



**TC02295**

**Appeal number: TC/2011/10133**

*INCOME TAX – self assessment – penalties and surcharges – late submission of return – difficulties with on-line registration and filing – use of accountant not officially appointed as agent – reliance on that accountant – further delay before paper return eventually submitted and tax paid – whether reasonable excuse continuing throughout period of default – on facts, held no such continuing excuse and not absolved from responsibilities by appointment of a third party – penalties and surcharges confirmed and appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DR GABRIELLA SAS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN CLARK**

**The Tribunal determined the appeal on 29 May 2012 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 27 November 2011 (with enclosures), and HMRC's Statement of Case submitted on 30 January 2012 (with enclosures).**

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## DECISION

1. As indicated above, this appeal was considered on the papers on 29 May 2012. A short form decision was released on 15 June 2012. The Appellant, Dr Sas, has indicated that she wishes to apply for permission to appeal to the Upper Tribunal, and has therefore requested full written findings of fact and reasons for the decision.

2. Dr Sas appeals against two fixed penalties for the late submission of her 2009-10 self assessment return and two surcharges for late payment of her tax for 2009-10. The details are set out below.

3. The first paragraph of the short form decision was as follows:

“The Tribunal decided that there was no continuing reasonable excuse throughout the period of default for the late submission of the Appellant’s self-assessment return for the year ending 5 April 2010, that the first and second penalties for late submission of that return should be confirmed, that the initial and second surcharges for late payment of tax should be confirmed, and that the appeal should be dismissed.”

### **The facts**

4. On 23 September 2010, the Respondents (“HMRC”) issued a Notice to File to Dr Sas. The filing date for the self-assessment return was 31 December 2010 for a paper return, or 31 January 2011 if filed on line.

5. The adviser whom Dr Sas consulted in relation to her 2009-10 return was a Mr Jasani, based in St Albans. Dr Sas stated in her letter to HMRC dated 14 March 2011 appealing against the first penalty that she had first visited Mr Jasani on 20 January 2011 “when presenting him with most of the paperwork he needed for my tax return of 09/10”. Her next visit to him had been on 26 January 2011 when presenting Mr Jasani with more paperwork which he had requested earlier.

6. There was no evidence to show on what date Dr Sas had enrolled to use the Self Assessment service through the Government Gateway. The letter to her from the Government Gateway containing the activation code was dated 27 January 2011. Dr Sas stated in her 14 March 2011 letter to HMRC that she had received the Government Gateway letter on 2 February 2011. Although this gave 28 days within which the service could be activated, she had sent the code to Mr Jasani in a text message on the same day. I accept Dr Sas’s evidence as to the date of receipt of the activation code, and the sending of that code by text message to Mr Jasani.

7. On 15 February 2011 HMRC issued a penalty determination to Dr Sas for failure to submit her return by the due date. There was no evidence as to the date when she received this notice.

8. As Dr Sas had had no news from Mr Jasani as to the progress of submission of her return on line, she contacted him by telephone on 23 February 2011. She arranged an appointment with him for the evening of 1 March 2011, after her working hours. (This allowed for travel from her home in Essex.)

9. She arrived for the appointment at around 7.30 pm. Mr Jasani explained to her that he had not been able to access her on-line account. He told her that he had spoken to an HMRC officer at about 6 pm, and had been advised that he should call HMRC again after the meeting with Dr Sas, but before the service closed for the day. Although he attempted to call shortly before 8 pm, the office was shut.

10. Dr Sas called HMRC at 1.18 pm on 2 March 2011. The officer indicated that Dr Sas had not been registered under the number which she had quoted, and that this was the reason for the issue of the penalty determination dated 15 February 2011.

11. Immediately afterwards Dr Sas telephoned Mr Jasani, who promised her that he would on that day register her under a new enrolment, explaining to her that she should be given another code from the Government Gateway in around seven days' time.

12. She had tried to contact Mr Jasani a few times during the period from 2 March to 23 March 2011, as she had not received her new code. She had no further information as at the latter date concerning the process of submission of her return.

13. In her initial penalty appeal letter she explained that on 3 March 2011 she had paid £350 to Mr Jasani for his services. She commented that this meant that he was the person who had been given the right and responsibility to deal with her tax return and therefore should be contacted if any trouble was encountered. She argued that she was not responsible for the penalty, and therefore appealed against it.

14. On 8 April 2011 HMRC responded to Dr Sas's appeal letter, explaining that the appeal could not be considered until her return had been received, and giving HMRC's general views on the question of reasonable excuse.

15. On 13 April 2011 Dr Sas emailed Mr Jasani to forward a new activation code received from the Government Gateway in a letter to her dated 29 March 2011. Mr Jasani replied stating that he had to check whether this was the correct one, as it should have come to his address. As she had not heard from him, she emailed him again on 17 April 2011 emphasising the urgency for him to complete the filing. He responded that he had not heard anything from HMRC concerning web filing. He had tried to contact them twice, but they would not talk too much to him as he was not officially her agent; to make him her agent she would need to fill in a form "68-4" (ie a form 64-8), which he would have arranged ages ago if they had known that HMRC were "going to give us such a hassle".

16. In an email exchange between Dr Sas and Mr Jasani dated 26 April 2011, Mr Jasani stated that he had made a fresh application as an emergency measure to push for a response from HMRC with all new codes, "as we have too many old ones and their system seems to be rejecting them".

17. On 21 June 2011 HMRC considered again Dr Sas's appeal against the initial penalty. HMRC did not consider that she had had a reasonable excuse for not sending in her return on time. The officer commented:

“You have stated that the responsibility for ensuring your tax return was correctly filed lies with your accountant because you have provided them with all the relevant information and paid for their services. I must advise you that the sole responsibility for ensuring that your tax return is filed correctly and on time lies with yourself. You do not have a reasonable excuse.”

18. On 7 July 2011 Dr Sas emailed Mr Jasani to ask about the dates on which he had tried contacting HMRC and asked for new codes. She referred to various points concerning the contractual position between her and Mr Jasani. She requested him to co-operate and get in touch with her as soon as possible.

19. On 8 July 2011 Dr Sas requested a review of HMRC's decision. She referred to her previous appeal letter and also attached details of email correspondence between her and Mr Jasani between 12 April 2011 and 7 July 2011 (extracts from which are set out above). She stated:

“Mr Jasani (the accountant) took over my corresponding address with HMRC to his address with my permission in order to make him eligible to apply for new registration code and complete my tax returns he calculated yet in January! For some reason he was not able to succeed with the registration/authentication - failed on a few occasions. This is entirely out of my control at this stage and I really would like to have it sorted out myself!”

20. On 31 August 2011 HMRC's Appeals and Reviews Unit issued their review conclusion letter rejecting Dr Sas's appeal. They considered that the decision in the letter dated 21 June 2011 should be upheld. The reason was that the 2009-10 tax return remained outstanding. They enclosed a duplicate form for Dr Sas to complete, and explained that if no tax was due, the penalty would be reduced to nil. They commented again that the responsibility for filing the return lies with the individual and that this responsibility cannot be passed to a third party. They commented:

“The actions of dilatory agent [*sic*] do not relieve a taxpayer from his legal obligation to ensure his returns are filed on time. To do so would be unreasonable and unfair to taxpayers who do adhere to this same obligation. It is essential that taxpayers who adhere to their obligations feel confident the system does not reward non compliance. Each taxpayer is responsible for dealing with and adhering to their obligation to ensure they file their personal tax returns by their due date - this obligation cannot be transferred to another person. Even if someone engages someone to assist with that obligation, the responsibility for submitting the personal tax returns rests squarely on the shoulders of the taxpayer.”

21. Dr Sas responded in her letter dated 22 September 2011 that the lateness of the return had been due to technical issues on HMRC's side (complications and subsequent failure on a number of occasions to get an authentication code working)

and that therefore resolving this matter on time had been completely out of her control. She explained that a different accountant would not have been in a position to complete the on-line return process. She supplied further copies of her most recent correspondence with Mr Jasani “as further evidence of my intention of sorting this matter out as soon as possible.” She had received the paperwork from him the previous day for her to sign, and enclosed it with her 22 September letter.

22. On 31 October 2011 HMRC wrote to her to tell her that the return had been processed, but also advising her that the decision to uphold the late filing penalty still stood; if she did not agree with the appeal review decision, she should refer the appeal to the Tribunals Service as explained in the review conclusion letter.

23. On 1 November 2011 HMRC issued an initial notice of surcharge, as no payment had been received by 31 January 2011. On 1 November 2011 HMRC also issued a second notice of surcharge, as the amount of tax due for 2009-10 remained unpaid at 30 July 2011. Subsequently, on 9 November 2011, HMRC issued a Self Assessment Statement to Dr Sas. This showed first and second fixed penalties of £100 each for late submission of the 2009-10 return, and first and second surcharges for 2009-10 of £121.20 each.

24. As Dr Sas had not contacted HMRC within the deadline (ie within 30 days of 31 August 2011, the date of the review letter), Miss Walsh of HMRC wrote to Dr Sas on 5 November 2011 to explain that as the appeal had not been notified to HM Courts & Tribunals Service within the time limit, Dr Sas’s appeal was now treated as settled under s 54(1) of the Taxes Management Act 1970 (“TMA 1970”). The penalties had been released for collection and were now due and payable.

25. Dr Sas replied on 12 November 2011, giving details of the history of the matter which she had discussed on 9 November 2011 with an officer on HMRC’s free helpline number. Dr Sas requested Miss Walsh to reconsider the matter.

26. On 24 November 2011 Ms C McMichael, another HMRC Appeals and Review Officer, responded. She noted the points in Dr Sas’s letter but explained that the review of the appeal had now ended and the Appeals Review Unit had no further involvement in Dr Sas’s case. Ms McMichael apologised for HMRC’s provision to Dr Sas of an incorrect telephone number for HM Courts & Tribunals Service, and stated that the Tribunals Service might accept a late appeal but that Dr Sas needed to raise this when contacting them. The appeal was settled under s 54(1) TMA 1970.

27. In her Notice of Appeal, Dr Sas set out the reasons for the delay in submitting her return and making payment during November 2011 of the tax due (without the penalties or the surcharges). There was no specific reason given for the late notification of the appeal to HM Courts & Tribunals Service.

### **Arguments for Dr Sas**

28. The arguments put by Dr Sas in her Grounds of Appeal and in her reasons for late notification of the appeal are as set out above. She also referred to her financial

position, and to various difficulties following the loss of her sole and regular income in May 2011.

### **Arguments for HMRC**

29. A taxpayer appealing against a penalty was required to have a reasonable excuse which existed for the whole period of default. A reasonable excuse was normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevented him from complying with an obligation when he otherwise would have done. It was necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper responsibility for their responsibilities under the Taxes Acts.

30. If the event could reasonably have been foreseen, whether or not it was beyond the person's control, HMRC would expect the person to take steps to meet their obligations.

31. If there was a reasonable excuse, it must exist throughout the period of default. This was defined at s 93(10) TMA 1970. The period of default in Dr Sas's case was from 31 January 2011 to 26 September 2011, ie 236 days (the latter date being that on which HMRC received her return).

32. The first notification by HMRC to Dr Sas that the return had not been received had been early in March 2011, yet the return had not been filed until 26 September 2011, over six months later. She could have contacted HMRC herself to request a paper return as soon as it had become apparent at the time of her meeting with Mr Jasani on 1 March 2011 that there was going to be a delay in filing. While HMRC recognised that Dr Sas was in communication with Mr Jasani, it was ultimately her responsibility to ensure that the return was filed by the deadline.

33. The activation code had been issued on 27 January 2011 and received by Dr Sas on 2 February 2011. The letter clearly stated that the account must be activated within 28 days. However, Mr Jasani had only tried to use the code for the first time on 1 March 2011, which was after the 28 day time limit. He had then had to apply for a new activation code. HMRC's records showed that further activation codes had been requested on 28 March 2011 and 26 April 2011.

34. It was not clear why it had not been possible for Dr Sas or Mr Jasani to register successfully with the activation codes issued as a result of these requests. However, there were no records of any further calls to the on-line filing helpdesk about any difficulties encountered. Neither Dr Sas nor Mr Jasani had stated in any of the correspondence provided exactly what action had been taken when they faced difficulties in using the activation codes issued. Dr Sas had said that these technical difficulties were totally out of her control, but had not taken any action to seek advice as to what alternative course of action she could take.

35. The last email between Dr Sas and Mr Jasani had been on 7 July 2011, and yet the return had not been filed until 26 September 2011. In HMRC's view, it would

appear that the late filing of the return had been mainly due to the delay by the agent in acting on the instruction of his client.

36. HMRC requested that the Tribunal to find that there had been no continuing reasonable excuse throughout the period of default, to dismiss the appeal and to confirm the penalty surcharges and penalty determination.

### **Discussion and conclusions**

37. Dr Sas's Notice of Appeal to HM Courts & Tribunals Service was not given until 27 November 2011. In the letter dated 6 January 2012 acknowledging receipt of the Notice of Appeal, Dr Sas was informed that if HMRC objected to her application for permission to appeal out of time or the Judge was unwilling to give permission, she would be given the opportunity to make further representations before a final decision on the application was made. HMRC made no objection to her application. My view, which I did not explicitly state in the short form decision, was that it was in the interests of justice for her appeal to be considered despite the late notice.

38. The Notice to File was issued to Dr Sas on 23 September 2010. This gave her two options. The first was to complete a paper return; the latest date by which this could have been filed without incurring any penalty was 31 December 2010. The second option was to file on line; the time limit for this was 31 January 2011.

39. Dr Sas did not (at least initially) take up the first option. She therefore put herself in the position that her return had to be filed by 31 January 2011 if penalties were to be avoided. As stated above, there is no evidence to indicate when she applied to enrol for on-line filing. There is no suggestion in any of the correspondence that there had been any undue delay between her application and the date of the Government Gateway letter dated 27 January 2011 containing the activation code. I therefore find, on the balance of probabilities, that her application for enrolment must have been submitted no earlier than a week or so before 27 January 2011. In Dr Sas's letter to HMRC dated 14 March 2011 she referred to Mr Jasani's explanation that a new registration would result in a new code being sent by the Government Gateway "in around 7 days time".

40. Thus Dr Sas had in excess of three months to apply for enrolment for on-line filing, but left it until about two weeks before the filing date. She provided Mr Jasani with "most of the paperwork" required for her return on 20 January 2011, and further paperwork on 26 January 2011. This gave little margin for any delay in completing the on-line filing. The activation code letter was dated 27 January 2011, but Dr Sas did not receive it until 2 February 2011, which was after the filing date. Thus, even if the activation code had worked, it would not have been possible for Dr Sas's return to be filed on line by the due date. 27 January 2011 was a Thursday; 2 February 2011 was the following Wednesday. There is no evidence to show whether the Government Gateway letter was sent by first class post or second class post. I am therefore unable to make any finding either way. However, the time allowed by Dr Sas for the whole process of enrolment for on-line filing, activation of her account, the completion of her return from the materials provided to Mr Jasani and the intended on-line filing

appears to have been very limited, thus increasing any risk of failure to complete the process by the due date.

41. On HMRC's website, under the heading "What counts as a reasonable excuse for filing an online return late?", HMRC give some examples of what may constitute a reasonable excuse. (I must emphasise that these views are HMRC's, and do not necessarily represent the views which may be held by particular Tribunals on the basis of the facts of the cases before them.) One example is: "you registered for HMRC Online Services but didn't get your Activation Code in time". HMRC continue with the following qualification:

"Remember, these are just examples. They can only apply if the problem actually prevented you from filing your return on time when you otherwise would have done. Each case is unique and will be considered on its own merits. You should still always send your tax return as soon as you can.

HMRC will not accept an excuse where you haven't made a reasonable effort to meet the deadline. For example, you:

- found the online system too complicated to follow
- left everything to your accountant to do and they let you down
- ..."

42. I am not satisfied that the time allowed for enrolling for self assessment and the obtaining of the necessary activation code was sufficient to justify treating the late receipt of the activation code as amounting to a reasonable excuse in the particular circumstances of Dr Sas's case. However, assuming for the present that it would in principle have amounted to a reasonable excuse, this is not sufficient to decide the matter. Section 93(8) TMA 1970 provides:

"(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—

(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."

43. The requirement is that the taxpayer had the reasonable excuse throughout the period of default. The activation code was received on 2 February 2011, but the return was not submitted until Dr Sas submitted it in paper form as an enclosure to her letter dated 22 September 2011, over seven months afterwards. Thus the delay in receiving the activation code after having registered before the filing date did not constitute a reasonable excuse which continued throughout the period of default.

44. Dr Sas provided the activation code to Mr Jasani by text message on the date of receipt, ie on 2 February 2011. There is nothing included in the evidence to indicate that he took any action in relation to the code before 1 March 2011, the date of Dr

Sas's evening meeting with him. The expiry date for the code was 28 days from 27 March 2011; on my calculations, this period would have expired on 23 February. Whether coincidentally or otherwise, this was the date on which Dr Sas telephoned Mr Jasani to arrange a meeting in order to try to resolve the process of submitting her return.

45. The copy record of the unsuccessful attempt to access her account, which does not carry a date but was emailed by Mr Jasani to her on 12 April 2011, shows the name "Gabrielle Sas" at the top. Throughout the email correspondence, Mr Jasani referred to her as "Gabrielle" rather than by her correct name "Gabriella". It is possible that this difference in her user name could have given rise to the errors when seeking to access her account. The error message in the copy record does not specifically give the reason for the failure; it states:

"ERROR: The details you have entered are either incorrect or you may have already enrolled for this service. If the problem persists please contact the HM Revenue & Customs Online Services Helpdesk or select 'Back' to return to Your Services."

46. As there is no evidence of any attempt by Mr Jasani up to 23 February 2011 to use the activation code which had been relayed to him by text on 2 February 2011, the late receipt of the code cannot be regarded as amounting to a continuing reasonable excuse, whether or not it amounted initially to a reasonable excuse. I accept that Dr Sas put the task of completing and submitting her return into the hands of Mr Jasani, and paid him for that task. However, his attempts to carry it out were not successful, and the exercise continued for a considerable period until the return was submitted in paper form in September 2011. (I have not attempted to record in full detail the additional email correspondence between Dr Sas and Mr Jasani which led eventually to the submission of the return; not all the emails were included in the evidence, and it appears that there were also exchanges of text messages, which were also omitted from the evidence.)

47. Although there were records of telephone calls to HMRC requesting further activation codes, there were no further records of calls to the on-line filing desk about any difficulties encountered. If Dr Sas had contacted HMRC as soon as practicable following the meeting with Mr Jasani on 1 March 2011, she could have told them that there were further difficulties in accessing her on-line account, and could have requested a paper return at that stage. Direct contact in this way might have resulted in HMRC deciding not to pursue penalty liabilities, although this would have been a matter for their discretion rather than a definite outcome.

48. As shown by one of the email messages referred to above, Mr Jasani was not officially a tax agent for Dr Sas. She was dealing with matters by permitting him to use the activation code for her on-line HMRC self assessment account. There is no indication in the papers before me that this in itself would have resulted in technical problems, but it appears that repeated attempts to enrol and activate accounts by reference to Dr Sas's Unique Taxpayer Reference may have prevented the process from operating as it should have done.

49. If Dr Sas could have arranged a telephone conversation with the HMRC Online Services Helpdesk at a time when she was in a meeting with Mr Jasani, the problem of his lack of tax agent status could have been overcome by her giving authority to the Helpdesk to speak to Mr Jasani. Again, this might have enabled the position to be resolved. Unfortunately no such conversation took place.

50. The correspondence shows that Dr Sas considered the responsibility for ensuring the correct filing of her tax return to lie with Mr Jasani. I find that, whatever contract there may have been between Dr Sas and Mr Jasani, it could not have the effect of absolving Dr Sas from her obligations to file her return and to ensure payment of her tax by the due date. In general, reliance on another person does not constitute a reasonable excuse for failure to comply with those obligations; there is nothing in Dr Sas's case to suggest that there are any grounds for exception from that general principle. In correspondence and in their Statement of case, HMRC commented that they do not consider a dilatory agent as a reasonable excuse. There is insufficient evidence to enable me to decide whether Mr Jasani's behaviour was dilatory, although there are quite a few factors tending to point in that direction.

51. The question whether Mr Jasani had properly fulfilled his obligations under his contract with Dr Sas is not a matter within this Tribunal's jurisdiction. In the same way, although I have commented that the period in question given was very limited, I am unable to express a firm view as to whether Dr Sas had given Mr Jasani adequate time to enable him to assist her in complying with her obligations to file her return and pay her tax by the due date.

52. In the light of my findings above, I do not consider that there were any exceptional continuing circumstances preventing Dr Sas and Mr Jasani from fulfilling her filing and payment obligations by the due date. Thus there was no reasonable excuse for the late filing of the return, or for the late payment of the tax.

53. Following the issue of the notices of surcharge on 1 November 2011 Dr Sas referred, in her Notice of Appeal sent to HM Courts & Tribunals Service, to her financial position from May 2011 onwards. I sympathise with her position, but must emphasise that inability to pay the tax is not, in itself, a reasonable excuse for delay in payment. Further, if the filing and payment had been dealt with on a timely basis, this would have been before these financial difficulties arose.

54. As the return was not filed until 26 September 2011 and the tax had not been paid by the end of July 2011, I find that the penalties and surcharges were properly imposed by HMRC. In the absence of any reasonable excuse, the penalties and surcharges must be confirmed and the appeal must be dismissed.

55. Dr Sas is seeking to apply for permission to appeal. In considering the making of an application, she needs to be aware of the requirements, as set out in the relevant guidance referred to in the following paragraph, (available from the HMC&TS website), in particular that an appeal to the Upper Tribunal can only be made on a point of law.

**Right to apply for permission to appeal**

56. 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.

**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 3 October 2012**