arrange her tax affairs. That may have been her preference but having chosen to retain a property in the UK she should have made
30 appropriate arrangements to honour her obligations in terms of the Taxes Acts. There are many UK taxpayers who live and work elsewhere in the world but comply with their obligations.

35 53. By her own admission there was no loss of tax. On the balance of probability, given that it related to only one property, the tax return in each year is unlikely to have been unduly complicated. Even if it was, there is extensive guidance available on line. There is a helpline. She made no attempt to contact HMRC between January 2012 and the submission of the returns on 30 May 2014 by her representative.

² 2016 UKFTT 100 (TC)

54. It is for the appellant to prove that she had a reasonable excuse for the period after the litigation was concluded and she has not done so. She certainly did not act without undue delay. There was no explanation of the delay from early 2013 until April 2014. On the balance of probability I find that she did not prioritise her tax affairs. A prudent and diligent taxpayer would have taken action at an earlier date to file the returns.

55. Mr Burke's argument that daily penalty cases are a "money making exercise" and that other clients have been successful in having a reasonable excuse accepted does not amount to a reasonable excuse.

56. This Tribunal can only look at this appeal and cannot consider the circumstances pertaining to other taxpayers.

57. It was argued that the fact that there was no tax liability is an important fact. It is not. There are separate penalties for late payment of tax. These penalties were put in place by Parliament expressly to ensure that returns were lodged timeously. The penalty is not tax geared.

58. Parliament has 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 widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Boshier*³ makes it clear that I do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

Special circumstances

59. Paragraph 16 of Schedule 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁴ said "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'". That case, and one other on special circumstances, was in the bundle but no reference was made to it.

60. HMRC did not address the issue of "special circumstances". The Review Conclusion letter addresses only reasonable excuse. I can find nothing in the Bundle, which is deficient in a number of respects, addressing special circumstances.

61. A failure by HMRC to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances can render the decision to impose penalties flawed.

³ 2013 UKUT 579 (TCC)

⁴ 1971 3 All ER 967

62. That means that I must consider whether there are special circumstances which apply to this appellant.

63. It is evident that HMRC did consider all of the circumstances recounted by the appellant. I too have considered all of the circumstances and it is for that reason that I
5 have found that she had a reasonable excuse in 2012.

64. I can allow the appeal if I find that HMRC's implied decision that there were no special circumstances was flawed in a judicial review sense, that is to say that, as Lady Hale said in *Braganza v BP Shipping*⁵ at paragraph 24 "... the result is so outrageous that no reasonable decision maker could have reached it...".

10 65. I do not believe that there are special circumstances. As indicated above, that must be something exceptional, abnormal or unusual. After the end of 2012, although she had debts and she worked very long hours, she was holding down a very demanding job. She had been litigating but she must have been relieved that finality had been achieved. She chose to prioritise other matters.

15 66. As Mr Burke said, she had the tax returns on her list of things to do when she came to the UK. That is neither a reasonable excuse nor can the reason that she deferred acting earlier, being her personal circumstances from January 2013 onwards, amount to special circumstances on the basis of the information furnished by the appellant and her representative.

20 **Decision**

67. In all these circumstances the appeal succeeds in part in relation to 2010/11, as set out in paragraph 41 above. The 12 month late filing penalties for 2010/11 and all of the other penalties are confirmed.

25 68. 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)"
30 which accompanies and forms part of this decision notice.

35 **ANNE SCOTT**
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2018

⁵ 2015 UKSC 17