



**TC04111**

**Appeal number: TC/2013/07959**

*INCOME TAX – Appeal out of time – reasons for delay – reasonable excuse  
- reliance on a third party accountant – balancing exercise of all factors –  
Application refused.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ALDO PIA & FIORINDA PIA**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE ANNE SCOTT, LLB, NP  
                      MRS CHARLOTTE BARBOUR, CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday  
5 November 2014**

**Having heard Mr Atkinson and Miss Stewart for the Appellant and  
Ms Shari McMullen for the Respondents**

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## DECISION

1. Mrs Pia was not present but the parties wished to proceed in her absence. The Tribunal had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier  
5 Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). It was clear that Mrs Pia had received notice of the hearing and that Mr Atkinson was instructed on her behalf. The Tribunal decided that it was in the interests of justice to proceed with the hearing in her absence.

2. The application (see paragraphs 8 and 12 below) to admit the appeal out of time  
10 is refused.

3. The substantive appeal in this matter relates to two decisions dated 15 March 2013 which were the statutory review of the amount of penalties levied for a failure to notify liability to tax. Both appellants and their agent received copies of those review letters. The final paragraph of that letter made it explicit the options  
15 available to the appellants. In particular it stated

“If you do not agree with my conclusion you can ask for an independent Tribunal to decide the matter. If you want to refer your appeal to the Tribunal, you must write to the Tribunal within 30 days of the date of this letter. You can find out how to do this on Her Majesty’s Courts and Tribunal Service website  
20 [www.justice.gov.uk/tribunals/tax/appeals](http://www.justice.gov.uk/tribunals/tax/appeals) or you can phone them ... If I do not hear from you and you do not refer your appeal to the Tribunal within 30 days of this letter I will assume that you agree my conclusion and the matter will be treated as settled by agreement under section 54(1) Taxes Management Act 1970.”

25 4. No appeals were lodged with the Tribunal within the required time.

5. The appellants’ representative Mr Banks telephoned the decision-maker, as opposed to the officer who wrote the review letter, on 25 March 2013 disputing the level of penalties and finishing by stating that he would “write in and ask for the case to go to Tribunal”.

30 6. In response to a further letter from the representative dated 2 May 2013 the same original decision-maker sent to the representative copies of the relevant penalty determinations and penalty assessments on 16 May 2013.

7. On 17 July 2013 the review officer responded to a further letter from the representative which had asked how HMRC wished to proceed to the First tier  
35 Tribunal (FTT). The response from HMRC indicated that their approach had not changed at all and that they had had no notification of an appeal from the Tribunal. HMRC asked for details as to when the representative/their clients had contacted HM Courts and Tribunals Service (“HMCTS”).

8. On 14 November 2013 the representative sent to HMCTS a Notice of Appeal.  
40 That Notice is deficient in respect that at box 6 it indicates that the appeal ought to have been notified by 15 February 2013 (which of course is incorrect since the 30 days would have expired on 14 April 2013). It then indicates that there is no wish to request permission to appeal outwith the time limit and no reasons are given. On

18 November 2013 HMCTS wrote to both appellants indicating that the appeal had been lodged late and stating that they had 21 days within which to give reasons for the late appeal. The representative responded on their behalf on 5 December 2013 confirming that there had been no formal “letters of appeal” but that it was clear from correspondence that the clients did not accept the findings. The Tribunal accepted that letter as an application to make late appeals.

9. At the hearing the appellants were represented by a new representative, Mr Atkinson. In that context the Tribunal notes that in the Notice of Appeal the previous representative had indicated in the final paragraph at box 7 that “Our client, having been disappointed by previous representatives ...”. At the hearing Mr Pia confirmed that the previous representative had acted for him for many years, he had then changed representative and then he had returned to that representative. He now had Mr Atkinson representing him. That was the only evidence from Mr Pia.

## 15 **Arguments**

10. It was argued for the appellants that the Tribunal has a wide discretion, that reliance on a third party can constitute a reasonable excuse (and that was the reasonable excuse in this matter), that once the omission had been noted action was taken with due diligence and lastly that the appellants would suffer considerable prejudice if the appeals were not admitted late.

11. HMRC argued that it was only at the hearing that they had heard, for the first time, the argument that there was reliance on a third party and there was no detail as to the issue in that regard. They pointed to the fact that there certainly had not been prompt remedial action taken in any sense of the word. The appellants themselves, quite apart from their agent, had been notified on 15 March 2013 that there was a 30 day time limit to lodge an appeal with the Tribunal. In July 2013, although it was outwith the 30 day time limit, HMRC again made it very clear to the representative that the onus was on him or his clients to lodge an appeal with the Tribunal. Nothing was done until November 2013 and no explanation was given even for the delay between July and November.

### **The substantive appeal**

12. We use the word appeal because the two appeals TC/2013/07959 and TC/2013/07961 were consolidated by Direction of the Tribunal dated 31 March 2014.

13. The substantive appeal relates to penalties imposed on both appellants (but for different years) in terms of Section 7(8) Taxes Management Act (“Section 7”) and penalties for the years 2009-10, 2010-11 under Schedule 41 Finance Act 2008 (“Schedule 41”) in the total sum of £16,096.

14. In the case of Mr Pia the Section 7 penalties were for the years 2005-06 and 2008-09 totalled £1,392 and for Mrs Pia they were for the years 2005-06, 2007-08 and 2008-09 in the total sum of £2,176.

15. For Mr Pia the Schedule 41 penalties totalled £4,770 and for Mrs Pia the total was £7,758.

16. Those penalties had been imposed because, in the case of both appellants, it had been identified that there had been a failure to notify liability to tax in terms of Section 7(8) Taxes Management Act 1970. The unchallenged material facts were as follows:-

5 (a) Following informal requests for details of taxable income, to which there was no response, a statutory “Information Notice” was issued to each appellant in accordance with paragraph 1, Schedule 36 Finance Act 2008 dated 23 March 2012.

10 (b) Neither appellant responded to those Notices and a £300 penalty had then been imposed on each appellant.

(c) On 16 August 2012 the appellants’ former representative forwarded unsolicited partnership returns and individual returns for the six years ended 5 April 2011. The figures therein were accepted. HMRC did not accept that there was a reasonable excuse for the failure to notify (see paragraph 17).

15 (d) The outstanding tax was not paid in the course of the enquiry and no offer, acceptable or otherwise was made to settle the liabilities.

(e) Thereafter the penalty notices were issued. The Schedule 41 penalties were imposed at the minimum level of 35%.

20 (f) In regard to the earlier years, for both appellants, the full abatement of 20% was allowed in respect of *Disclosure*. As far as *Co-operation* was concerned the maximum abatement is 40% and HMRC allowed 30% because there had been delay and formal powers had to be utilised to prompt co-operation. Lastly, the maximum abatement is 40% and HMRC allowed 25% on the basis of the amounts of money involved, the long number of years involved and the failure  
25 to make any payment whatsoever on account. Accordingly, the Section 7 penalties were reduced to 25%.

17. It had been argued for the appellants that they had a reasonable excuse for failure to notify because they had not been issued with self-assessment returns. That argument was not accepted by HMRC. The appellants had previously been in the self-  
30 assessment regime regarding the same source of income. It is accepted in the second paragraph of the Notice of Appeals that the appellants acknowledged that they had a responsibility to notify chargeability to HMRC. That responsibility was conceded orally at the Hearing.

### **Reasons for decision**

35 18. Although the grant of permission to appeal out of time does not involve extension of time as such, the approach to be followed is essentially the same. When considering this we are very conscious of, and explained at length to the parties, the importance of the overriding objective in Rule 2 and the necessity to consider all of the circumstances. As Judge Berner states at paragraph 26 of *O’Flaherty v HMRC*<sup>1</sup>:-  
40 “The FTT must consider all material factors, including the reasons for the delay, whether there would be prejudice to HMRC if the taxpayer were to be permitted to

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<sup>1</sup> [2013] UKUT 0161 (TCC)

appeal out of time, and whether there would be demonstrable injustice to the taxpayer if permission were not to be given.”

19. In the following paragraphs, he then goes on to confirm that the well-established principles enunciated by Morgan J in *Data Select v HMRC*<sup>2</sup> are the correct approach.  
5 The principles in *Data Select* were recently specifically endorsed by Judge Bishopp at paragraph 19 in *HMRC v Leeds City Council*<sup>3</sup>.

20. The relevant factors then to consider are:-

- (1) What is the purpose of the time limit?
- (2) How long was the delay?
- 10 (3) Is there a good explanation for the delay?
- (4) What will be the consequences for the parties of an extension of time?
- (5) What will be the consequences for the parties of the refusal to extend time?

#### *Time limit*

15 21. The purpose of the time limit is precisely what is set out in the letter from HMRC, and quoted in paragraph 3 above, namely that if an appeal is not lodged with the Tribunal within 30 days then the matter is concluded and the matter will be treated as settled. The time limit delivers a degree of certainty and clarity.

#### *How long was the delay?*

20 22. The delay was long. The time limit is 30 days and the Notice of Appeal was only lodged some seven months later despite it being drawn to the representative's attention in July that there had been no notification of an appeal.

#### *Is there a good explanation for the delay?*

23. Even if there had been a good explanation for the delay until 17 July 2013,  
25 which we do not accept, no explanation has ever been offered for the very long delay thereafter between July and November 2013. The only explanation belatedly offered at the Hearing was “reliance on a third party”.

24. Mr Atkinson was specifically asked what he meant by that but he was non-committal. He just said that Mr Pia relied on the representative.

30 25. When pressed, firstly, he said that Mr Pia thought that by making a payment, including a contribution towards penalties, to HMRC the matter was settled. The position in that regard is that eventually, on 19 February 2013, the representative had sent to HMRC a cheque in the sum of £71,000 stated to be full and final settlement of the outstanding tax and interest thereon and the penalties. We note that he had only  
35 used the interest figure as calculated by HMRC to 4 January 2013 and of course

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<sup>2</sup> [2012] UKUT 187 (TCC)

<sup>3</sup> [2014] UKUT 350 (TCC)

interest continued to run so that therefore eroded further the “contribution” to the sums due by way of penalties.

26. Unsurprisingly, since the tax and interest, as calculated by the representative amounted to £63,408.99 and the total penalties amounted to £16,096, and there would  
5 have been further interest, HMRC wrote back on 25 February 2013 stating that they had treated it as payment to account of outstanding liabilities and did not accept it in full and final settlement.

27. Whether or not HMRC had the right to do that, in that context, does not impinge on reasonable excuse for delay in appealing because it antedated the disputed  
10 decisions. Accordingly, as a matter of fact when the review decisions were sent to the appellants, they knew that from HMRC’s perspective the matter was far from settled. The appellants themselves therefore knew or should have known that the cheque was not relevant to the days of appeal.

28. As a result of the telephone conversation on 25 March 2013 (see paragraph 5  
15 above) which was before the days of appeal expired the representative also knew that. There is no suggestion anywhere that the representative suggested to the appellants that the issue of the cheque had solved the penalties issue. Indeed, the Notice of Appeal does not even mention the cheque.

29. The simple issue of the cheque is not therefore relevant to the delay itself since  
20 the appellants could not reasonably have believed that there had been resolution on that point.

30. The only other argument then advanced was that the appellants had been led to believe that because there was ongoing dialogue with HMRC, that constituted an appeal. Given the tenor of the correspondence from the representative with HMRC  
25 between March and July, that is a possibility, but it does not sit well with the requirement set out in the review letters to lodge an appeal with HMCTS.

31. Mr Atkinson argued that *Chen v HMRC*<sup>4</sup> (“*Chen*”) was authority for the proposition that “reliance on a third party is capable of constituting a reasonable excuse for failure to comply with a statutory time limit”. Firstly, that is an FTT  
30 decision and we are not bound by it. However, as that decision makes clear, that statement is based on paragraph 54 in *Conquer v HMRC*<sup>5</sup>. In fact, that was a decision of this Tribunal. We did state that in certain circumstances reliance on a third party can amount to a reasonable excuse but we pointed out that the crucial word which was used is “can”. It is not that it “will” necessarily always be a reasonable excuse. In  
35 particular we went on to say at paragraph 64:-

“Failure of the agent(s), if there was such failure, to meet their obligations to the Appellant might entitle the Appellant to some recourse against the agent(s), but in the Tribunal’s view reliance on a third party such as an accountant cannot  
40 relieve the Appellant of his own obligation to ensure that actions have or have not been taken. A prudent taxpayer, exercising due diligence and in the knowledge of simple time limits should have checked that appropriate action had been taken.”

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<sup>4</sup> [2014] UKFTT 848

<sup>5</sup> [2014] UKFTT 612

32. We do not find that Mr and Mrs Pia acted with reasonable prudence and diligence in dealing with their tax affairs. When looking at the enquiry initially they failed to cooperate at all and then suffered a penalty. They were or should have been aware of the 30 day time limit for lodging an appeal with the Tribunal. Given that  
5 they had been dissatisfied with at least one previous accountant it would have been prudent to have sought written confirmation of progress of any appeal.

33. Further, in passing we note that Judge Reid in *Chen* goes on to point out in paragraph 32 that in *Siobhan Helena Heaney Irving*<sup>6</sup> a genuine and honest belief that an accountant had done something does not necessarily amount to a reasonable excuse  
10 and did not in that case. We do not agree with the reasoning in that case (since the circumstances do not have to be exceptional) and in any event it was decided on its own facts but we do agree with that premise.

34. The time limit was known to the appellants, or should have been. It is straightforward. It does not require the services of a tax advisor. Many appellants are  
15 unrepresented and submit Notices of Appeal themselves. Just as a prudent taxpayer should seek sight of a Return that has been made to HMRC or at the very least written confirmation that that has been done, so too should these appellants have ensured that appeals had been lodged.

*What will be the consequences for the parties of a refusal to extend time or the grant  
20 of such an extension?*

35. We accept that a refusal to allow the appeal to be admitted will mean that the appellants cannot further challenge the penalties. However, if the extension of time is granted HMRC would be put to expenditure of time and resource in preparing for and conducting a hearing in the substantive appeal.

25 *Prospects of success in the substantive appeal*

36. It is appropriate to pay some regard to whether or not the appellants would be likely to be able to raise valid and compelling points in a substantive appeal. It was conceded in the Notice of Appeal and at this hearing that there had been a failure to notify in all of the years in question. There was no dispute about the amounts of  
30 overdue tax. Looking at the appellants failure to cooperate in the face of the Schedule 36 measures, albeit thereafter they did indeed cooperate, the calculation of the penalties in the disputed decisions is well within what may be found to be appropriate. In particular the Schedule 41 penalties have been imposed at the minimum level and they total £12,528.

35 37. The submission of the cheque in full and final settlement, and the rejection of that stipulation, has not been advanced as a ground of appeal. Whether, in the context of a decision for the Tribunal in an appeal that would carry any weight is a matter of conjecture since it relates more to the apparent compromise of a debt (or potential debt) rather than whether the penalties are actually correctly levied.

40 **Summary**

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<sup>6</sup> [2011] UKFTT 785

