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TC04470

Appeal number: TC/2015/02035

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*Capital Gains Tax – Whether reasonable excuse for late payment of Tax,
yes.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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SUDAR SHINI MAHENDRAN

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA AIIT**

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**The Tribunal determined the appeal on 27 May 2015 without a hearing under
the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax
25 Chamber) Rules 2009 (default paper cases) having first read the Notice of
Appeal dated 28 February 2015 with attachment, and HMRC's Statement of
Case dated 30 March 2015 but received by the Tribunal on 15 April 2015 with
attachments. The Tribunal wrote to the Appellant on 16 April 2015 indicating
30 that if they wished to reply to HMRC's Statement of Case they should do so
within 30 days. A reply from the appellant and letters from her medial advisers
were received and considered by the Tribunal.**

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DECISION

1. Introduction

This considers appeals against a first late payment penalty of £627 imposed under Paragraph 3 (2) of Schedule 56 Finance Act 2009 for failure to pay tax on time for the year ended 5 April 2013 and against a second late payment penalty of £627 imposed under Paragraph 3 (3) of Schedule 56 Finance Act 2009 for failure to pay tax on time for the year ended 5 April 2013.

2. Statutory Framework

The Finance Act 2009 Schedule 56 includes the following:

"Penalty for failure to pay tax

1(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table)."

Reasonable excuse

16(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

Taxes Management Act (TMA) 1970 Section 59B

3. Case law

Rowland v HMRC [2006] STC (SCD) 536

Anthony Wood t/as Propave v HMRC [2011] UK FTT 136 (TC)

4. Facts

The appellant and her ex-husband sold a jointly owned property in May 2012 and money to pay the Capital Gains Tax arising was held by the appellant's solicitor Slater Bradley & Co. The appellant appointed Rajendra Mugunthan of Arran James Consulting Ltd to undertake preparation of her tax return.

The appellant's unsolicited tax return for the year ended 5 April 2013 was received by HMRC on 22 July 2014 and was processed the same day. A second version of the return was received by HMRC later the same day and was processed on 28 August 2014.

The appellant's tax liability for the year was £12,544.74 which almost entirely consisted of capital gains tax.

Payment was due in accordance with Section 59B TMA 1970 and in this instance the due date for payment was 31 January 2014 under Section 59B(4). A late payment penalty is chargeable where a taxpayer is late in paying tax due.

The first penalty is calculated at 5% of all tax remaining unpaid after the expiry of 30 days from the due date in accordance with paragraph 3(2) Schedule 56 Finance Act 2009.

Where tax remains unpaid, after the end of the period of 5 months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed under paragraph 3(4) Schedule 56 of the Finance Act 2009.

The 'penalty date' as defined at Paragraph 1(4) Schedule 56 Finance Act 2009 means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after 30 days from the date specified in Section 59B (3) or (4) TMA 1970. In this case the date specified is 31 January 2014 and the penalty date is 3 March 2014.

At the penalty date £12,544.74 of tax remained unpaid therefore a penalty of 5% of that tax liability was due, that is £627. HMRC issued a notice of penalty assessment for this sum on or around 22 July 2014.

By 3 August 2014 which is 5 months after the penalty date the outstanding tax remained the same so on or around 18 August 2014 HMRC issued a further notice of penalty assessment for £627.

HMRC say the tax liability was finally paid in full on 30 September 2014.

5. The appellant's submissions.

In a message sent from her I-phone on 26 August 2014 the appellant wrote to Mr. Rajendra Magunthan of Arran James Consulting Ltd. (who describe themselves as Accountants and Business Consultants) including the following paragraphs:

“ I regret having to express my disappointment that you have not answered my phone calls nor replied to my various text messages and to my last e-mail regarding my tax return.

Although you probably have received the same notice from HMRC, but on the 5th August I sent you a copy of the penalty notice of assessment for £627 and asked you for an explanation as I was shocked to receive such a serious note where I did/cooperated my duties promptly with you.

You could clearly see the dead line for me to pay or respond to the notice within 30 days but you simply ignored my various communication including via Mahen which is not appropriate.

I must clarify a few things here:

26.01.2013 I confirmed by email that BBK Accountants did not register for my tax return and asked you over the phone to undertake as you are acting for Mahen so that it would be easier.

21.03.13 I asked you via email the progress of my CGT furthermore, I asked, are we going to proceed or leave it until March 2014 and I kindly asked you to ring me but you did not. In between, I sent you various text messages to see the progression but you did not reply to my messages

On 31.01.14 we had so many phone conversations and numerous text messages back and forth, you asking various details until midnight in order for you to send my tax return but you failed but the next day you simply sent me a text saying, you will have to pay £100 for your own mistake and it is totally unfair for me to pay it.

01.02.14 You sent me an email saying that you sent my tax return but it hasn't gone through to HMRC but I was surprised and I sent you an email also you didn't answer my phone calls nor my text messages

18.02.14 You sent me the client authorisation form to fill in and send it back to you (more than 13 months after saying BBK did not register me) and I have posted through your letter box the very next day and you have confirmed that you got it after various requests

27.05.14 I forwarded my solicitor's letter to you regarding the fund they are withholding and you responded to that a week later.

22.07.14 Eventually you emailed me saying that you filed my tax Return only today despite receiving my UTR on the 5th July 2014 (after 17 days).

I am truly sorry to say that unfortunately you have disappeared for a considerable period of time from January 2013 till now and simply failed to provide the professional service effectively to me.....”

6. A letter dated 23 February 2015 to the Tribunal from the appellant includes

“.....As far as I was aware the accountants and solicitors were handling the CGT and so I had no reason to arrange for any further help. Had I realised I had to complete a self-assessment form, I would have asked for their assistance

Even though I was not fully fit, mentally, I still contacted my solicitor to remind them that CGT was due and after that I gave it little thought, as I had many other stressful things to deal with.

Of course, I knew there was CGT to pay, that is why money was left with the solicitors. However even though I called them to remind them about the payment, it was paid late due to their negligence. Other than sitting with the lawyer as they actually carried out the job of paying the CGT, I don't think I could have done much more, particularly as I was, and still am, unwell.

7. The Appellant enclosed a number of letters from medical practitioners which are summarised as follows

A letter dated 7 October 2014 from DR. Jill Harling of The Courtfield Medical Centre states:

“I am writing as a General practitioner who has been involved in the care of Mrs. Mahendran for over 20 years now.She has been under enormous stress since the acrimonious split from her husband over ten years ago. She has been left to bring up three young children all on her own whilst continuing to work as school teacher, a remarkable achievement.

The present situation with this fine hanging over her is contributing to her emotional ill health. She is already on antidepressant medication (which she has been for many years and receives regular supportive psychotherapy.....”

A letter dated 19 March 2015 from Dr. Gemma Nott of The Redcliffe Surgery states:

“I am writing to confirm that Mrs Mahendran was diagnosed with anxiety and depression in February 2014; She continued to see Dr. Lewis-Crosby regularly throughout the year and required regular reviews.

A letter dated 27 April 2015 from Ms Ione Alexander-Somerville a Chartered Psychologist of the NHS Primary Care Mental Health Service, London confirms that the appellant underwent “a course of psychological treatment for anxiety and low mood between October 2014 and January 2015”.

8. The appellant also wrote to HMRC on 30 September 2014 appealing against the penalties and on 18th December 2014 asking for a review by HMRC of their decision.

She makes similar points to those mentioned above. She said the money to pay the tax due was held by her solicitors Slater, Bradley & Co. and she left responsibility for payment with them.

9. HMRC Submissions

HMRC say that Information about self assessment is widely available in the public domain, via the internet on HMRC's website and telephone helplines. Had the appellant contacted HMRC for advice on completion of tax returns and how to make a payment of tax on or before its payment due date, she could have avoided having to pay any penalties.

10. In their review dated 3 February 2015 HMRC say "For illness to be considered a reasonable excuse the illness must be so serious that it prevented you from controlling your business and private affairs immediately before the deadline to the date you send the tax return in. Although HMRC can sympathise with your health issues there is no evidence that this prevented you from controlling your affairs or had a direct (effect) on your ability to ensure that arrangements were put in place so that the tax was paid before the penalties arose." HMRC consider that the appellant did not have a reasonable excuse for the late return and payment.

11. HMRC say they have considered Special Reduction under paragraph 9 Schedule 56 Finance Act 2009 but consider there are no special circumstances that would allow them to reduce the penalty.

12. The Tribunal's observations

It is apparent from the papers that the appellant knew that there was Capital Gains Tax to pay. It is also apparent that the appellant accepts that her tax return and payment for her tax liability for the year to 5 April 2013 were not submitted by the due date. Therefore a penalty is due unless the appellant can establish that she had reasonable excuse for the late return and associated payment.

13. The appellant has lodged various letters from medical practitioners. The Tribunal notes that most of these letters are dated well after the due date for the return and payment and some refer to periods after the tax was paid. The Tribunal also notes that during the ten year period since her separation from her husband the appellant was able to perform her duties as a primary school teacher.

The Tribunal agrees with HMRC that there is no evidence that the appellant's ill health was so serious that it prevented the appellant from controlling her affairs or had a direct effect on her ability to ensure that arrangements were put in place so that the tax was paid before the penalties arose. In fact the evidence is to the contrary. The appellant was able to instruct an accountant and a solicitor to attend to her tax affairs on her behalf and she checked on them and communicated with them by telephone and e-mail but unfortunately to no avail.

14. HMRC has fairly pointed out the decision of the Special Commissioners in the case of Rowland which the Tribunal found of great assistance. In particular Judge Shipwright considered at 20 b of that decision

“b. It was sensible and reasonable for Mrs Rowland to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not possess personally.”

This Tribunal considers it was similarly sensible and reasonable for the appellant in this case to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not possess personally.

The decision in Rowland also includes:

“ 21. In these circumstances I consider that it was reasonable from Mrs Rowland to rely on her than accountants and it was this reliance that led to the underpayment. I consider that this was an excuse for making the underpayment and as the reliance was reasonable the excuse was at first blush reasonable. I find this as a primary fact.

22. The issue arises as to whether reliance on a third-party is prevented from being a reasonable excuse. For VAT purposes there is specific provision that where "reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied on is a reasonable excuse." There is also specific provision that insufficiency of funds is not a reasonable excuse (see section 71 VATA). The legislation that I am concerned with in this case was passed after the VAT legislation but only contains a provision that insufficiency of funds is not a reasonable excuse. There is no equivalent provision that reliance on a third party is not a reasonable excuse for direct tax purposes.”

15. Since the decision in Rowland which is dated 2006 there has been new legislation on the matter in the Finance Act 2009 and the relevant paragraphs are set out at paragraph 2. above.

As it is clear that the appellant did rely on another person to submit and pay the tax due on her tax return it is for this Tribunal to decide whether or not it considers the appellant took reasonable care to avoid the failure.

The Tribunal considers that in the difficult circumstances the appellant was in, and as the tax rules concerning the calculation of a capital gains tax liability are not straight forward, it was a logical and sensible step for her to appoint and rely on an accountant and solicitor to deal with the matter. She did not leave it there, the appellant has detailed the steps she took and these are set out above at paragraph 5. She clearly took reasonable care within her own circumstances to avoid any failure but she could not stand over the accountant and solicitor to ensure they acted promptly in dealing with her affairs. It is understandable that she did not contact HMRC to ask for assistance before the due date as she thought matters were being dealt with by her accountant and solicitor.

16. The Tribunal accepts that the appellant took reasonable care to avoid the failure but was badly let down by those whose expertise she was relying on. The appellant

thus has reasonable excuse for the failure, and that excuse existed throughout the period and therefore the appeal against the penalties is allowed.

17. In view of the fact that the Tribunal decided that the appellant did have reasonable excuse for the late payment it has not gone on to consider whether or not HMRC were correct in considering that there are no special circumstances that would allow them to reduce the penalty.

18. 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.

**PETER R. SHEPPARD
TRIBUNAL JUDGE**

RELEASE DATE: 9 June 2015