



TC02336

Appeal number: TC/12/04219

Penalties for late returns – failure of appointed agent - whether reasonable excuse under Schedule 56 Paragraph 16 Finance Act 2009 – No – and whether appellant took reasonable care. No, too long a delay. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TJS CONSULTING LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE PETER R SHEPPARD, FCIS, FCIB, CTA
KENNETH MURE, QC**

**Sitting in public at George House, 126 George Street, Edinburgh, EH2 4HH on
Monday 15 October 2012**

Mr Terry Smith & Mr John Buick for the Appellant

Mr William Kelly for the Respondents

DECISION

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1. This concerns an appeal by TJS Consulting Ltd (TJS) against a decision of Her Majesty's Revenue and Customs to impose three penalties totalling £907.23 for the late submission of tax returns. In respect of the failure to submit the Company Tax return for the accounting period ending 31 March 2009 on time a fixed penalty of £200 was imposed. In respect of the failure to submit the Company Tax return for the accounting period ending 31 March 2010 on time a fixed penalty of £200 was also imposed plus a further penalty of £507.23 being 10% of the tax due. (The tax due on a profit of £24,154 was calculated at £5,072.34)

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2. Mr Terry Smith is a civil engineer. In 2008 he set up TJS and wishing to ensure that all compliance matters were dealt with timeously he appointed SCK Secretarial Services Limited (SCK) to act both as company secretary and as his tax agent. The registered office of TJS was that of the company secretary so Mr Smith never received any correspondence directly from the Respondents.

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Legislation

3. Finance Act 2009 Schedule 56 paragraph 16 – Reasonable Excuse
Taxes Management 1970 Section 108 – Responsibility of Company Officers
Finance Act 1998 Part II - Company Tax Return

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Case law

4. *G & A Jeffers v HMRC 2010 (TC 00337)*

Facts

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5. In January 2010 Mr Smith approved the accounts and tax return for 2009 as prepared by SCK and assumed the tax return would have been lodged on line by SCK around 22 January 2010 well ahead of the 27 March 2010 deadline. He arranged for payment of the tax due and this was sent to HMRC on 28 January 2010. He also had agreed with SCK that they would advise the Respondents that the company's year end would be changed to 31 March.

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6. Although Mr Smith had not received the notice to file dated 19 April 2010, because it was sent to SCK, he was aware of the deadline for the return for the period to 31 March 2010. Accordingly on 17 August 2010 Mr Smith sent the necessary documentation to SCK to enable them to prepare the company's accounts for the year ending 31 March 2010. When no response was forthcoming Mr Smith sent e-mails to SCK and attempted to make contact by telephone on numerous occasions with little success. He provided a schedule showing the many occasions he had attempted by one means or another to contact SCK.

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7. Mr Smith did not contact HMRC at any time to advise them of the difficulty he was having. When asked why, Mr Smith said that he was not a tax expert and so preferred to leave communication with HMRC to someone with that expertise.

5 8. On 5 July 2011 Mr Smith sent a cessation letter to SCK. On 26 July 2011 Mr Smith discussed the situation with his solicitor. Mr Smith thought the best course of action was to appoint a new accountant/adviser and in August 2011 appointed Buick & Co Limited, Chartered Tax Advisers (Buick).

10 9. It was only when Buick contacted the Respondents on 13 September 2011 that it was discovered that the return for 2009 had not been filed. This was remedied on 4 October 2011 and by 5 December 2011 Buick had submitted the returns for the years ending 31 March 2010 and 31 March 2011 so bringing the company's tax affairs up to date.

15 10. Mr Kelly pointed out that as SCK had been appointed company secretary it was therefore a proper officer of the company (Taxes Management Act 1970 Section 108(1)). Therefore there had been a failure by TJS to submit a return.

20 11. Mr Smith accepted that the returns had not been submitted on time but considered TJS had at all times acted in good faith and that in the circumstances TJS had reasonable excuse for the failures.

Reasonable Excuse and Reasonable care

25 12. The terms of the Finance Act 2009 Schedule 56 paragraph 16 were discussed Mr Buick pointed to paragraph 16(2)(b) which states:

“where P relies on any other person to do anything, that is not reasonable excuse unless P took reasonable care to avoid the failure, and”

30 He said that although Mr Smith had relied on another person he had taken reasonable care.

35 Mr Kelly pointed out that the following paragraph (c) had also to be considered and this reads

“Where P had a reasonable excuse for the failure but the excuse had ceased, P is treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

40 Mr Kelly said that it was the Respondents view that there had been unreasonable delay. After receipt of the tax for 2009 no return had been submitted and no response obtained until the telephone call of 13 September 2011.

45 13. Mr Smith had indicated that he had begun to be concerned at the lack of response from SCK in March 2011 yet it was over four months until a new adviser was appointed, and a further six weeks until any contact was made with the

Respondents. During the hearing Mr Smith said he could not see what more he could have done. The answer is that he could have informed the Respondents of his difficulty much earlier.

5 **Respondents behaviour**

14. Two further arguments were raised by the Appellant. One was that after the Appellant had sent the money for the 2009 return why did the Respondents not enquire as to why there had not been any corresponding return form. Although he had not been able to contact SCK to see if they had received anything from the
10 Respondents it was also obvious that the Respondents had not included a copy of any such communication in the bundle which he suggested showed there had been no such communication.

15 Mr Kelly said there was no legal obligation on the Respondents to correspond in the way suggested, whereas the Appellant does have a legal obligation to submit a return.

Proportionality

15. The second argument was that the penalty was disproportionate to the offence committed.

20 Mr Kelly argued that every country in the EU set out in legislation requirements for submission of tax returns and penalties for failure to do so. The level of penalties are set by each government and in the UK they are to some extent a percentage of the tax due. The penalties applied in this case follow that provided by legislation. The
25 penalties for late submission and late payment of tax returns have been well publicised.

16. During the hearing Mr Kelly referred to the decision of Sir Stephen Oliver in the case of *G and A Jeffers* (TC 00337). The Tribunal notes the following passage
30 from paragraphs 17 and 18 of that decision:

*“17...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
35 circumstances in which the taxpayer’s failure, through his agent, to comply with, e.g. 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.*

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*18. Here there is no explanation for the defaults save that the previous agents never did what they had been engaged to do. Even if that is right as a matter of fact in the present case (and, as noted, the previous agents dispute the circumstances alleged by the appellants), it does not in my opinion amount to a
45 reasonable excuse. There was no other underlying cause suggested for the failure to make the return on time. Quite simply, the appellants relied upon what they now regard as a firm of unreliable accountants...”*

Other than the bracketed words in paragraph 18 these words describe the position of the Appellant in this case precisely.

5 17. The Tribunal has a great deal of sympathy for Mr Smith who has clearly been let down by SCK. It is evident from the documents provided by the Appellant that they are aware their remedy is to seek redress from SCK.

10 18. The legislation in this area is tightly drawn and in the circumstances the Tribunal concludes that as the failures occurred as a result of TJS' reliance on another it had no reasonable excuse for the failures. In respect of whether TJS took reasonable care the Tribunal considers that there was too long a delay before the Respondents were contacted about the situation. Thus TJS had no reasonable excuse for the failures and so the Tribunal dismisses the appeal.

15 19. 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
20 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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**PETER R SHEPPARD, FCIS, FCIB, CTA
TRIBUNAL JUDGE**

RELEASE DATE: 25 October 2012

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