



TC03670

Appeal numbers: TC/2013/01833, TC/2013/01834 & TC/2013/01836

Income Tax – penalties for late filing and late payment – reasonable excuse – series of life events – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KAREN BREEN

**- and -
DESMOND BREEN
- and -**

**REDMIRES LODGE NURSERY & PRE-SCHOOL Appellants
(PARTNERSHIP)**

- and -

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

**TRIBUNAL: JUDGE LADY JUDITH MITTING
MR RICHARD CROSLAND, FCA**

Sitting in Manchester on 14 May 2014

Dr Desmond Breen appeared for the Appellants

**Ms Rosalind Oliver, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. Dr Desmond Breen and his wife Mrs Karen Breen were both appealing against penalties for the late filing of their Self Assessment Tax Returns for the years 2008/09, 2009/10 and 2010/11. Dr and Mrs Breen also trade in partnership as Redmires Lodge Nursery & Pre-School and in that capacity they were appealing against the penalty for late filing of the partnership returns for the same years. Dr and Mrs Breen also appeal against surcharges for the late payment of the tax in each of those years.

2. Dr and Mrs Breen's returns for 2008/09 were due on 31 January 2010 and were both filed on 2 October 2012. Their returns for 2009/10, due 31 January 2011, were both filed on 2 October 2012. The returns for 2010/11, due 31 January 2012, were both filed on 8 November 2012. The same dates, in each of the years, apply to the partnership returns.

3. It was Dr Breen's contention, on behalf of himself and his wife, that they had a reasonable excuse for the late submission of the returns and late payment of the tax in that they were overcome by a series of life events throughout the years in question which should be taken together. His submission to us was full and graphic and fully evidenced by the production of supporting documentation. It will be sufficient in this decision for us to summarise the events and the effect which they had on the family.

4. Dr Breen is a senior consultant anaesthetist who has both an NHS practice and a private practice. Mrs Breen had an income from her husband for administrative support to his private practice of £5,200 in the first two years and £5,720 for 2010/11. Dr and Mrs Breen also trade in partnership running the Redmires Lodge Nursery. In fact it is Mrs Breen who is the operational partner of this business and for the three years in question the income from the nursery was all attributed to Mrs Breen. In 2008/9, Dr Breen's tax calculations revealed a total income less losses of £189,799 and Mrs Breen's £100,177. In 2009/10, Dr Breen's income less losses was £194,175 and Mrs Breen's £130,150. For 2010/11, Dr Breen's income less losses was £194,848, and Mrs Breen's, £165,436.

5. HMRC did not challenge any of the events described by Dr Breen and we therefore find the facts to be as follows.

6. In 2004/05, when the Nursery opened, HMRC commenced an enquiry into all of the Breens' tax affairs. We were told that nothing untoward came out of this but it was a lengthy inquiry, not being signed off until mid 2009 because of an ongoing discussion as to the precise point at which income from Dr Breen's private patients should be recognised for taxation purposes. This was a purely technical issue and there was no suggestion of any malpractice.

7. In August 2008, the family moved to a seven bedroomed house, in much need of renovation. The extensive renovation works began in autumn 2008 causing major, but anticipated, upheaval. However a fire occurred in early 2009 causing some smoke

damage to records but of far greater impact was that, also in early 2009, the builders discovered asbestos around old central heating pipes in Dr Breen's study. The house was immediately "quarantined" and the entire contents of the study, including tax, accounting and business records, were all destroyed in the decontamination process.

5 While the house was in the main sealed off, as part of the decontamination process, Dr and Mrs Breen and their three children all had to live in one room, a living room and the kitchen. The discovery of the asbestos not only necessitated a huge amount of additional building work and the consequential disruption but led to a spiralling of the building costs in that an estimate of £300,000 became a bill of £650,000. The

10 builders also started demanding weekly payments in advance to ensure the security of their payment. It was not until towards the end of 2011 that the building works were completed and even then they were left with a leaking roof.

8. Against this background, Mrs Breen, who had suffered for some time from pre-existing debilitating symptoms, became increasingly unwell to the extent that a

15 diagnosis of cancer was feared. A crisis point was reached in late 2010/early 2011 when investigative tests were undertaken which mercifully revealed it was not cancer but a, still significant, chronic but manageable condition. Additionally, during 2009, two of their three children had not insignificant medical problems.

9. In October 2009, Mrs Breen's mother, to whom she was very close, was

20 diagnosed with inoperable cancer. She died in June 2010. The tragedy of this is that the cancer was missed twice at a much earlier stage by the admitted negligence of the hospital. The Breens' grief was made much worse by the knowledge that her death was avoidable.

10. It fell to Dr Breen to try and cope with all the above problems and to support his

25 wife and family throughout. This was made considerably harder for him because of additional responsibility which he was being given by his hospital. In the light of the Francis report and increased fears for patient safety, Dr Breen was given the lead responsibility for patient safety by his Trust. Additionally, to support his increasingly responsible role at the hospital, the Trust demanded that he should begin an MBA

30 course. Dr Breen estimated that he was working in his professional career for some 60/70 hours per week.

11. Dr Breen told us that the effect of these events manifested itself on all aspects of their lives. Dr Breen completely lost his ability to function effectively. He fell into

35 concentrating totally on his clinical work and everything else went by the board. The Nursery suffered a serious decline in numbers when deposits for new children dropped between 2008/09 and 2010/11 from 30 to 6 and such was the inability of Dr and Mrs Breen to function properly that this was not even noticed until two years later when they came to do their tax returns. This decline in numbers had been going on but had fallen under their radar. All administrative tasks became difficult and put to

40 one side. It was not, said Dr Breen, as if he did not realise what was happening. He did realise he wasn't coping. He knew the tax returns had to be dealt with. He would wake in the morning in a panic about them but he was quite unable to do them. His practice with his accountants was that he would prepare everything they needed on a spreadsheet and they would merely transfer the figures into returns. It was therefore

not an answer to put the returns in the hands of the accountants because there was more work than he could face before this could be done. The only administrative areas that were kept going were those that could be done by some form of automation such as the payment of bills. Bills that were not automated on occasion went unpaid,
5 even the house insurance leaving the house uninsured for a number of months. His revalidation process before the GMC had to be deferred in January 2013 because of the amount of supporting documentation which was needed and which Dr Breen just could not bring himself to put together.

12. Dr Breen stressed that he had no possible motive for not completing his tax returns. He wanted his affairs to be up-to-date but just couldn't get round to doing them; such was the result of the pressure upon him. He had always been a person who could cope and he coped and functioned perfectly well prior to these events and indeed is doing so again now and the fact that he could not function over these intervening few years is a measure of the impact upon him of all these events.

13. In response to Dr Breen, Ms Oliver contended that none of these events amounted to a reasonable excuse. She pointed out that the returns had been late for the two previous years (this was explained by Dr Breen as a result of his having to wait for HMRC to determine the tax point for billing his private patients). Ms Oliver submitted that a reasonable excuse is normally an unexpected or unusual event that is
20 either unforeseeable or beyond the person's control and which prevents the person from complying with an obligation to file or pay on time. It was necessary to consider the actions of the person from the perspective of a prudent person, exercising reasonable foresight and due diligence. If the person could have foreseen the event, whether or not it was within their control, HMRC would expect the person to have
25 taken steps to meet their obligations.

14. Ms Oliver analysed the individual circumstances. The building works were not, in her view, an unexpected event. There would obviously be an expectation of disruption which would require forward planning. Dr Breen may have lost some records in the house fire and in the decontamination but these could have been
30 reconstructed and in any event would not affect those records which came into existence after the event. The injury to Dr Breen's elder son in September 2009 and the illness of his younger son were both before the first default. Dr Breen had referred to his daughter having an abdominal condition but, although obviously very worrying, this does not appear to have been as serious as that of the two boys. Whilst
35 unfortunate, and a matter for much sympathy, the death of a parent is a life event and everyone has to bear it at some time. The fact that Mrs Breen continued to be in receipt of the income from her husband, tended HMRC to believe that her illness was not serious enough to prevent her from attending to her business and private affairs. All in all, the life events were those that could affect anyone. Whilst it was accepted
40 that it was a difficult period for Dr Breen and his wife, it did not amount to a reasonable excuse.

Consideration

15. Dr Breen argued that these events should not be looked at individually and he was not claiming that any single event would amount to a reasonable excuse. His case was that they all had to be viewed together and as a whole and that it was the accumulation which gave rise to the reasonable excuse. We agree with this as a concept but it is still necessary to look at the individual elements because there could for example be circumstances which were so within the control of an individual that they should be taken out of the reckoning. Dr Breen had mentioned as one of the life events that his builders had moved his records. The builders had found them, boxed them up and moved them. This we totally reject as being a factor which should even be taken into account. As Ms Oliver contended, this was quite clearly something which was in the control of Dr and Mrs Breen. They ought to have had the foresight to box up and remove their records before the builders were even let loose. However, this apart, all the remaining events outlined by Dr Breen need to be taken into account. They were all serious and it is perfectly possible to understand how an individual trying to keep his family together and to keep his own career going under ever increasing pressure could just go under with the strain. We accept that the combination of these circumstances had such an effect on Dr Breen that he became incapable of performing duties outside the norm. All he was able to do was to keep his clinical life going.

16. We do therefore accept that Dr and Mrs Breen have a reasonable excuse for the late filing of their returns for the first two of the years in question (2009/09 and 2009/10). We also accept that in relation to those two periods the reasonable excuse lasts for the duration of the period until the returns were filed. However in relation to the third year, we believe that the reasonable excuse had all but exhausted itself. The returns were not due until 31 January 2012 by which time the vast majority of the problems were in the past. Dr Breen told the Tribunal that he would normally begin to put the papers together for the submission of the returns some 6 to 7 months before they were due to be filed which would mean in respect of this year that Dr Breen would have started collating data by June/July 2011. The Tribunal believes that a more timely and greater effort should have been made to get tax affairs for 2010/11 in order. In summary the Tribunal acknowledges that whilst there was a reasonable excuse for late submission of the returns for 2008/09 and 2009/10 up to 2nd October 2012 there was no reasonable excuse for late submission of the 2010/11 returns.

17. We do not accept however that there was a reasonable excuse in any of the years for the late payment of the tax. Both Dr and Mrs Breen were in receipt of substantial income throughout these three years. Without expending much effort at all, they would both have been aware approximately how much tax was due and even if they did know precise calculations, they could and should have made some payments on account. Dr Breen denied that there was a cash flow problem although we do appreciate the cost of the building works was spiralling. Dr Breen did say that it would have been possible in the short term to raise capital to pay the tax. He could have used some of his pension fund; he could have sold their rental property or he could have borrowed money from the bank. For whatever reason, the Breens did none of these things. The funds were available to make at least some interim payment

and this should have been done. The appeal against the surcharges for late payment are therefore dismissed.

18. The appeal is therefore allowed in part.

5 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 than 56 days after this decision is sent to that party. The parties are referred to
10 “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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**JUDGE LADY JUDITH MITTING
TRIBUNAL JUDGE**

RELEASE DATE: 3 June 2014