



TC04257

Appeal number: TC/2014/03655

Penalty for late filing of self-assessment return - Appellant appointed agent who believed he was unable to file the return without an authorisation code - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JORDAN PENFOLD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 22 October 2014 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 2 July 2014, HMRC's Statement of Case submitted on 6 August 2014 and the Appellant's reply dated 17 October 2014.

DECISION

The Appeal

5 1. Mr Jordan Penfold, ('the Appellant') appeals against a £100 penalty imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of his Individual Tax Return for the year ending 5 April 2013.

2. The point at issue is whether or not the Appellant has a reasonable excuse for the late filing.

Background

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3. An individual's self-assessment filing date is determined by s 8(1D) TMA 1970 which states that for the year ended 5 April 2013, a non-electronic return must be filed by 31 October 2013 and an electronic return by 31 January 2014. A late filing penalty is chargeable where a taxpayer is late in filing their individual tax return.

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4. If the return is not received by the filing date a penalty of £100 is payable in accordance with Paragraph 3 Schedule 55 FA 2009.

5. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a period of 90 days are payable in accordance with Paragraph 4 Schedule 55 FA 2009.

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6. If after a period of 6 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 5 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to tax which would have been shown on the return or £300.

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7. If after a period of 12 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 6 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to tax which would have been shown on the return or £300.

8. A notice to file for the year ending 5 April 2013 was issued to the Appellant on 6 April 2013.

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9. The filing date was 31 October 2013 for a non-electronic return or 31 January 2014 for an electronic return.

10. As the return was not received on time, HMRC issued a notice of penalty assessment on or around 18 February 2013 in the amount of £100.

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11. The Appellant's electronic return for the year ending 5 April 2013 was received on 18 April 2014.

Appellant's contentions

12. The Appellant does not dispute that his return was late.

5 13. The Appellant had previously filed his own tax returns, but in 2013 delegated the task to Andrew & Co, Accountants ('the agent').

10 14. The agent says that the Appellant's tax return was ready and waiting to be filed on time. He attempted to submit an electronic return on 31 January 2014, but was unable to do so. He was using free software provided by HMRC to submit returns online, but one of the limitations of the software is the lack of functionality to allow an agent to file the return, without client authorisation. As a consequence, an Agent Authorisation Code was required. The agent says he therefore applied for a code to be issued to him directly but 'was refused'. He made the assumption that there was 'some kind of system gremlin', and had to apply for a code to be sent, via the client. Effectively, he says HMRC prevented the return being filed on time.

15 15. The Appellant asserts that the agent applied for a code before the deadline. He has established with reasonable certainty that the agent was in a position to file at that time and had made a conscious effort to do so. HMRC guidance states that requesting an activation code prior to 31st January is a reasonable excuse. In those circumstances the Appellant says he has a reasonable excuse for the late filing of his return. He says
20 that on HMRC's website it is clearly stated that late receipt of an online code before the tax return deadline is a reasonable excuse.

HMRC's contentions

16. When the agent accepted the Appellant as a client they knew that they would not be able to file an online return until they had received an authorisation code.

25 17. HMRC acknowledges the failed Agent Authorisation Code application on 31 January 2013, but regardless of whether the Agent Authorisation Code process worked or not, the agent would not have been able to file the Appellant's 2012-13 tax return on time because the code is posted to the taxpayer. The agent would or should have been aware of this. The agent has been submitting online returns on behalf of
30 their clients' for many years using HMRC's free software. HMRC submit that the agent was completely aware of the limitations of the free software.

18. The agent says that 'HMRC guidance states that requesting an activation code prior to 31 January is a reasonable excuse'. The guidance they refer to - ('Reasonable excuse - some examples') is intended for taxpayers. HMRC guidance has another
35 section specifically designated for agents.

19. The guidance referred to specifically states 'you registered for HMRC Online Services but didn't get your Activation Code in time.' The Appellant registered for HMRC Online Services in 2012, received his activation code and subsequently filed online for 2011-12. HMRC submit that the guidance referred to by the agent has no

relevance in this case. The Appellant could at any time after 6 April 2013 have used his own self-assessment return.

20. HMRC submit that the section in its guidance that details agent authorisation codes clearly states:

- 5 “The authorisation code can take up to several days to arrive. You will need to enter the code before the client will appear on your list, so, ideally you need to do this well in advance of their tax return deadline.”

HMRC submit that use of the word ‘their’ in relation to the tax return deadline is significant in so far as it reaffirms that it is the taxpayer’s obligation to file.

- 10 21. If the Appellant or his agent were experiencing problems in respect of filing the return the Appellant could have contacted HMRC Online Services Helpdesk.

- 15 22. Reliance on an agent or a third party does not constitute a reasonable excuse for a failure to deliver a self-assessment tax return by the filing deadline. It was the Appellant’s responsibility to ensure that he complied with his tax responsibilities by filing a 2012-13 self-assessment tax return by the filing date. This responsibility cannot be transferred to any other person acting on their behalf. HMRC would expect the Appellant to have taken reasonable care to explain to the third party what he require them to do, to set deadlines for the work and to make regular checks on progress.

- 20 23. It is not necessary to wait until a filing date is imminent before filing a self-assessment tax return. The agent attempted to file at the end of January 2014 almost 9 months after the notice to file was sent to the Appellant. The Return was not filed until 18 April 2014. HMRC would consider this to be unreasonable delay.

- 25 24. HMRC’s view is that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence and having proper regard for their responsibilities under the Tax Acts.

25. HMRC have no discretion in the calculation of the penalty amount as it is set in Schedule 55 FA 2009, and all taxpayers who fail to submit their self-assessment returns on time will be subject to penalty under this section.

- 30 26. In the case of *Hok Ltd v Revenue & Customs*, the Upper Tribunal found that HMRC’s decision to charge Hok Ltd penalties for late filing of their Employer’s Annual Return was correct and that the First-tier Tribunal acted beyond its jurisdiction in discharging the penalties. The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair. The decision of the Upper Tribunal creates a precedent and is binding on all cases where similar issues are raised.
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27. Although the Upper Tribunal decision in relation to Hok Ltd related to penalties for the late filing of an Employer’s Annual return, the £100 penalty charged in this case for late filing of the self-assessment Tax return is also a fixed penalty.

28. HMRC have to be seen to be consistent in their approach to all customers, particularly to those who comply with the regulations.

29. In the case of *Jeffers v HMRC* TC 2009/11281 it was held that there may be 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'. However this appeal does not highlight any circumstances that prevented the Appellant from ensuring the return was submitted by the due date.

30. In the case of *Stewarton Polo Club Ltd v HMRC*, Judge Dr C Staker stated in paragraphs 14 and 17:

"The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or his obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file on time."

31. Special Reduction (Paragraph 16 Schedule 55 FA 2009)

Paragraph 16(1) allows HMRC to reduce a penalty below the statutory minimum if they think it is right because of special circumstances. While 'special circumstances' are not defined, the courts accept that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe*) or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union*).

32. HMRC have considered special reduction but their view is that there are no special circumstances which would allow it to reduce the penalty.

Conclusion

33. The onus of proof rests with HMRC to show that the penalty or penalties were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late filing of his return. The standard of proof is the ordinary civil standard of the balance of probabilities.

34. There is no statutory definition of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable

excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

5 35. Information about self-assessment, the completion of returns, return filing dates, acknowledgement messages, penalties and the online services helpdesk is well within the public domain and widely available via the Internet including HMRC's website.

36. A taxpayer acting in a reasonable manner to ensure that they adhered to their legislative obligations would make themselves aware of such information and act
10 accordingly.

37. The Agent Authorisation Code is posted to the taxpayer, who in turn gives it to his appointed agent. The agent would have known this and therefore it is difficult to understand why he thought that there was something wrong with HMRC's agent authorisation process.

15 38. The agent had been registered for online services since 8 December 2008. When an agent is registered in their own right to file returns, as HMRC say, they do not require a 64-8 authority, or online agent authorisation to submit information. They can do this for any client whether a 64-8 is held or not. Therefore the Appellant's 2012-13 self-assessment return could have been filed by the agent as a 'filing only agent' any
20 time after the tax year had ended.

39. I do not accept the agent's contention that HMRC prevented the filing of the return on time. Clearly the delay was the fault of the agent, whether by innocent mistake or otherwise. However, reliance on an agent or a third party does not constitute a reasonable excuse for a failure to deliver a self-assessment tax return by
25 the filing deadline. It was the Appellant's responsibility to ensure that he filed his 2012-13 self-assessment tax return by the filing date. This responsibility cannot be transferred to any other person acting on their behalf

40. The Tribunal finds that the late filing penalty charged is in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file his tax
30 return on time. There are also no special circumstances, which would allow the penalty to be reduced under Special Reduction.

41. The appeal is accordingly dismissed and the £100 late filing penalty confirmed.

42. 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
35 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.

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 20 January 2015

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