



TC03967

Appeal number: TC/2012/06055

INCOME TAX – whether the Tribunal has jurisdiction over the Respondents’ decision to refuse exercising any discretion to accept loss relief under sections 64 and 72 of income tax act 2007 outside the time limited specified in the legislation

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MRS ANJANA BIBIN CHAUHAN
&
MR BIPIN HARAISHAN CHAUHAN Appellants**

- and -

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

TRIBUNAL: JUDGE DAVID S PORTER

Sitting in public at King’s Court, North Shields on 21 August 2014

Mr Bipin Haraishan Chauhan, appeared for himself and his wife.

Mr Aidan Boal, a Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. Mr Bipin Haraishan Chauhan (Mr Chauhan) appealed, on behalf of himself and his wife, against the Respondents' (HMRC) refusal, in a letter dated 9 July 2008, to exercise its discretion to allow losses incurred for the period 2005/6 out of time, because the Appellants had had substantial difficulties with their computer, which led to the delay of 4 months. HMRC said that the Tribunal had no jurisdiction to hear the appeal arising from HMRC's failure to exercise its discretion and that the appeal, should be struck out. If that was not correct, Mr and Mrs Chauhan did not have a reasonable excuse for their failure.

2. Mr Aidan Boal, a Presenting Office, appeared for HMRC, produced a bundle of documents and speaking notes. Mr Chauhan appeared for himself and his wife and also produced speaking notes.

15 The Cases

3. I was referred to the following cases:

- *Steibelt (H M Inspector of Taxes) v Paling* [1999]BTC 184
- *Privet v IR Commrs* (2001) Sp C279
- *Watts* [2011] TC 00824
- 20 • *Durkin (Halifax Architects)* [2012] TC 02373

The Law

4. Section 12 AA of the Taxes Management Act 1970 (TMA) requires a partnership to file a partnership self-assessment return on or before 31 January following the year concerned. Section 8 of TMA requires an individual to file a self-assessment return on the same basis.

Relief for losses incurred by a trader can be claimed under sections 64 and 72 of the Income Tax Act 2007 (ITA). Section 64 (5) ITA states that the claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year. Section 72 (1) ITA states that an individual may make a claim for earlier trade losses relief in the first year of trade, or any of the following three years to be deducted in calculating the individual's net income for the 3 tax years before the year in which the loss is made.

Section 72 (3) ITA requires that the claim must be made on or before the first anniversary of the normal self-assessment filing date for the tax year in which the loss is made. For the tax year 2005/6 the claim is to be made on or before 31 January 2008.

Section 5 of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners and Officers of Revenue and Customs shall be responsible for the collection and management of revenue. Section 9 provides for ancillary powers and confirms that 9 (1) (a) the Commissioners may do anything which they think
5 necessary or expedient in connection with the exercise of their function or (b) incidental or conducive to the exercise of their function. The Act has no provision for an appeal against the Commissioners or an Officer if they fail to exercise a discretion within the terms of the Act.

The Facts

10 5. Mr Chauhan and his wife had traded in partnership as general dealers involved with property maintenance and repair. From April 2005 they traded in partnership as property developers. Mr Chauhan told me that they currently had two rental properties, one rented and the other awaiting a tenant. Mr Chauhan produced evidence of the difficulties which he had had with his computer. He had purchased a computer
15 which was repaired and upgraded in March 2005. The repairs had been unsatisfactory and he had purchased a new computer from Currys store on 12 May 2005. In spite of attempts over the next 5 months to make the computer function, he had had to purchase a reconditioned tower system in February 2007. As this had also proved unsatisfactory, as he had ultimately purchased a more expensive computer on 3
20 January 2008 and this appeared to be working satisfactorily.

6. Mr Chauhan told me that as he and his wife had to run the business during the day time, he had to enter the appropriate information in the compute in the evening. As the machines had kept breaking down, he not only had to keep up to date with the current business, but also input the original information that had been lost during the
25 various difficulties with the computers. As a result, he had needed more time to enter the information and to ensure it was correct. He eventually had produced the appropriate return and filed the same with HMRC on 28 May 2008 some 4 months late.

7. I have decided that Mr Chauhan and his wife did not have a reasonable excuse for the delays caused by the difficulties with their computers. I was told that they had earned between them, prior to the difficulties with their computers, in excess of
30 £50,000. In those circumstances, any reasonable businessman, reliant on his computer, would have made sure that the system was working properly. A period of malfunction over a period of three years is not acceptable.

8. Mr Boal told me that the Chauhan's self-assessment returns for the year 2004/5 should have been submitted on or before 31 January 2006 and their return for the period 2005/6 by 31 January 2007. In fact both returns were not submitted until 28
35 May 2008, The 2005/6 return indicated losses incurred in the property development business of £28,024 for each partner. For the losses to be allowed the return should have been filed on or before 31 January 2008.
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The submissions

9. Mr Boal submitted that if Mr Chauhan and his wife wished to exercise their option of claiming relief under sections 64 and 73 above, the claim had to be made within the time limit. Neither of the sections make any provision for any extension of the claim time limits. HMRC could exercise its discretion on the basis of its responsibility for the collection and management of tax under section 5(1) of the Commissioners for Revenue and Customs Act 2005. HMRC have declined to exercise such discretion and there is no right of appeal against such refusal.

10. Mr Boal referred me to the cases mentioned above. In *Steibelt (H M Inspector of Taxes) v Paling*, a case before the General Commissioners, concerning the attempted roll-over of a capital gains tax liability from the proceeds of the sale of a public house, which might also have contained a restaurant, to a narrow boat restaurant, several years after the sale, had been disavowed by HMRC. Sir Richard Scott VC said:

“... section 152 (3) (Taxation of Capital Gains Tax Act 1992) clearly gives power to the Revenue, at its discretion, to allow an extended period within which the acquisition of the new asset may take place. No criteria are expressed in the subsection as to when the power should or should not be exercised. The matter is left entirely to the discretion of the Revenue. The exercise of that power by the Revenue would be susceptible to challenge by judicial review on the grounds of unreasonableness or any other suitable ground, but it is not a power that can be exercised by the general commissioners.”

11. In *Privet v IR Commrs* Special Commissioner, Mr O’Brian, decided that Mr Privet had failed to give notice of his losses within the two years after the year of assessment. Mr O’Brian said at paragraph 9, in reference to *Steibelt (H M Inspector of Taxes) v Paling*:

“.. In that case the discretion was explicit but clearly the principle applies equally (perhaps with even greater force) to a case where the discretion is derived merely from ‘care and management’ and the inspector has declined to disregard clear words of the statute, as a concession.”

In *Watts*, a case where a builder did not challenge assessments raised by HMRC but sought to set off losses out of time and *Durkin (Halifax Architects)* a case where the Appellant attempted to amend his self-assessment for the period 2005/6 out of time to claim a repayment of tax, the Tribunal came to the same conclusion as *Steibelt* and *Privet*.

12. Mr Boal therefore requested that the Tribunal strike out the appeal on the basis that the Tribunal has no jurisdiction over HMRC’s decision not to exercise any discretion in allowing the late loss relief claim.

13. Mr Chauhan re-iterated that he considered that he and his wife had a reasonable excuse as a result of the failure of their computer on three occasions. He also submitted that the claim for losses did not need to be in their self-assessment return and that it was open to them to apply for the losses at a later time. HMRC should have advised them at that time, as it could see that they had made a loss, and granted the

relief without the need for a further application. HMRC had pursued the matter in the County Court, but the Judge there had indicated that he could not proceed with the matter until the Tribunal had decided that the losses would be allowed or otherwise. In the circumstances the appeal and losses should be allowed.

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The Decision

14. I have considered the law and the facts and I strike out the appeal under Rule 8 (2) (a) of The Tribunal procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. I am satisfied that this Tribunal has no jurisdiction with regard to HMRC's failure to exercise its discretion under the Commissioners for Revenue and Customs Act 2005. Sir Richard Scott V-C in *Steibelt (H M Inspector of Taxes) v Paling* dealt with similar circumstances and has been followed in the other three cases. The decision of Judge Blewitt in *Durkin (Halifax Architects)* has been decided on facts, which mirror the facts in this case, in that the application for the loss relief in this appeal was made after the statutory deadline of 31 January 2008.

15. Section 118 (2) of the Taxes Management Act 1970 defines a reasonable excuse as relating to the purposes of that Act. Although that Act deals with assessments and their amendments, it does not specifically refer to sections 64 and 72 of the Income Tax Act 2007 nor Section 5 of the Commissioners for Revenue and Customs Act 2005. As a result, the reasonable excuse defence is of no assistance to Mr and Mrs Chauhan in this appeal. I have also decided that Mr Chauhan and his wife do not have a reasonable excuse. I must and do, strike out this appeal.

16. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 28 August 2014

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