



**TC01912**

**Appeal number: TC/2011/04198**

*INCOME TAX – self assessment – penalty for late submission of return – delay by HMRC in issuing activation code for online filing – whether reasonable excuse – held, on particular facts, yes – delay between receipt and use of activation code and submission of return – held excuse did not continue throughout period of default – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**STUART BLAKEMORE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN CLARK  
CHRISTINA HILL WILLIAMS**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 17 October 2011**

**The Appellant in person**

**Eleanor Gardiner, Presenting Officer, HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

- 5     1. Mr Blakemore appeals against a surcharge for the late submission of his self assessment return for the year 2009-10 by the Respondents (“HMRC”). As agreed at the hearing, we produced a summary decision dismissing Mr Blakemore’s appeal; this was dated 5 November 2011, and released to the parties on that date. However, for some reason, Mr Blakemore did not receive his copy.
- 10    2. Following discussion between Mr Blakemore and HM Courts and Tribunals Service (“HMC&TS”), HMC&TS sent him another copy on 20 December 2011. On 3 January 2012, Mr Blakemore emailed HMC&TS to explain that he wished to appeal, and asked for help to enable him to do so.
- 15    3. HMC&TS took that request as a request for a full reasoned decision, in accordance with the combined effect of Rules 35 and 39 of the Tribunal Rules.
4. On 10 January 2012, HMC&TS contacted this Tribunal to explain the position, and to pass on the request for full written findings and reasons.
- 20    5. It is not clear to us whether Mr Blakemore is aware that, where a Tribunal has produced either a short form decision or a summary decision, a full decision is not prepared unless one of the parties requests it. This requires additional work to be done by the Tribunal in preparing a full decision providing all the necessary detail to enable a party to consider whether an application for permission to appeal is to be pursued, and (if such an application proves to be successful) to enable the Upper Tribunal to deal with the appeal.
- 25    6. The additional task of preparing this full decision has had to await our availability, as work notified before 10 January 2012 on other appeals has had to take precedence. In addition, one of us has been unavailable over an extended period. The lapse of time since the hearing has been unfortunate, but we hope that the parties understand the reasons for that rather lengthy interval.
- 30    7. Paragraph 1 of our summary decision stated:
- 35            “The Tribunal decided that the Appellant’s return for the year ended 5 April 2010 was filed late, that the Appellant did not have a reasonable excuse which continued throughout the period of default, and that the penalty of £100 was in the correct amount. Accordingly, the Tribunal dismissed the appeal.”

### *The facts*

8. The evidence consisted of the bundle of documents prepared for the hearing; in addition, Mr Blakemore provided us during the hearing with two CDs of recordings of telephone conversations between him and HMRC, as explained below. In addition,

Mr Blakemore gave informal evidence in the course of putting his case. Except to the extent indicated later in this decision, we accepted that evidence, which Mrs Gardiner did not seek to challenge. We asked Mrs Gardiner whether HMRC would accept our taking into account the CD recordings after the hearing if this proved necessary in arriving at our decision, as only one copy of each CD was available. She agreed that we could do so, but commented on this in opening her argument. From the evidence we find the following facts.

9. Mr Blakemore had filed self assessment returns for a number of years, but as a result of a change in circumstances, he had stopped doing so following advice from HMRC that this was not necessary. In respect of 2009-10, he became aware as a result of advice from HMRC that he would need to file a self assessment return. At that point the filing date for paper returns had already passed. As a result he needed to file on line.

10. He submitted form SA1 during the latter part of 2010. However, he was unable to log on to the HMRC system. He therefore contacted the HMRC help desk. He was told on different occasions by two HMRC employees that there were delays with the system. (He informed us that on the day of the hearing, he had checked again, and that there was a six week backlog.)

11. As a result he was unable to register. His position was compounded by a practical problem; there were two files relating to him within the HMRC system, and these were unable to be linked. Within these two files, some entries related to National Insurance and some were made against the UTR, so that neither file contained the full picture.

12. He had had a number of telephone conversations in the period from September 2010 to 31 January 2011. He had found it virtually impossible to deal with the matter through his contacts with HMRC. He had been told that no self assessment record had been set up; however, he had told HMRC of his UTR. It appeared that someone had previously tried to set up a self assessment record. He had telephoned on 10 January 2011, as he knew that the deadline for filing was approaching and he definitely did not want to be “fined” (ie, suffer a penalty). He was told again that his activation code would not be with him in time for him to file a return on line.

13. His telephone conversations had been between five and twelve minutes long. He had been told repeatedly by HMRC that it was not possible for him to file on line. He was also told that a new record needed to be set up. He had tried repeatedly to call. There had been contact between him and HMRC after the filing deadline because his return was not filed until after 31 January 2011. He emphasised that he had not been given the tools to access HMRC’s system.

14. According to HMRC’s records (of which there was no direct evidence), Mr Blakemore enrolled on line on 13 April 2011, and the activation “PIN” code was sent out on 14 April 2011.

15. He wrote to HMRC on 16 April 2011 about the fixed penalty issued to him for late submission of his self assessment return. He referred to telephone conversations which he had had with individuals at HMRC, first in October 2010 and then in January, as the filing deadline was approaching. He explained that he had again been told that he probably would not have the information which he needed to be able to file a return on line. He continued:

10 "I was told that a fine would be sent out automatically but I just needed to let you know that this was not due to me, but due to a backlog at HMRC and the fine would be cancelled. I'd be grateful if you could please confirm that this is the case. I have attempted to call 3 times but each time have been put on hold for over 30 minutes and as I don't have a landline this is extremely expensive.

15 As the situation currently stands I now have managed to get a Gateway ID number but I am still waiting for a password so I can finally submit my application. I'd be grateful if you could also let me know what this password is, or how long I should expect to wait for it."

16. Mr Blakemore's recollection was that he had not received an activation PIN code until about 18 April 2011. He had not been able to enrol on line until 13 April 2011, and the first occasion on which he had been able to log on to HMRC's on-line system had been about ten days before that.

20

17. He had activated his account on 10 May 2011 and filed his return on 19 May 2011, as he knew the deadline of 31 January 2011 had been substantially missed.

25

18. On 19 May 2011 HMRC wrote to Mr Blakemore concerning his appeal against the first penalty for late submission of his 2009-10 return. This letter indicated that the time limit for appealing against the penalty had expired, and that his letter had been received by HMRC after the expiry of the 30 day appeal period. The only circumstances in which a late appeal would be accepted were where Mr Blakemore had a reasonable excuse for not filing the return on time. The letter continued:

30 "This reasonable excuse must be an exceptional event beyond your control, which continued for the 30 days beyond the receipt of the penalty notice.

35 We are unlikely to agree you were prevented from filing your tax return on time or appealing against the penalty within a 30 day period if, during the exceptional event, you were able to manage the rest of your private and business affairs."

19. On 2 June 2011 Mr Blakemore gave Notice of Appeal to HMC&TS. In his grounds for appeal, he set out a broad description of the background facts, and stated:

40 "I was told that a fine would be sent out automatically but I just needed to notify HMRC that this was not due to me, but due to a backlog at HMRC and the fine would be cancelled."

*The law*

20. The relevant legislation is contained in the Taxes Management Act 1970 (“TMA 1970”). The sections relevant to Mr Blakemore’s filing obligations are s 8, and (in respect of a 2009-10 return) s 93(2), (7) and (8) TMA 1970. We need only set  
5 out the latter sub-section:

- “(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above that is notified to the tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the tribunal may—
- 10 (a) if it appears 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, confirm the determination.”

21. The legislation does not define reasonable excuse. Section 118(2) provides:

- 15 “(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and,  
20 after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.”

*Mr Blakemore’s arguments*

22. Much of Mr Blakemore’s argument was set out in his account of the facts,  
25 which we have very largely (but not completely) accepted.

23. As a result of his tax and National Insurance details being split between two separate and unlinked files, those involved in presenting HMRC’s case were not aware of all his telephone conversations with HMRC. He had therefore contacted HMRC’s Data Protection Officer, and obtained two CDs of conversations between  
30 him and HMRC. However, although Mr Blakemore had sent a fax requesting transcripts of the telephone conversations between him and HMRC relating both to his self assessment position under his Universal Tax Reference (“UTR”) and to his National Insurance position (under his National Insurance number), the conversations recorded on these CDs related only to the latter. His contacts with HMRC had been by phone and email. Each time he had contacted HMRC by phone, he had asked for a log  
35 of the call to be made. However, not all the calls had been listed.

24. He emphasised in his argument before us that he had tried to enrol before the due date. He thought that his postcode could be an issue, as he had moved residence several times. He submitted that the reasonable excuse had been maintained  
40 throughout the default except for the last period. The steps which he had taken to meet his obligation were shown by the transcripts (ie the CD recordings). He had not made errors. Those within HMRC dealing with the penalty had not been aware of the

recorded conversations. This was perhaps due to HMRC's administrative error in not linking the two files relating to him. He acknowledged that his filing of the return had been late, but this had been outside his control.

*Arguments for HMRC*

5 25. Mrs Gardiner commented that she had difficulty in dealing with the CD recordings when she had not had an opportunity to listen to them. She was not in a position to comment on them at the hearing.

26. The issues were:

- (1) Was the tax return for 2009-10 filed late?  
10 (2) If so, did Mr Blakemore have a "reasonable excuse for the entire period of default" for the return being delivered late?

27. As to the first issue, Mr Blakemore's return had been filed on line on 19 May 2011, which was 108 days late.

15 28. On the second issue, Mrs Gardiner provided information relating to the Government Gateway. Once an individual had completed the registration process, the activation code would be sent separately by post within seven days. If the PIN was not activated within 28 days it would expire.

20 29. Mr Blakemore had contended that he could not file his return as HMRC had failed to provide him with his User ID and/or activation code due to a 3 month backlog. However, she submitted that HMRC had no three month backlog in issuing activation codes.

25 30. There was no indication that Mr Blakemore had enrolled on line before 13 April 2011. She referred to a note of a telephone call made on 18 July 2011 to HMRC's Online Services department, which confirmed this, as well as the date on which the activation PIN code had been set out, the date on which Mr Blakemore had activated the online account, and the date on which he had filed his return.

31. Mr Blakemore had not activated the account until the 26th day of its validity period. Once he had done this, he had not filed his return for a further nine days.

30 32. Mrs Gardiner referred to the chronology. The penalty notice had been issued on or around 15 February 2011. Mr Blakemore's original contact with HMRC had been on 23 September 2010, to obtain advice on completing the employment pages of the self assessment return. This had been before the deadline for filing a paper return. His subsequent steps had been after the filing deadline. On 13 April 2010 he had asked for advice on registering to file on line. On 10 May 2011 he had contacted HMRC to explain that he was having trouble completing his return on line. On 17 May 2011 he had asked for clarification on payments on account. On 19 May 2011 he asked HMRC for advice on completing returns where there were losses, and also on payments on account. She submitted that this was a clear indication that he had not completed his tax return before 31 January 2011.

33. She further submitted that Mr Blakemore was familiar with the self assessment system, and therefore aware of his obligations to complete and file his 2009-10 return by specific dates, which he had failed to do. A reasonable person would have a process in place to ensure compliance with his various obligations, including the filing of returns.

5           34. HMRC contended that the penalty had been correctly issued in the correct amount. The Tribunal therefore had to consider whether there was a reasonable excuse under s 118(2) TMA 1970.

10          35. Mrs Gardiner submitted that a reasonable excuse was normally an unexpected or unusual event, either unforeseeable or beyond the relevant person's control, which prevented him from complying with an obligation when he otherwise would have done. A combination of unexpected and foreseeable events might when viewed together be a reasonable excuse.

15          36. If there was a reasonable excuse it must exist throughout the period of default. She submitted that Mr Blakemore did not have a reasonable excuse for the whole period of the default.

20          37. She contended that he had been negligent in not submitting his return on time, and that negligence could never be a reasonable excuse. The penalty had been correctly issued in the correct amount. There was no reasonable excuse, and the penalty should be confirmed.

38. HMRC had made no errors in the present case; Mr Blakemore had made the error by not taking action to ensure that he complied with the filing requirements. His appeal should be dismissed.

#### *Discussion and conclusions*

25          39. We are satisfied on the evidence that Mr Blakemore's 2009-10 return was filed late, on 19 May 2011. He is therefore liable to a penalty, unless he can satisfy us that there was a reasonable excuse for the late filing of his return, and that such reasonable excuse subsisted throughout the period of default.

30          40. At the hearing, having heard Mr Blakemore's arguments, Mrs Gardiner's arguments for HMRC and Mr Blakemore's reply, we retired to consider our decision. We found ourselves able to reach a decision immediately, and returned to announce it to the parties. Our decision was that although we considered that Mr Blakemore had a reasonable excuse for the late filing of his return, as a result of the difficulties which arose because of the existence of two separate and unrelated HMRC files concerning his tax and National Insurance position, the delay between receipt of the PIN and the activation and submission of the return was, in the circumstances, unreasonable.

35          41. Having waited for the position to be resolved, Mr Blakemore could reasonably have been expected to act immediately once the difficulties in arranging for filing of the return had been eliminated. We considered that if the Appellant had activated the

PIN and filed the return as soon as he had received the PIN, he would have had a reasonable excuse for the late filing, and that excuse would have continued throughout the period of default.

42. We therefore found that the reasonable excuse did not continue throughout the period of default. In the absence of a reasonable excuse which continued throughout the period of default, the determination of the penalty had to be confirmed and the appeal dismissed.

43. Following the hearing, we prepared our summary decision. In the course of doing so, we reviewed extracts from the recordings of telephone conversations which the Appellant had had with HMRC. (In the light of the amount at issue, we did not consider it appropriate to listen to every conversation, especially as Mr Blakemore had indicated that these recordings did not comprise all of the conversations which he had had with HMRC.) Although the conversations which we have listened to support the conclusion which we would otherwise have reached as mentioned at paragraph 41 above, in the light of the conclusion reached on the basis of ss 93(8)(a) and s 118(2) TMA, they do not affect the result of Mr Blakemore's appeal. The recordings and associated correspondence handed to the Tribunal by Mr Blakemore will be returned to him once matters relating to this appeal have become final.

44. We have referred above the absence of direct evidence of the date of Mr Blakemore's enrolment and the subsequent events concerning his on-line account. The record of the telephone conversation does not include any details of the caller, whom we presume to have been Mrs Gardiner. Although in the present case we have accepted the dates mentioned in that telephone conversation as correct, we consider that HMRC ought to provide evidence from an office in its Online Services department, at the very least in the form of an email identifying the officer in that unit who is giving details of the status and history of the on-line account.

45. It is clear that Mr Blakemore had conversations with HMRC between the date of activating his account and the final filing of his return. We can understand that Mr Blakemore would have wished to have his account operating before finalising his return and submitting it, although we think that he was somewhat imprudent not to have as much as possible of the necessary information available as soon as his account was activated.

46. The factor which leads us to conclude that he does not satisfy s 93(8)(a) TMA 1970, despite our having found that in his particular and unusual circumstances he had a reasonable excuse up to the time of receiving the activation code, is his failure to act with sufficient speed from that point onwards to ensure that his return was filed without further delay. He therefore does not fulfil s 118(2) TMA 1970. We emphasise that it is for him to satisfy us that he had a reasonable excuse, and in addition that such excuse continued throughout the period of default; as a result of his failure to act quickly following receipt of the activation code, he has not satisfied us that there is any reason for setting the penalty determination aside.

47. In reconsidering matters for the purposes of this full decision, we are aware that there was a great deal more information provided by Mr Blakemore than we were able to consider at the hearing, and also that some of the statements which he made at the hearing were not fully consistent with the facts as we have found them. However, we  
5 do not consider that the decision which we reached at the hearing is in any way affected by these matters. The reason why his appeal does not succeed is that his reasonable excuse did not continue throughout the period of default; he appeared to acknowledge this in the final stage of his argument (see paragraph 24 above). The other matters just mentioned are not relevant to the latter issue.
- 10 48. We note that on the HMRC website, under the heading “Making an appeal if you have a ‘reasonable excuse’”, the following is considered by HMRC to be a reasonable excuse:
- “late receipt of your online Activation Code, User ID or password even though you asked for them before the tax return deadline”
- 15 49. We have no means of establishing whether this wording was on the website in January 2010. However, we find that the administrative problem with the two  
20 unlinked files concerning Mr Blakemore’s taxation and National Insurance affairs continued beyond the filing date.
50. As we found at the hearing, Mr Blakemore’s appeal must be dismissed.
51. We have prepared this decision on the basis that Mr Blakemore is considering appealing against it. We have two comments on this. First, as indicated in the  
25 following paragraph, his only right is to apply for permission to appeal; the giving of permission is not automatic, and an appeal can only be made on a point of law. (Details of the requirements can be obtained from the First-tier Tribunal (Tax) website; see “Guidance notes on completing the First-tier Tribunal application for permission to appeal to the Upper Tribunal”, and the corresponding application form, which must be completed.) Secondly (but only relevant if permission to appeal were  
30 to be granted), the costs regime in the Upper Tribunal is entirely different; unlike a basic appeal before the First-tier Tribunal, an appeal to the Upper Tribunal carries the risk that the losing party may become liable to the costs suffered by the other party. The costs at risk are therefore likely to be many times more than the amount of the  
35 penalty under appeal. Mr Blakemore should therefore consider carefully whether seeking to appeal is an appropriate step for him to take.

#### *Right to apply for permission to appeal*

52. This document contains full findings of fact and reasons for the decision. Any  
40 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)”  
5 which accompanies and forms part of this decision notice.

**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 March 2012**