



TC01554

Appeal number: TC/2011/04411

Self-assessment filing penalty – taxpayer thought HMRC had issued self-assessment Notice in error – return not submitted – late filing penalty – no reasonable excuse – HMRC issued paper return and advised there would be no penalty if received by them within fourteen days – condition met - HMRC authority to discharge penalty – appeal allowed

FIRST-TIER TRIBUNAL

TAX

DAVID ARCHER

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 21 October 2011 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 12 June 2011 and HMRC's Statement of Case submitted on 20 July 2011.

DECISION

1. This was Mr Archer's appeal against a £100 penalty for late filing of his 2009-10 self-assessment ("SA") tax return. The Tribunal decided that the appeal was allowed.

5 **The legislation**

2. Under Taxes Management Act 1970 ("TMA") s 93, a person who has been issued with an SA tax return and fails to send it back by the due date is liable for a penalty of £100.

3. TMA s 102 states that "The Board [of HMRC] may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty". The case of *Bensoor v. Devine* [2005] STC (SCD) 97 established that an officer of the Board is any person employed by HMRC carrying on a specific function when authorised to do so.

4. TMA s 118(2) states that the taxpayer can appeal a penalty on the grounds of reasonable excuse. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal that "an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act" *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14].

5. TMA s 100B(2)(b) gives the Tribunal the power, in relation to a penalty which is "required to be of a particular amount" to set it aside "if it appears that no penalty has been incurred"; to confirm it, if it appears to be correct, and to increase or reduce it to the correct amount if it appears to be incorrect.

The facts

6. Mr Archer was employed by the same employer from March 2009 and throughout the 2009-10 fiscal year. He had previously been self-employed.

7. For the 2008-09 fiscal year Mr Archer completed his SA return online. On 6 April 2010 HMRC sent him a Notice to file a 2009-10 return. He assumed that this was a mistake because he was now employed. He ignored the Notice.

8. The due date for submission of the 2009-10 SA return was 31 October 2010 if filed on paper and 31 January 2011 if filed online.

9. On or around 15 February HMRC issued Mr Archer with a penalty notice of £100.

10. Mr Archer called HMRC. The content of this call is disputed and I discuss it below. As a result of the call, HMRC issued a paper copy of the SA return, and Mr Archer submitted it within seven days. HMRC received the completed form on 9 March 2011.

11. When HMRC processed the data on Mr Archer's SA return they realised that a further £155.40 should have been deducted under PAYE for 2010-11. This underpayment arose because the wrong PAYE code had been used by Mr Archer's employer.

5 **The conversation with HMRC**

12. Mr Archer's account of his conversation with HMRC is as follows:

10 "when I spoke to your colleagues by phone on receipt of the first penalty notice, I explained the situation, they understood fully and told me they would reissue the paperwork for me to complete and return within fourteen days. They said that as long as I followed this process then the fine would not apply. I followed your instructions clearly and returned the completed paperwork promptly within seven days of receipt."

13. HMRC's Statement of Case says:

15 "on receipt of the penalty notice the appellant contacted HMRC to advise that he had PAYE income only for 2009/10. Based on such information, the HMRC adviser would have advised that as tax would have been paid under PAYE, no tax liability would have been due at 31 January 2011 and so the penalty would be capped at 'nil'. This is because for personal late filing penalties, when a complete personal tax return proves that the unpaid liability at the filing date was less than the penalty imposed, then the penalty will be reduced to the figure of the unpaid liability. However, when the appellant's SA return was processed, an underpayment of tax of £155.40 arose because the incorrect tax code had been used by the appellant's employer. As this liability amount exceeded the penalty of £100, the penalty remains chargeable."

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Reasonable excuse

14. HMRC say that Mr Archer does not have a reasonable excuse for late submission of the return. Mr Archer relies on the conversation with HMRC set out above.

Discussion and decision

30 15. I agree with HMRC that Mr Archer does not have a reasonable excuse for late submission of the return. He was sent a Notice to file an SA return, and he should either have submitted the form, or contacted HMRC before the filing date to see if the Notice had, as he assumed, been sent to him by mistake.

35 16. In my view, his behaviour in ignoring the return does not come up to the standard of the responsible taxpayer described by *B&J Shopfitting* (quoted earlier in this Decision) and there are no other factors which provide him with a reasonable excuse.

17. However, this case does not turn on the requirements for a reasonable excuse but on HMRC's exercise of their statutory powers.

18. HMRC are authorised under TMA s 102 to discharge or reduce a penalty. They have made no submission that its call centre staff do not have the authority to discharge or reduce a penalty for late filing. Instead, they say that no such promise “would” have been made.

5 19. The Tribunal can only decide cases on the evidence. Mr Archer has given a clear account of his call to HMRC. He says he was told that “as long as [he] followed this process then the fine would not apply”. In that sentence “this process” refers to completing and returning the SA form within 14 days. His record of the conversation does not mention the quantum of PAYE deducted, any possible shortfall, or any link
10 between such a shortfall and the penalty amount.

20. HMRC have not produced any record of that call. Their Statement of Case says only that “the HMRC adviser *would have advised...*”. That is supposition, not evidence. HMRC have therefore not rebutted the evidence put forward by Mr Archer.

15 21. The evidence before the Tribunal is that HMRC promised to use its powers under TMA s 102 to discharge the penalty if Mr Archer met the 14 day turnaround time. He states that he did meet the deadline, and HMRC do not disagree.

22. The Tribunal has considered its powers under TMA s 100B(2). It appears to the Tribunal that no penalty has been incurred by Mr Archer, because the sum originally charged by the Notice issued in February 2011 was subsequently discharged by
20 HMRC under their statutory powers. The imposition of a £100 penalty is thus not correct and Tribunal allows Mr Archer’s appeal.

23. 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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Anne Redston

**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 9 NOVEMBER 2011**

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