



TC06528

Appeal number: TC/2017/05052

INCOME TAX – penalties for failure to make returns, whether reasonable excuse for late self-assessment tax returns for the years 2011-2012 and 2012-2013. Whether there was reasonable excuse for the failure. No Whether Special Circumstances existed, Yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW GEORGE HENDERSON

Appellant

- and -

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

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

MEMBER: SUSAN STOTT FCA CTA

Mrs. Henrietta Vernon for the Appellant.

Mr. Matthew Mason for the Respondents

Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow on 4 May 2018.

DECISION

1. Introduction

This considers an appeal dated 26 June 2017 against Penalties and interest levied by HMRC for the late filing and/or late payment by the appellant of his tax returns.

The amount appealed against as stated on the appellant's Notice of Appeal is £2,508. It appears that this is made up of penalties totalling £1,600 for the late filing of the appellant's self-assessment tax return for the period 2011/2012; and penalties totalling £1,300 for the late filing of the appellant's self-assessment tax return for the period 2012/2013. These total £2,900 to which interest has been added and sundry payments deducted leaving a balance due of £2,508.

The Tribunal has therefore treated this as an appeal against the penalties totalling £2,900.

2. This appeal was originally due to be heard on Monday 2 October 2017 but bad weather caused the cancellation of the ferry from Dunoon. This prevented Mrs Vernon from attending on that day so the hearing was rearranged.

3. The appeal was made out of time but as there was no objection from HMRC the Tribunal allowed the appeal to continue.

4. Legislation

Finance Act 2009 Schedule 55

Taxes Management Act 1970, in particular Section 8(1D)

5. 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

Keith Donaldson v HMRC [2006] EWCA Civ 761

Rowland v HMRC [2006] STC (SCD) 536

The Clean Car Company Ltd v Customs and Excise. [1991] VATTR 234

6. Facts

The appellant is a self employed builder. For a time he lived with his partner and her parents on their farm. The Vernons run a farm which rears Highland cattle.

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.

If a person ("P") 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 P is liable to a penalty of £100.

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

(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.

(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

Paragraph 6 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 12 months beginning with the penalty date.

(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

7. Paragraph 1 (3) of the Schedule states

“ (3) If P’s failure falls within more than one paragraph of this schedule P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17 (3))”

Paragraph 17 of the Schedule states:

“17(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to “any other penalty” does not include—

(a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).....

(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax.

(4) The relevant percentage is -

(a)

(b).....

(c) in all other cases 100%”

8. Paragraph 23 of the Schedule states:

(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)-

(a) An insufficiency of funds is not a reasonable excuse, unless attributable to events outside P’s control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(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.

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

10. In this case in respect of the tax year ended 5 April 2012 HMRC issued a notice to file to the appellant on 6 April 2012. The filing date for a non-electronic return was 31 October 2012 whereas for an electronic return the filing date was 31 January 2013. HMRC received the return on 12 May 2014. As the return was not submitted by the latest filing date of 31 January 2013 HMRC issued a notice of penalty assessment on or around 12 February 2013 in the amount of £100. As the return had still not been received 3 months after the penalty date of 1 February 2013, HMRC issued a notice of daily penalty assessment of £900 on or around 14 August 2013, 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 14 August 2013. As the return still had not been received 12 months after the penalty date HMRC issued a notice of penalty assessment on or around 25 February 2014 in the amount of £300.

11. In respect of the tax year ended 5 April 2013 HMRC issued a notice to file to the appellant on 6 April 2013. The filing date for a non-electronic return was 31 October 2013 whereas for an electronic return the filing date was 31 January 2014. HMRC received the return on or around 6 October 2014. As the return was not submitted by the latest filing date of 31 January 2014 HMRC issued a notice of penalty assessment on or around 18 February 2014 in the amount of £100. As the return had still not been

received 3 months after the penalty date of 1 February 2014, HMRC issued a notice of daily penalty assessment of £900 on or around 18 August 2014, 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 18 August 2014.

12. On 8 December 2014 J. Cameron Smith, Chartered Accountant appealed to HMRC on behalf of the appellant against the penalties for late submission of Self-assessment returns for the years 2011/2012 and 2012/2013. The letter continues

“The basis of the appeal is that Reasonable Excuse for the failure exists under Para 23 Sch. 55 Finance Act 2009. Alternatively, I would suggest that Special Circumstances, as defined under Para 16 Sch. 55 FA 2009, exist, and therefore request a Special Reduction under that legislation of 100% of the Penalties assessed.

The situation which gave rise to my client’s failure to submit his returns in time is unusual, and indeed tragic.

Mr. Henderson, although a hard working tradesman, had no knowledge of record-keeping, nor of business administration. He lived with his partner and her parents, Mr and Mrs Vernon. The latter, herself a business owner, kept his records for him. Even after he split from his partner, who left home, he continued to live with her parents, in what was basically a family relationship.

Mrs Vernon’s mother suffered a stroke. Although she did not live with them Mrs. Vernon spent a great deal of time visiting her and making arrangements on her behalf. This continued until her death in January 2012.

Mr. Vernon survived a cardiac arrest in 2009. Afterwards his health was poor and gradually deteriorated. Not only did this impose an enormous strain on Mrs. Vernon, and on her time, as she was running their farm business it affected Mr. Henderson also. He spent a great deal of his own time assisting in the conduct of the farm, to the detriment of his own business, regarding the Vernons as virtually family.

The situation became much worse. Mr. Vernon, as a result of damage to his brain caused by his illness and vital medication for it, became increasingly mentally ill. He began to hallucinate. He destroyed things, including business records belonging to Mr. Henderson. In normal circumstances these would have been replaced, duplicates being obtained, but the situation my client found himself in was far from normal.

Normally a placid, friendly man, Mr. Vernon became aggressive and physically violent. He assaulted both his wife and Mr. Henderson. On one occasion the police were involved. They later confiscated his firearms, fearing that a tragedy could occur if they didn’t act. In such a situation it would have been in Mr. Henderson’s best interests, both physical and business to have withdrawn from the situation. He felt, however, that to do so would have left Mrs. Vernon at serious risk.

Mr. Vernon died on 30 August 2013. For some time afterwards it was difficult for Mrs. Vernon to attend to business in view of her bereavement and the trauma which preceded it. Mr. Henderson felt that he had to lend support during this period, with the result that both returns were further delayed.

Your records will show that I appealed against the 2012 penalty in March 2013. The Appeal was rejected. At that time the full extent of the problems which my client faced were not known to anybody except my client and the Vernons, and the Appeal did not convey the full gravity of the situation. Subsequently I trust that you can examine that year again.

Although I realise that penalties are no longer limited to the amount of Tax payable, it is worth mentioning that my client had no tax liability in either year. In such circumstances the penalty of £2,880.12 seems a disproportionate punishment for the late submission of these two returns, both of which are now in HMRC hands.

I request that, in view of the above, my client be relieved of these penalties, under one or other of the provisions mentioned above.”

13. HMRC did not reply until 2 February 2015. Their letter included

“I do not agree that you have a reasonable excuse because the bereavements that you suffered took place in January 2012 and August 2013. The 2011 to 2012 tax return deadline was 31 January 2013 and the deadline for 2012 to 2013 tax returns was 31 January 2014.”

The letter continues by providing information about the ongoing Morgan and Donaldson v HMRC cases.

The letter makes no reference to Special Circumstances.

14. On 6 March 2017 HMRC wrote to the appellant advising the outcome of the Donaldson appeal. The letter only considered the daily penalties for the late 2011 to 2012 return. It included

“A reasonable excuse is something that stopped a person from meeting a tax obligation on time which they took reasonable care to meet.

You told us that you didn’t send your tax return in on time because you had suffered bereavements.

I’ve considered your appeal against the daily penalties for the 2011 to 2012 tax year. And I do not agree that you’ve a reasonable excuse. This is because the bereavements that you suffered were January 2012 and August 2013. The 2011 to 2012 tax return deadline was 31 January 2013 and the return was not received until 12 May 2014.

Special reduction

HMRC can reduce a penalty if they think it’s right to do so because of special circumstances. This is known as special reduction.

I’ve considered the reasons you’ve given for not filing your return on time. I don’t think they are special circumstances. So we can’t reduce your penalties.”

The letter offered a review.

15. The appellant completed a Request for review form SA634 dated 1 April 2017 which included:

“My paperwork, records and notes had been destroyed and damaged by Robert Vernon, late of Rashfield Farm.

I lived at Rashfield Farm when Mr Vernon was ill with vascular dementia, and became a threat to himself and Mrs. Vernon, who has added a note to this appeal....”

The note referred to is a letter to HMRC dated 2 April 2017 in which Mrs Vernon wrote:

“Special reduction

Andrew Henderson has lived in my farm since 2008. In 2009, my husband suffered a further cardiac arrest and without CPR given by Andrew my husband would not have survived.

In addition to reduced heart function and bodily weakness, due to the prolonged time in intensive care he suffered brain damage resulting in vascular dementia.

He was regularly in and out of hospital as his conditions deteriorated and his hallucinations became more frequent and frightening even when in hospital. On a number of occasions, Andrew intervened to stop my husband physically attacking me; threatening to smash the windows of the cars; letting the cattle out; throwing the televisions and computers out into the yard, and destroying paperwork, records, cattle returns and photographs.

The Police removed his gun licence and all his guns as they considered him a danger. The accountant Mr. J.C.Smith was aware of this as he was a signatory on the gun licences.

My mother died and my husband’s reasoning and behaviour became even more demented and he died in hospital.

I have been doing the book keeping for the firm and for Andrew Henderson and it is entirely my fault that Andrew’s books were as late as mine. Should you require any further information please contact me.

Thank you for giving me the opportunity to present these facts to you, to consider they may constitute “special circumstances”.

16. The result of the review was given in a letter dated 25 May 2017 and was that the decision to charge the penalties was correct. The review is headed “Appeal against daily penalties for late filing of your 2011-2012 Self Assessment Tax Return. It only considered the daily penalties imposed in respect of the 2011/2012 return. The review included the following comments:

- Whilst I appreciate the difficulty in completing your tax return where records have been destroyed your tax return could have been completed with provisional figures whilst records were replaced.
- I am sorry to hear of Mr. Vernon’s medical condition and I am sorry to hear that Mr. Vernon has passed away. Having a serious or life threatening illness is likely to be accepted as a reasonable excuse, and I note that the 2011-2012 and 2012-2013 late filing partnership penalties for Mr. Vernon have been cancelled.

Whilst I appreciate the difficult circumstances and difficulties you faced due to Mr. Vernon’s serious medical condition, as you were aware of the circumstances you would have been able to seek assistance elsewhere if you were

having difficulties in completing your tax return. I can find no trace of you contacting HMRC for assistance and I note that you have an agent who was aware of the situation.

- I cannot accept that you relied on someone else to send your tax return by the deadline date as a reasonable excuse. You remain responsible for ensuring that you(r) tax return is received by the relevant deadline and you are liable to the penalties if it is not. The self-assessment system places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that you submit your tax return at the correct time and pay any liability by the due date. It is your responsibility to make sure you meet any deadlines.

As you have not provided a reasonable excuse for failing to submit your return on time, the daily penalties for late filing of your return have been correctly charged.

Under the heading Special Reduction the letter states:

“A penalty may be reduced if there are special circumstances. Special circumstances mean circumstances that are uncommon or exceptional. I have carefully considered all of the information I hold but do not think there are any special circumstances which allow me to reduce the penalty.

In reaching my decision I considered the following:

- Your records were destroyed
- Mr. Vernon’s medical condition
- Mr. Vernon’s actions as described by yourself and Mrs. Vernon.
- Mr. Vernon passed away
- You lived at Rashford Farm during the period of Mr. Vernon’s medical condition and at the time Mr. Vernon passed away
- Mrs Vernon did your book keeping

Please let me know if you think there are any other circumstances you have either not told me about or you believe we should take into account.”

17. Appellant’s oral submissions

The Appellant was represented by Mrs. Henrietta Vernon. She accepted that the returns had been sent late but said she considered that the appellant had reasonable excuse and there were special circumstances. Mrs. Vernon used the phrases reasonable excuse and special circumstances interchangeably throughout her submissions. The Tribunal explained the difference to her and has considered both possibilities.

Mrs Vernon advised that during her husband’s illness all her books were destroyed by him. This included the appellant’s records. He therefore had nothing he could submit to HMRC.

Mrs Vernon said her mother had suffered a stroke in 2009 and she had to visit her regularly until she died in January 2012.

Mrs Vernon said that her daughter who was Mr.Henderson's partner could not handle her father's behaviour so left home. The Appellant stayed and helped with what she described as "the muscle" for the farm.

Mrs Vernon described her husband as a gentle giant and he completely changed as a result of his illness. She said one cannot stand over a person 24 hours a day so unfortunately records and family photographs were destroyed. She had had to search out evidence and records in order to submit returns. She had to do the same in order to provide information to Mr. Vernon's executors.

Mrs Vernon did not wish to go through the long history of her husband's illness which was already described in the papers but did mention the Police attended about an assault.

Mrs Vernon said she had not contacted HMRC as she left that side of tax returns to Cameron Smith.

18. Respondents Oral Submissions

Mr Mason said that the appellant was aware of the family situation and would have been able to appoint a different agent but chose not to.

He observed that the destruction of the paper work did not stop the return from being submitted, albeit late.

He said that J. Cameron Smith had been appointed agent in 2008 and were still acting as such in 2014. There was evidence on HMRC's self-assessment record that the agent had telephoned about the penalties in December 2014

Mr. Mason said that it seems that the appellant had put helping others ahead of dealing with his own affairs. He said the appellant had an obligation to make sure he submits his returns on time.

Mr. Mason said that HMRC had considered special circumstances and considered there were no special circumstances to allow a reduction. He pointed to folio 2 and page 15 of the bundle which was the letter dated 25 May 2017 covering the review of the daily penalties for the late 2011/2012 return

Mr.Mason confirmed that the appellant had no tax liability in either 2011/2012 or 2012/2013

In respect of the Tribunals questions on the six month and twelve month penalties, each of £300, in respect of tax year 2011/2012 he said that the penalties were not made by reference to a tax liability. Therefore paragraph 17(3) is not engaged.

19. Tribunal's Observations

The Tribunal cannot understand why when dealing with the appeal made on behalf of the appellant by J Cameron Smith HMRC narrowed what they considered so that they ultimately only considered and later reviewed the daily penalties in respect of tax year 2011/2012. There is no evidence to suggest that they considered the appeal against the other penalties for 2011/2012 and all the penalties for 2012/2013 although it is clear that J.Cameron Smith's letter of 8 December 2014 did appeal these.

20. In respect of the complaint that in view of the fact that there was no tax due in either tax year the level of the penalties is disproportionate 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.

21. 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."

22. The Tribunal has considered whether the penalties have been correctly imposed.

The Tribunal has considered Paragraphs 1 (3) and 17(3) of the Schedule which are set out above. In the Tribunal's view the late filing penalty of £100 and the daily penalties totalling £900 levied in each of the tax years have not been determined by reference to a liability to tax and therefore have been correctly imposed subject to the regulations concerning reasonable excuse and special circumstances.

However in the Tribunal's view it is impossible to determine the six month penalty and the twelve month penalty without reference to a liability to tax. Therefore applying paragraph 17(3) the Tribunal considers that the aggregate of the six month penalty of £300 and twelve month penalty of £300 levied in respect of the late 2011-2012 tax return must not exceed the liability to tax which was nil for that tax year. Therefore the Tribunal allows the appeal in respect of those penalties.

In respect of the tax year 2012-2013 there was only a £300 six month late filing penalty so there is no aggregate and so paragraph 17 (3) does not apply.

23. The legislation on reasonable excuse is set out above but there is no definition of reasonable excuse. The Tribunal is mindful of the wording his Honour Judge Patrick Medd OBE QC used in *The Clean Car Company Ltd v The Commissioners of Customs and Excise*. In that case Judge Medd wrote;

"It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse...."

24. The Tribunal has considered the submissions made by the appellant, his agent Mrs Vernon and his accountant J.Cameron Smith.

It is evident that the appellant relied on his agent, Mrs Vernon. Who quite properly admitted “it is entirely my fault that Andrew’s books were as late as mine”

It is clear that the law at Section 23 (2) (b) of the Schedule provides that “where P (*a person*) relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure.”

The Tribunal therefore has to consider whether the appellant took reasonable steps to avoid the failure. Unfortunately for the appellant there was no evidence given that the appellant took any steps to avoid the failure. He clearly was experiencing very difficult circumstances. There is no evidence that he tried to contact HMRC to advise them of the predicament and difficulties he was in. There is no evidence that he tried to appoint someone other than Mrs. Vernon to complete his return for him. Mrs Vernon gave no evidence that he had regularly spoken to her about submitting the return. It is quite possible that the appellant was aware that no tax was due so failed to give submission of the return sufficient priority. This is especially so in the light of the circumstances he found himself in. Having been assaulted by Mr. Vernon and having had his records destroyed by him must have been traumatic for him but it is commendable that he sought to protect Mrs. Vernon and help her with the farm at the expense of his own business as a builder.

It is noted that on 13 March 2014 HMRC accepted that Mrs Vernon had reasonable excuse for not submitting Mr Vernon’s partnership return on time.

As Mrs Vernon also did the book keeping for the appellant The Tribunal has considered why HMRC did not also accept that the appellant has reasonable excuse for his late return which was submitted by her on his behalf.

HMRC have pointed out that Mr. Vernon died on 30 August 2013 but it was not until 12 May 2014 that the appellant’s tax return was submitted.

Whilst the appellant suffered considerable difficulties which were tragic and no doubt traumatic for him. He could see the difficulties experienced by Mrs. Vernon and should have alerted HMRC to the difficulties he was experiencing. After Mr. Vernon had died it was over 8 months before returns which showed no tax due were submitted.

In these circumstances the Tribunal finds that the appellant has failed to establish that he had a reasonable excuse for the failure to submit his return on time.

25. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalties 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 penalties and have concluded there are none. The Tribunal disagrees.

Special circumstances are described by HMRC as circumstances that are uncommon or exceptional. In *Crabtree v Hinchliffe* they are described as “circumstances which were exceptional, abnormal or unusual”. In *Clarks of Hove v Bakers’ Union*, Lord Justice Geoffrey Lane, as he then was, described special circumstances as “something out of the ordinary, something uncommon.”

In the Tribunal's view the circumstances in this case which are detailed above can clearly be described as out of the ordinary, uncommon, abnormal, unusual and exceptional.

It is clear that in their review HMRC only considered the daily penalties in respect of tax year 2011/2012. They did not consider whether special circumstances applied to the other penalties in respect of tax year 2011/12 or to any of the penalties in respect of tax years 2012/2013. They did not consider the detrimental effect that the illness and ultimate demise of Mrs. Vernon's mother had on the running of the farm. HMRC's review does not mention that they considered the letter from J. Cameron Smith dated 8 December 2014 when considering special circumstances.

For all these reasons the Tribunal considers that HMRC's decision on Special circumstances is flawed. The Tribunal has no hesitation in reducing the penalties in both tax years to nil.

26. This document contains a summary of the facts 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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 7 JUNE 2018

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