



TC05428

Appeal numbers: TC/2016/01953

Income Tax - self assessment returns - late filing penalties - Schedule 55 Finance Act 2009 - application for permission to appeal out of time - reliance on third party - whether reasonable excuse - guidance in Data Select considered - permission not granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAJID HUSSAIN

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LES HOWARD**

Sitting in public at City Exchange Albion Street Leeds on 25 July 2016

Mr Robert Campbell for the Appellant

Mr Allan Hall, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Applications

- 5 1. This is an application by Mr Wajid Hussain (“the Appellant”), for permission to make a late appeal against penalty notices issued in respect of the late filing of his Self-Assessment Tax Returns (“SA Returns”) for each of the years 2012-13 and 2013-14 under Schedule 55 to Finance Act 2009 (“Sch 55 FA 2009”).
2. The issue for determination is whether to allow the application for permission to
10 make or notify a late appeal.
3. HMRC apply for the Appellant’s application to be struck out on the grounds that it is out of time and no reasonable excuse has been shown for the delay in notifying the appeal.

Background

- 15 4. The Appellant had a statutory obligation to file his SA Returns under s 7 of the Taxes Management Act 1970 (“TMA”), as amended by Schedule 41 to the Finance Act 2008.
5. The Appellant accepts that SA Returns for 2012-13 and 2013-14 were issued to him in April 2013 and April 2014 for completion.
- 20 6. The filing due date of the 2012-13 return was 31 January 2014.
7. On the failure to do so, the first penalty notice dated 18 February 2014 was issued to impose the fixed penalty of £100 under paragraphs 1 to 3 of Sch 55 FA 2009.
8. Successive failures to file the 2012-13 SA Return led to further penalties under paras 4 to 6, Sch 55 FA 2009 as follows:
- 25 On 18 August 2014, a penalty of £900 representing the daily penalty of £10 per day for failure continuing after the due date (maximum chargeable of 90 days);
- On 18 August 2014, a further penalty of £300 the failure having continued after 6 months, being the greater of £300 or 5% of the tax liability;
- 30 On 24 February 2015 a further penalty of £300 the failure having continued after 12 months, being the greater of £300 or 5% of the tax liability.
9. The filing due date of the 2013-14 SA Return was 31 January 2015.
10. On the failure to do so, the first penalty notice dated 18 February 2015 was issued
35 to impose the fixed penalty of £100 under paras 1 to 3 of Sch 55 FA 2009.

11. Successive failures to file the 2013-14 SA Return led to further penalties under paras 4 to 6, Sch 55 FA 2009 as follows:

5 On 14 August 2015, a penalty of £900 representing the daily penalty of £10 per day for failure continuing after the due date (maximum chargeable of 90 days);

 On 18 August 2014, a further penalty of £300 the failure having continued after 6 months, being the greater of £300 or 5% of the tax liability.

10 12. On 26 January 2016 the Appellant filed his self-assessment tax returns for the years 2012-13 and 2013-14.

15 13. On 28 January 2016, HMRC wrote to the Appellant with a Statement of Liabilities which showed that in addition to £2,900 total penalties which had been imposed for the Appellant's delay in filing his 2012-13 and 2013-14 Returns, he also owed £11,354.99 being the total amount of assessed self-assessment balancing charges, late payment surcharges and accumulated interest from 5 April 2008 to 28 January 2016. HMRC advised the Appellant that despite reminders he had not paid the amounts due, which together with the penalties for the late SA Returns, totalled £14,254.99 and that HMRC were considering issuing bankruptcy proceedings.

20 14. On 16 February 2016, the Appellant responded to say that he had now filed the Returns for 2012-13 and 2013-14, and that with regard to the earlier assessments, surcharges and interest he had relied upon a firm called Halcroft Business Solutions Limited to whom he had passed all his papers. He had subsequently discovered that the company was under investigation by HMRC and that his papers had been taken by HMRC who were refusing to return them. He said that he had been misled by Halcroft
25 Business Solutions who had told him that the earlier years (pre-2012-13) had been dealt with and that he had no tax liabilities other than £1,200 penalties which (at that stage) had been imposed for the late delivery of the 2012-13 SA Return. He said that given that he had been lied to, he could not see how he could be held to blame and that he had done his best to ensure that his returns were filed on time.

30 15. HMRC responded on 11 March 2016 to say that the penalty notices said that he had 30 days within which to write in and appeal the penalty. The appeal had been lodged significantly later than the deadline for appealing the penalties. HMRC advised that they could only accept a late appeal if the Appellant could show a reasonable excuse for not appealing within the time limit and that the appeal had been
35 made without unreasonable delay after the excuse ended. The Appellant was further advised that the reasonable excuse had to be an unexpected or unusual event, beyond his control and had to continue up until the time the appeal was made. The Appellant was invited to respond and address these points.

40 16. On 4 April 2016 the Appellant lodged a Notice of Appeal with the Tribunal. The Appellant's grounds of appeal were:

- i. "self-assessment based on incorrect earnings for the years

- ii. HMRC did not recalculate even after being told that I had worked out my self-assessment tax to be from the old accountant
- iii. the penalties and charges are more than I earn in the period
- iv. unfair treatment by the self-assessment team who did not wish to listen to my findings.”

Relevant legislation

The provisions of reasonable excuse

17. Under para 23 of Sch 55 FA 2009, it is provided that:

- 10 “(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] 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) -
- 15 (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside [the taxpayer’s] control,
- (b) where [the taxpayer] relies on any other person to do anything that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure.
- 20 (c) where [the taxpayer] had a reasonable excuse for the failure but the excuse has ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

18. There is no statutory definition for *reasonable excuse*. The term is to be given its normal everyday meaning as referring to an unexpected or unusual event, either unforeseeable or beyond a person’s control, which prevents one from complying with an obligation.

19. In *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234, Judge Medd QC remarks:

- 30 “... the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular Appellant as the tribunal considered relevant to the
- 35 situation being considered.”

The provisions for special circumstances

20. Para 16 of Sch 55 FA 2009 provides that if HMRC think it right because of special circumstances, they may reduce a penalty. Under para 22 of Sch 55 FA 2009, the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is “flawed when considered in the light of the principles applicable in proceedings for judicial review”.

21. The legislation does not define “special circumstances”. From case law, it is accepted that for circumstances to be special they must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152).

5 *The onus of proof*

22. With regard the substantive appeal, HMRC have to show that the Return was not submitted by the due date and that there is therefore is a prima facie case that a penalty is due. The burden is then on the Appellant to prove that he had a reasonable excuse for failing to submit the Return on time. With regard to the application for permission to make a late appeal, the onus is on the Appellant to prove to the Tribunal that he had a reasonable excuse for making an appeal late. The standard of proof is the civil standard of the balance of probabilities. This Tribunal is only concerned with the application for permission to make a late appeal.

23. The Tribunal’s discretion to exercise its case management powers by extending the time limit to admit a late appeal comes under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“Tribunal Rules”). Rule 20(4) clearly states that unless the Tribunal gives such permission, the Tribunal must not admit a late appeal.

24. As stated By Mr Justice Morgan in in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC):

“33. . as a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.

35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* (a firm) [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196.

36. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA.”

25. Mr Justice Morgan also referred to the approach of the Court of Appeal in holding that, when considering an application for an extension of time for an appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: - *Sayers v Clarke Walker* [2002] 1 WLR 3095. In that case, referring to item (f) on the checklist (“whether the failure to comply was caused by the party or his legal representative”), it was held to be a relevant factor that the failure to comply was caused by the party’s legal representatives and not by the party himself.

Appellant’s case

10 26. Mr Campbell representing the Appellant said that his company, Halcroft Business Solutions, had indeed been instructed by the Appellant to assist with his tax returns. The company had taken over from the Appellant’s previous accountants, West Yorkshire Accountancy Services. Mr Campbell said they had advised the Appellant that he owed £2,500 tax which the Appellant paid to West Yorkshire Accountancy Services, of which only £1,250 was paid to HMRC.

15 27. Unfortunately because of an HMRC investigation into Halcroft Business Solutions, the Appellant’s papers had been seized along with other clients’ documents and had never been returned. Mr Campbell agreed that his company had misled the Appellant. He said that it was obviously unusual in such circumstances for him to be representing the Appellant, but he did so in order to support the Appellant’s appeal. The Appellant had since appointed another company HCA Accountants who in 2016, based on information the Appellant was able to provide verbally, brought the Appellant’s returns up-to-date.

HMRC’s case

25 28. Mr Hall for HMRC said that there had been a history of late returns and penalties as evidenced by the earlier assessments, surcharges and interest owed by the Appellant, amounting to £11,354.99. Contrary to Mr Campbell’s assertion that £1,250 had been paid on account, HMRC had no record of any payments being made. The Appellant had only taken action to file the outstanding returns when threatened with bankruptcy proceedings.

30 29. Mr Hall said that the search warrant which led to papers held by Halcroft Business Solutions being seized, was issued on 15 September 2014, long after the return for 2013 was due and the penalties issued. He had received numerous reminders. There was no reason why, after the Appellant had received the first penalty notices, he could not have provided HMRC with the same information which he eventually gave to his new accountants, in order that estimates could be made and returns filed.

35 30. Mr Hall produced a chronological schedule showing that the penalties imposed in respect of the late 2013 return were imposed, as to the £100 penalty after 18 days, as to the first £300 and £900 penalties after 199 days, and as to the second £300 penalty after 389 days; the penalties in respect of the late 2014 return were imposed, as to the

£100 penalty after 18 days, and as to the £900 penalty after 195 days, which was in August 2015.

31. It was not until after numerous visits by HMRC representatives to the Appellant's home, telephone calls to his agent and warning letters, that the outstanding returns were eventually filed on 26 January 2016. Consequently, even if a reasonable excuse had initially existed, it did not continue up until the date the outstanding returns were filed. No explanation had been provided for the inordinate delay. Furthermore, legislation specifically states that reliance upon an agent is not a reasonable excuse.

Conclusion

32. Time limits are to be adhered to unless good reason can be shown why they should be overridden. In order to consider whether good reason is shown, it is necessary for the Tribunal to take into account the overriding objective of the 2009 Rules and actively exercise its discretion under rule 5(3) of the Rules, for which purpose a balancing exercise must be conducted, taking into account all relevant circumstances and the factors set out above in *Data Select*, including the arguable merits of each party's case, if appropriate.

57. We address in turn, each of the factors referred to in *Data Select*.

(1) What is the purpose of the time limit? Generally the purpose of adherence to time limits is finality and certainty. It is necessary for HMRC to operate and enforce the taxation system. Time limits also promote the efficient organisation of the Tribunal system.

(2) How long was the delay? The 2013 tax return was filed 725 days late and the 2014 tax return was filed 360 days late. The appeal to HMRC against the penalties was made in February 2016, some two years after the first repayment penalty was imposed for the outstanding 2013 return, and six months after the £900 penalty was imposed in respect of the outstanding 2014 return.

(3) Is there a good explanation for the delay? The appeal was prompted by HMRC threatening to take debt enforcement and bankruptcy proceedings against the Appellant. The Appellant has perhaps provided some explanation as to why his returns were filed late but no explanation for the late appeals against the penalties. He was aware of the time limit within which an appeal had to be made.

(4) What will be the consequences for the parties of an extension of time? HMRC did not indicate any particular prejudice suffered if the application to appeal out of time is allowed. There may of course be a general prejudice in having to revisit the Appellant's assertion that penalties should not be paid by him, but that prejudice is not, on its own, so significant as to outweigh the other factors and determine the application in favour of HMRC.

5 (5) . The merits of Appellant’s substantive appeal are questionable. Legislation specifically states that reliance upon a third party is not a reasonable excuse for the late delivery of self-assessment tax returns. The Appellant must have been aware that his returns had not been filed. He did nothing about this, even after substantial penalties were imposed, not just for one annual SA Return, but for two.

10 (6) What will be the consequences for the parties of a refusal to extend time? If the application is refused, then the penalties are payable by the Appellant, but that is the necessary consequence of the penalties being appealed out of time with no reasonable explanation for the delay.

15 58. Generally, an extension of time is the exception rather than the rule. In the overall context of the history of the matter with particular reference to the overriding objective and the lack of any significant merit in the substantive appeal, we consider that this is not a case, in which in the interests of justice we should exercise the Tribunal’s discretion to permit the appeal to be made after the expiry of the statutory time limit.

59. Accordingly the application for permission to appeal out of time is refused and HMRC’s application to strike out is granted. The penalties referred to in paragraphs 7 to 11 above are confirmed.

20 61. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 19 OCTOBER 2016