



TC01619

Appeal number: TC/2011/04209

*Penalty – Failure to file self-assessment tax return – Reliance on accountant
– Whether reasonable excuse on facts – No – Appeal dismissed – section 93
Taxes Management Act 1970*

FIRST-TIER TRIBUNAL

TAX

SIOBHAN HELENA HEANEY-IRVING

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 30 September 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 31 May 2011, HMRC's Statement of Case submitted on 15 July 2011 and the Appellant's Reply dated 29 July 2011.

DECISION

1. This is an appeal by Mrs Siobhan Heaney-Irving against a fixed penalty of £100 imposed under s 93 of the Taxes Management Act 1970 (“TMA”) as a result of the failure to file her self-assessment tax return (the “Return”) for 2009-10.

2. On 6 April 2010 HMRC issued Mrs Heaney-Irving with a notice, under s 8 TMA, requiring her to file the Return. Section 8(1D) TMA provides that a taxpayer who has been given notice by HMRC to deliver a self-assessment tax return for “*a year of assessment (Year 1)*” must do so:

10 (a) *in the case of a non-electronic return, on or before 31st October in Year 2, and*

 (b) *in the case of an electronic return, on or before 31st January in Year 2.*

3. As in previous years Mrs Heaney-Irving relied on her accountant to submit the Return to HMRC on her behalf within the statutory time limit. However, despite having never previously done so, rather than file the Return by the due date the accountant wrote to Mrs Heaney-Irving on 8 February 2010 requesting confirmation of the amount she received under a trust. The letter continued by stating:

20 There will be no penalty for the late submission of the return as [the] worst case scenario is a repayment [of tax] therefore I considered it in your best interest to delay submission rather than submit a potentially incorrect return which showed an overstated repayment claim.

4. The delay in the submission of the Return continued and as at 15 July 2011, the date HMRC submitted the Statement of Case in this appeal, the Return remained outstanding despite Mrs Heaney-Irving’s repeated unsuccessful attempts to engage with the accountant (a matter which has been reported to his professional body).

5. Section 93 TMA provides, so far as relevant:

Failure to make return for income tax and capital gains tax

(1) This section applies where—

30 (a) *any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act) to deliver any return, and*

 (b) *he fails to comply with the notice.*

35 (2) *The taxpayer shall be liable to a penalty which shall be £100.*

...

(4) If—

 (a) *the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and*

(b) no application is made under subsection (3) above before the end of that period,

the taxpayer shall be liable to a further penalty which shall be £100.

5 *(5) Without prejudice to any penalties under subsections (2) to (4) above, if—*

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and

10 *(b) there would have been a liability to tax shown in the return, the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.*

(6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.

15 *(7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.*

20 *(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the Tribunal may—*

(a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or

(b) if it does not so appear to them, confirm the determination.

25 6. Although s 93(7) TMA provides that a penalty “*shall not*” exceed the liability to tax (and it must therefore follow that if there is no liability to tax there can be no penalty), in my judgment s 93(7) TMA cannot apply in the absence of a return as without a return it would not be possible to prove that the liability to tax “*shown in the return*” would be such that the penalty should be reduced.

30 7. Therefore, as there has been a failure to file the Return Mrs Heaney-Irving is liable to a penalty of £100 in accordance with s 93(2) TMA unless she has a reasonable excuse for the failure which continues throughout the period of default in which case the penalty may be set aside. There is no definition in the legislation of “*reasonable excuse*” which has been held to be “a matter to be considered in the light
35 of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

8. In this particular case the Return was not filed because the accountant, on whom Mrs Heaney-Irving relied to submit it on her behalf, failed to do so. It is therefore necessary to consider whether this amounts to a reasonable excuse.

40 9. In *Rowland v HMRC* and other cases (eg *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199) the Tribunal has held that reliance on a third party, such as an accountant, can be a reasonable excuse in a direct tax context.

10. However, as the Tribunal Judge (Dr Christopher Staker) noted in *The Cove Fish & Chip Restaurant Ltd v HMRC* [2011] UKFTT 625 (TC) at [13]:

“... reliance on a third party “can” be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.”

5 11. It is also clear that the responsibility for filing a self-assessment tax return remains that of the individual taxpayer even where, as in this case, an accountant has instructed to prepare and submit the self-assessment return to HMRC on his client’s behalf. In *Jeffers v HMRC* [2010] UKFTT 22 (TC) Sir Stephen Oliver QC (the then President of the Tribunal) said, at [17]:

10 “The obligation to make the tax return on time is nonetheless the taxpayer’s. It remains his obligation regardless of the fact that he 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
15 comply with, eg the obligation to make the return on time can amount to a “reasonable excuse”. To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional.”

12. *Jeffers* was followed by the Tribunal (Judge Charles Hellier and Mr Peter Laing) in *Bushell v HMRC* [2010] UKFTT 577 (TC) where it was said, at [56 – 57]:

25 [56] “It seems to us that reliance on an agent may be an excuse or a reason for non compliance, but such reliance is normal and customary, and the statute cannot have intended such reliance to constitute a *reasonable* excuse in every case. It seems to us that it cannot be the intention of legislation to permit the reliance on a competent person who fails unreasonably to fulfil the task with which he is entrusted to absolve the principal in all cases.

30 [57] We concur with the President when he said that to be a reasonable excuse the excuse must be something exceptional. In our view, in determining whether or not that is the case it may be necessary to consider why the agent failed (and thereby to regard the agent as an arm of the taxpayer). To give a simple example, if a return was given to someone to post, and that person failed to do so, the reasons for that failure will illuminate whether or not there is a reasonable excuse: if
35 the messenger was run over by a bus the position will be different from the case where the messenger merely forgot.”

13. Although the failure to file the Return in the present case may have been outside the control of Mrs Heaney-Irving I am unable to find any evidence that it was beyond the control of her accountant who, if the information regarding the trust income was
40 necessary for the completion of the Return could, and should, have requested it before the filing deadline. Even if this was outside of the accountant’s control as it is, in my judgment, clearly a matter that was reasonably foreseeable and certainly not something that could be described as “exceptional” I am unable to find that there was a reasonable excuse for the failure to submit the Return.

14. In the circumstances I have no alternative but to dismiss the appeal and confirm the penalty.

5 15. 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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JOHN BROOKS

TRIBUNAL JUDGE

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