



TC04704

**Appeal numbers: TC/2010/8717, TC/2011/6344, TC/2012/3804,
9637, 9947, 9948, 9953, 10600, TC/2013/5031, 5075, 6504**

***PENALTIES FOR FAILURE TO FILE ONLINE – strike out application -
appellants instructed elderly agent to prepare and submit returns – agent
submitted paper returns – whether appellants have reasonable prospect of
success in a claim that either they have a reasonable excuse or that they
have the right to submit by paper – no – appeals struck out save that part of
one appeal concerning another issue and one appeal in respect of which
HMRC withdrew the application***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**NIGEL THOMAS ORGAN AND TERRY LESLIE BRYANT Appellants
T/A ADDITIONAL AIDS (MOBILITY)
LIONEL ABRAHAMS T/A JOSH AND JON HAIR COMPANY
JEWEL AVIATION & TECHNOLOGY LIMITED
B19 SUPPLIES LIMITED
SASKIA LIMITED
C N MOTORS LIMITED
OSPREY DESIGN LIMITED
MICHAEL CLEMENTS T/A THE GLASS CENTRE**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, London on 17 August 2015

Mr K Bland of WB Accountancy and Bookkeeping for the Appellants

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

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DECISION

1. The appellants listed above instructed Mr K Bland, their agent, to lodge an appeal against the imposition of various late filing penalties for their failure to submit various returns online. In all cases it seems paper returns were submitted: sometimes before the due date and sometimes after it. HMRC rejected the paper returns.
2. I have scheduled the appeals in an appendix to this decision.

HMRC's application

3. HMRC applied for three of the cases to be made lead cases and for those three cases to be struck out; I indicated that I considered this a peculiar way of proceeding. It made more sense to consider whether all or any of the appeals should be struck out; if they were not, only then I would consider making a lead case direction.

The appellants' cases

4. Mr Bland considered the situation to be very simple: his view was that the decision of this Tribunal in *L H Bishop and others* [2013] UKFTT (TC) meant that HMRC could not require him to file his clients' various tax returns online, because he was now some 69 years old and was over 64 at the time the various penalties on his clients were imposed which are at issue in this appeal.
5. Before even turning to consider HMRC's view of the case, there is of course a very real distinction, which Mr Bland appeared not to recognise, between the position of the appellants in *L H Bishop* and those in this case: in *L H Bishop* the various appellants filed their own VAT returns. The first three appellants in that appeal (successfully) claimed it was unlawful for HMRC to compel them to file online because of their own old age and/or disability and/or remote location.
6. In contrast, the appellants here do not based their appeal on a claim that they are old, and/or disabled, and/or live in a remote location: on the contrary they employ an agent to file their tax returns. Their claim is that it is unlawful to compel them to file their tax returns online because their agent, Mr Bland, is elderly and does not use a computer.

HMRC's case

7. HMRC's case is that the appeals should be struck out on the grounds that they have no reasonable prospect of success under Rule 8(3)(c) of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules No 2009/273.
8. Ms Nathan cited various standard authorities to me on what the test for striking out should be, such as *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16 at [95] where Lord Hope said that an appeal should be struck out if the party would lose even if the facts were found to be what he claimed them to be. Another way of saying

this is that the appeal should be struck out where the party's submissions on the law have no reasonable prospect of success. I was also referred to [41] of *Fairford* [2014] UKUT 0329 (TC) where the Upper Tribunal said that there must be realistic prospect of success.

5 9. HMRC's case is that what matters is the appellants' individual positions and not the position of the appellant's agent. The only defence available to the appellants, in HMRC's view, is one of reasonable excuse and that defence on the legislation looks at whether the appellant has a reasonable excuse; not whether the agent appointed by the appellant has a reasonable excuse.

10 *Observations*

10. Mr Bland expressed forcibly in correspondence before the hearing and at the hearing his view that HMRC were pursuing a vendetta against him and that it was HMRC's intention to put him out of business. He also made allegations of improper behaviour against the solicitor employed by HMRC who has had responsibility for
15 dealing with these appeals.

11. However, this Tribunal is not the forum to air complaints against the conduct of individual officers and employees of HMRC: if Mr Bland believes that he has cause for complaint, he must write to HMRC and initiate their complaints procedure. Ultimately the complaint can be taken to an ombudsman. This Tribunal has no
20 jurisdiction.

12. In any event, I see no evidence of any such vendetta or any improper behaviour by HMRC or by its solicitor in this matter. I can understand that Mr Bland is very concerned about his ability to continue in business if he must file online the returns he prepares for his clients, in circumstances in which, he says, he can neither afford a
25 computer nor, it appears, knows how to use one. Nevertheless, the liability to file online is a matter of statutory law and it seems to me that HMRC here have sought to do no more than enforce the law as they see it and the accusations made by Mr Bland appear quite unjustified.

13. I was concerned, on the contrary, whether the appellants themselves fully
30 understood the issue at stake in this appeal. Mr Bland made representations to the Tribunal almost exclusively about what he saw as his rights whereas the appeal is an appeal by the appellants and concerns what are their rights. However the Tribunal holds written authorisations from all the appellants in this case (with the exception of one of the *Osprey* appeals which I mention in detail in the appendix) for Mr Bland to
35 act on their behalf and the Tribunal must therefore accept that the case Mr Bland put was the case they had authorised him to put on their behalf.

The statutory law

14. I was taken through the law at some length but do not repeat it all here as I understood that there was no dispute on it. Mr Bland appears to accept that the

statutory law obliges his clients to file online but considers that his own or his clients' rights, which he considers were outlined in *L H Bishop*, trump the statutory law.

15. In brief summary, the statutory law in force at the time the returns the subject of this appeal were filed by paper was as follows. S 135 Finance Act 2002 permitted HMRC to make regulations making the use of online filing mandatory. HMRC used this power to make regulations including the following:

(1) VAT returns: Regulation 25A of the Value Added Tax Regulations 1995/2518 makes online filing of VAT returns mandatory;

(2) Corporation tax returns: Regulation 3 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003/282 (as amended) require corporation tax returns to be submitted online for any return period ending on 1 April 2010 or later;

(3) PAYE returns: Regulation 22 of the Social Security (Contributions) Regulations 2001/1004 requires an annual PAYE return from employers; Regulation 205 of the Income Tax (Pay As You Earn) Regulations 2003/2682 as amended require the return to be made electronically.

16. Regulation 25A(15) imposed a penalty on a person for failing to comply with the obligation to file online; Reg 25A(16) provided that a person who has a reasonable excuse for failing to comply with the obligation would not be liable to the penalty.

17. Regulation 3(9) of the 2003/282 regulations states that a corporation tax return that is delivered by means other than online must be treated as not delivered; Schedule 18 paragraph 17(1) Finance Act 1998 imposes a penalty on a taxpayer for failing to deliver a corporation tax return by the due date. Section 117(2) of that Act provides that Schedule 18 shall be construed and have effect as if it were contained in the Taxes Management Act 1970. Therefore, s 118 of the TMA 70 applies and that provides at (2) that 'reasonable excuse' is a defence to a failure to do something by the due date as long as it is done within a reasonable time after the excuse ceased.

18. Regulation 210C of the Income Tax (Pay as You Earn) Regulations 2003/2682 provides that a taxpayer who has a reasonable excuse is not liable to a penalty for failing to comply with Regulation 205.

19. In other words, for all the various returns concerned in the various appeals with which this hearing was concerned, 'reasonable excuse' is a defence to liability.

Do the appellants have an arguable case in law?

20. HMRC understood the appellants' cases as a claim that they had a reasonable excuse for failing to file their respective returns online; Mr Bland tended to put his case on the basis that the law as stated in *L H Bishop* meant that his clients were not liable to file their respective returns online.

21. So I will deal with the cases on the basis both that a defence of reasonable excuse was claimed and on the basis of whether there was a liability on the various appellants to file online. As this is a strike out application, I ought to strike out the appeals if none of these possible grounds have a reasonable prospect of success.

5 *Do the appellants have a reasonable prospect of establishing the defence of 'reasonable excuse'?*

22. The reasonable excuse which the appellants put forward for failing to file their returns online is that their agent is elderly and does not own or know how to use a computer.

10 23. No explanation, however, was given of why the appellants did not therefore do one of a number of things to comply with the law:

(a) they could have employed a different agent who was able to file online; or

15 (b) they could have continued to employ Mr Bland, but taken the paper return prepared by him and entered the figures themselves online;

(c) they could have continued to employ Mr Bland and Mr Bland could have prepared the return but either the appellants or Mr Bland could then have sub-contracted the submission of it online to another person who knew how to make online returns.

20 24. Without a reasonable explanation for the failure to do any of the above things, I do not see how any of the appellants have even an arguable case in law on reasonable excuse. Where the appellants have an obligation, such as the obligation to file online, it is no excuse simply to say that they employed an agent to fulfil that obligation, but the agent could not do it. That begs the question of why they employed an agent to
25 comply with the law on their behalf, when the chosen agent was unable to comply with the law on their behalf.

Do the appellants have a reasonable prospect of establishing they were not liable to file online?

30 25. As I have said, Mr Bland appeared to put the case that it was unlawful for HMRC to require the various appellants to file online at all. Mr Bland relies on my decision in *L H Bishop* where I did indeed decide (for complex reasons given at some length) that the VAT regulations requiring online filing were unlawful under the European Convention on Human Rights where the taxpayers were elderly and/or disabled and/or in a remote location, such that they were unable to file online.

35 26. The entire tenor of Mr Bland's submissions in this hearing was that it was not fair to him to require his clients to file online, because he was elderly (aged 69 at present), he did not own a computer and (it appears) did not know how to use one, and so he would lose business because his clients might instead instruct someone who could comply with the law on their behalf. In other words, Mr Bland's real complaint

(albeit made in an appeal against the various appellants' liability to penalties) was that it was a breach of his human rights to require his clients to file online.

27. I do not consider that such a claim could succeed. While Mr Bland is truly, and understandably, aggrieved by the threat the obligation on his clients to file online poses to his ability to carry on in his business, there is no human right to carry on a business (*R (Countrywide Alliance)*[2007] UKHL 52 eg at §§14-15). The reality is that it would cost him money, and presumably make his business less profitable, if he either has to buy a computer or sub-contract the online filing to another person. While there is a human right to non-interference with property, the obligation on their clients to file online affects all agents equally. Therefore the obligation to file online, which as explained in *L H Bishop* has the objective of saving the Government money, would appear justified and well within the UK's margin of appreciation. Mr Bland might claim *indirect* discrimination on the basis the rules makes no exception for agents unable to file online due to age and computer illiteracy, but again it appears that such indirect discrimination is justified. Indeed if an exception were made for taxpayers who wished to instruct agents who were elderly and did not use a computer, any taxpayer could avoid the liability to file online by instructing such an agent. Such an exception could not in my view be justified: certainly its absence is justified.

28. Moreover, in *L H Bishop*, while I did not find the failure to exempt taxpayers who were elderly, disabled, computer illiterate and/or living remotely to be justified that was in the special circumstances that (a) the government had made it a universal requirement for all taxpayers and (b) the government had recognised that elderly and disabled persons should have an exemption by giving them a concession (albeit unlawful and unpublished). In the case of agents there are no exceptions and no concessions. The failure to make an exception for elderly agents is, I consider, well within the margin of appreciation for the UK.

29. For these reasons, I do not believe that Mr Bland has a case under the Human Rights Act or European Convention on Human Rights nor under the EU law on proportionality (which applies to VAT returns if not the CT and PAYE returns). But in any event, this is an appeal against the appellants' liability to penalties and not the forum in which Mr Bland can complain of any breach of his rights. If he wants to do that he needs to take a case personally, perhaps in the European Court of Human Rights, although, as I have said, I do not think such a case could possibly succeed.

30. Nor do I consider that the appellants can rely on an alleged breach of Mr Bland's rights as a defence to their liability to the penalties. Firstly, as I have said, I do not consider that Mr Bland has any rights which have been breached by the requirement for his clients. In any event, to rely on human rights they would have to prove a breach of their own rights and claim 'victim' status: those without victim status cannot rely on the rights of others. Nor do I consider it to be a reasonable excuse to rely on a breach of the rights of others.

31. In conclusion, I do not consider that the appellants' appeals have a reasonable prospect of success in claiming that they should not have been required to file online because they employ an elderly agent to file online on their behalf.

The position of the elderly appellants

32. Mr Bland pointed out that three of the appellants are (or their directors are) elderly. This was only a hearing of a strike out application so no evidence on this was called. I will proceed on the assumption that the alleged facts can be proved.
5 However, I do not consider that, for the appellants who were old, that their age was the cause of their failure to file online: the cause of their failure to file online was their decision to instruct an agent who was unable to file online. If their age did not cause the failure to file online, it could not amount to an excuse, let alone a reasonable excuse.

10 33. So far as human rights were concerned, and I consider human rights were engaged where elderly taxpayers were required to file online for the reasons explained in *L H Bishop*, those rights were not infringed where the taxpayers with those rights chose to instruct an agent, unless they did so solely in order to comply with the obligation to file online. But clearly they did not do so as Mr Bland would not file
15 online. It must be the case that the appellants instructed the agent to act on their behalf for other reasons, and not because of the obligation on them to file online.

34. In conclusion, I am satisfied that even the elderly appellants do not have an arguable case that either they have a reasonable excuse nor that they have human rights which have been breached by the requirement to file online.

20 35. I strike out all the appeals in the schedule save:

(1) that element of TC/2012/3804 (Lionel Abrahams T/A Josh & Jon) which concerns the VAT default surcharge. That element of the appeal must proceed to be determined and directions to take it to hearing will be issued separately. That element of the appeal which concerns the late filing penalty is however
25 struck out.

(2) Mr Clements' appeal as HMRC withdrew their application to strike it out.

The future for the appellants?

36. Having struck out the appeals, the penalties are now enforceable and must be paid. As HMRC chose not to levy penalties for the appellant's later failures to make
30 online returns during the course of their appeals, the amounts involved are not particularly large.

37. Going forward, that concession will, I understand, no longer apply. But that is not to say that the various appellants will now be necessarily liable to file online. Some of the appellants may be able to apply for exemption on the basis of their age, at
35 least if they file their own returns. Such an application is made under the legislation introduced following the decision in *L H Bishop*. So far as VAT returns are concerned this is Reg 25A(6)(c) of the VAT regulations 1995/2518 as amended:

Regulation 25A(6)(c):

..A person...(c) for whom the Commissioners are satisfied that it is not
40 reasonably practicable to make a return using an electronic

system...for reasons of disability, age, remoteness of location or any other reason, is not required to make a return required by Regulation 25 using an electronic return system.

Michael Clements T/A The Glass Centre

5 38. This appeal is slightly different in that it is against a direction issued by HMRC that the appellant must file online. Mr Clements' turnover was such that he was regarded by HMRC as within phase 1 of the introduction of VAT online filing and therefore under the legislation at the time was notified of his obligation to file online. He was entitled to appeal against that notification as he has done. It appears that
10 HMRC were concerned whether (presumably applying the reasoning in *L H Bishop*) Mr Clements ought to have been notified of an obligation to file online.

39. On 23 January 2015 HMRC applied for further and better particulars in this appeal and therefore agreed that their strike out application did not extend to this appeal. I ordered at the hearing, with the consent of Mr Bland, that further and better
15 particulars be provided by the appellant of its grounds of appeal. These have now been provided so that appeal will now proceed separately.

40. 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
20 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 22 OCTOBER 2015

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Appendix

VAT late filing penalty appeals			
Appellant	Appeal ref	Period	penalty
Additional Aids	6344 ¹	05/11	£200
	8376 ¹	08/11	£200
	1530 ¹	11/11	£200
B 19	6504	01/13	£100
Josh and Jon	3804	12/11	£200 and default surcharge of £1,146.88
M Clements	8717	N/A	N/A
Corporation tax late filing penalty appeals			
Appellant	Appeal ref	APE	Penalty
B19 Supplies	9947	End August 2011	£100
Osprey Design**	7422 ²	End 2010	No penalty
	5075 ²	End 2011	£100
C N Motors	9953	End May 2011	£100
	5031	End May 2012	£100
Jewel Aviation*	9637	17 December 2010	£200
Saskia	9948	End May 2011	£100
PAYE late filing penalty appeal			
Appellant	Appeal ref	Period	Penalty
Josh and Jon	10600	11/12	£300

5 Notes to schedule

¹ These three files were consolidated;

² These two files were consolidated.

10 **Jewel Aviation*: The filing date for Jewel Aviation for its APE 17 December 2010 was 17 December 2011. The return was not received. HMRC imposed a late filing penalty of £200 on 27 July 2012. On the same date HMRC determined tax at £2,252 and imposed a 10% late payment penalty at £252. On 2 November 2012 the company filed an online return showing liability to be £0. HMRC therefore reduced the determination and late payment penalty to £0. Only the £200 late filing penalty is therefore at stake. The appellant's case is that a paper return was filed on 12
15 September 2011 and that therefore the appellant filed on time as HMRC is wrong to insist that it should have filed online.

5 ***Osprey Design*: There were two Osprey appeals, which were consolidated by the Tribunal on 5 December 2013. However, the consolidated appeal was struck out on 13 February 2015 following the appellant's failure to comply with an unless order. (The history to that was that the appellant had failed to reply to a letter written to it by the tribunal so the appellant had been ordered on 17 December 2014 to state no later than 16 January 2015 whether it intended to pursue the appeals but it failed again to reply.) Mr Steve Bennett of Osprey wrote to the Tribunal on 16 February 2015 applying for reinstatement on the basis of "loss of contact with our agent". The Tribunal wrote to the appellant on 25 February asking for clarification of the reinstatement application and in particular asking why the above letters and orders had received no reply and what was the significance of the loss of contact with agent when the letters and unless order had been sent direct to the appellant. The reply dated 5 March 2015 was from Mr Bland and said the basis of the reinstatement was that the letter and order should have been sent to him as an authorised representative.

15 In fact the Tribunal only held an authorisation dated August 2013 for Mr Bland to act on behalf of Osprey in respect of TC/2013/5075. When the appeals were later consolidated, they were consolidated into the earlier number (TC/2011/7422) for which no authorisation was held and therefore the Tribunal had written direct to the appellant rather than Mr Bland.

20 While I have no explanation of why the appellant did not reply to the letter and order referred to above until the appeal was struck out, I accept that at the time the unless order was issued the Tribunal ought to have treated the authorisation for Mr Bland as relating to that part of the consolidated appeal which had been TC/2013/5075 and ought therefore to have sent the order to Mr Bland as agent: (Rule 11(4)(a)).
25 Therefore, neither the unless order nor strike out were properly issued at least in so far as the appeal originally lodged under number TC/2013/5075 and therefore both were procedurally irregular and the TC/2013/5075 appeal ought to be reinstated.

30 The position with TC/2011/7422 is different. That appeal arose because Mr Bland filed a paper corporation tax return on behalf of the taxpayer in July 2011. In anticipation of his client receiving a penalty for failing to file online, he filed a notice of appeal in September 2011. However, no penalty was ever issued, it seems, because the director of the appellant chose to then file a corporation tax return online just before the deadline. HMRC's case at the hearing was that there was therefore nothing which could be the subject of this appeal and asked for it to be struck out. Mr Bland did not object.

40 It seems to me that either the authorisation for Mr Bland to act on behalf of Osprey covered TC/2011/7422 or it did not. If it did not, then in so far as TC/2011/7422 is concerned, there was no procedural irregularity with the strike out and it was properly struck out. It should not be reinstated as there is nothing to reinstate for the reasons explained above. However, if the authorisation of Mr Bland did cover TC/2011/7422 then it should be reinstated for the reasons TC/2013/5075 was reinstated (procedural irregularity) but then Mr Bland, as authorised representative, consented to it being struck out on the grounds that there was no dispute over which the Tribunal had jurisdiction. Either way the appeal TC/2011/7422 is struck out and only

TC/2013/5075, de-consolidated from TC/2011/7422, remained a live appeal for Osprey in the hearing before me. And I have considered TC/2013/5075 and struck it out for the reasons explained in the above decision notice.