



TC05725

Appeal number: TC/2017/00528

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INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns - No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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Dr. OLGA MALINOVSKAYA

Appellant

- and -

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

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

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The Tribunal determined the appeal on 28 March 2017 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 28 December 2016 with enclosures, and HMRC's Statement of Case received by the Tribunal on 6 February 2017 with enclosures. The Tribunal wrote to the appellant on 8 February 2017 indicating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days. The appellant replied by e-mail on 24 February 2017 attaching what is described as a witness statement dated 24 February 2017 consisting of 7 pages, which the Tribunal read.

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DECISION

1. Introduction

5 This considers an appeal against a penalties totalling £2,250 imposed by the respondents (HMRC) under Paragraphs 3 and 4 of Schedule 55 Finance Act 2009 for the late filing by the appellant of her self-assessment (SA) tax returns for the tax years 2012-2013, 2013-2014, and 2014-2015.

2. Legislation

Finance Act 2009 Schedule 55
10 Taxes Management Act 1970, in particular Section 8(1D)

3. Case law

Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967
Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152
15 Keith Donaldson v HMRC [2006] EWCA Civ 761
HMRC v Hok Ltd. [2012]UKUT 363 (TCC)
International Transport Roth Gmbh v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
David Collis [2011] UKFTT 588 (TC)

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4. Facts

Schedule 55 of the Finance Act 2009 (“the Schedule”) makes provision for the imposition by Her Majesty’s Revenue and Customs (“HMRC”) of penalties on taxpayers for the late filing of tax returns.

25 If a person fails to file an income tax return by the “penalty date” (the day after the “filing date” i.e. the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

Paragraph 4 provides:

30 “(1) A person is liable to a penalty under this paragraph if (and only if)–

(a) The failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

35 (c) HMRC give notice to the person specifying the date from which the penalty is payable.”

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

40 The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

5. In this case in respect of the tax year ended 5 April 2013 HMRC issued a notice to file to the appellant on 2 February 2016. An SA return whether electronic or non-electronic was required to be submitted by 9 May 2016. The appellant failed to submit her tax return until 16 October 2016. As the return was not submitted by the filing date of 9 May 2016 HMRC issued a notice of penalty assessment on or around 10 May 2016 in the amount of £100. As the return had still not been received 3 months after the penalty date of 10 May 2016, HMRC issued a notice of daily penalty assessment of £680 on or around 18 October 2016, calculated at £10 per day for 68 days (10 August to 16 October is 68 days)

6. In respect of the tax year ended 5 April 2014 HMRC issued a notice to file to the appellant on 2 February 2016. An SA return whether electronic or non-electronic was required to be submitted by 9 May 2016. The appellant failed to submit her tax return until 16 October 2016. As the return was not submitted by the filing date of 9 May 2016 HMRC issued a notice of penalty assessment on or around 10 May 2016 in the amount of £100. As the return had still not been received 3 months after the penalty date of 10 May 2016, HMRC issued a notice of daily penalty assessment of £680 on or around 18 October 2016, calculated at £10 per day for 68 days.

7. In respect of the tax year ended 5 April 2015 HMRC issued a notice to file to the appellant on 11 February 2016. An SA return whether electronic or non-electronic was required to be submitted by 18 May 2016. The appellant failed to submit her tax return until 16 October 2016. As the return was not submitted by the filing date of 18 May 2016 HMRC issued a notice of penalty assessment on or round 24 May 2016 in the amount of £100. As the return had still not been received 3 months after the penalty date of 19 May 2016, HMRC issued a notice of daily penalty assessment of £590 on or around 18 October 2016, calculated at £10 per day for 59 days (19 August to 16 October is 59 days).

8. HMRC's approach to daily penalties was the subject of an appeal by Keith Donaldson which culminated in a decision of the Court of Appeal. The Tribunal has read that decision and considers that its conclusions whilst informative have negligible effect on the matters considered in this appeal save that the absence of the correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice.

9. Appellant's submissions

In the Notice of Appeal dated 23 September 2016 the appellant gives the following grounds of appeal:

"There is no tax due or in dispute since I have always paid my tax 'at source' through full time employment. This is also confirmed by Self-Assessment returns for years 2012-2013, 2013-2014, and 2014-2015. The notices to file SA, however, have been in dispute, since the notices were issued late, on 3 February 2016.

Thus, what is in dispute are the SA notices for historic years 2012-2013, 2013-2014, and 2014-2015 on assumption that I was a Director of a trading company. They were issued to me late, in February 2016, with a short deadline in May 2016, and the late

filing penalties were incurred on them since then precisely because I was in discussion with HMRC about my obligation to file SA.

I was in constant communication with HMRC trying to cancel the notices for the following reasons:

- 5 1. I paid tax through full time employment;
2. The company of which I have been a director has always been dormant and yielded no taxable income;
3. The notices to file SA for the historic years were issued late, only in February 2016.

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HMRC informs me that they treated this case as two separate issues;

1. Whether I was supposed to file or not;
2. Filing SA later than May 2016 deadline

15 I believe that I was grossly misadvised by HMRC advisers from the start in our communication to appeal the late filing penalties instead of asking a tax inspector to cancel the notices themselves, which would automatically cancel the penalties. Furthermore, I was also advised to file the SA against my belief that I was not supposed to do so, and this eventual filing was quoted as a reason for not cancelling
20 the notices when it became apparent there was no tax due

Because of this conundrum, the penalties accumulated on NO tax due and without taking the ongoing appeals to HMRC in account. (Even more so, there was a tax overpayment for 14/15 now withheld from me).....”

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10. Following receipt of HMRC’s statement of case the appellant forwarded to the Tribunal a document described as “Witness statement of Olga Malinovskaya” it is dated 24 February 2017 and is signed by the appellant but the signature has not been independently witnessed. The document runs to 7 pages and is too lengthy to
30 reproduce here. It was accompanied by numerous other pages in support. The Tribunal has therefore summarised the points made.

The appellant was born in Russia and is an academic. She has obtained degrees in the USA and France. She was a research student at Lincoln College, Oxford from 15
35 January 2011 to 6 June 2016 successfully reading for the degree of Doctor of Philosophy in Medieval and Modern languages, and graduating on 22 July 2016. The appellant has provided evidence in support of the above.

In an attempt to fund her stay in Oxford she formed a film distribution business (Vintage Films Ltd) which was registered in October 2010. The company has never yielded any profit. It is still in existence but the appellant says it has been “dormant
40 for HMRC purposes”

The appellant worked full time at Gherson, an immigration and human rights law firm from January 2012 to May 2014 and from August 2016 to date. Whilst there she paid tax at source and was never asked to complete SA returns until February 2016.

In January 2016 the appellant was aware that she had received £500 from Oxford
45 University in June 2015 so applied for self-assessment. The end result was that she was also asked to provide SA returns for years 2012-2013, 2013-2014, and 2014-2015.

5 The appellant points out that her viva (a defence of a PhD thesis) was scheduled for 18 February 2016. The result of that was that numerous corrections had to be made to her thesis by 6 June 2016. She states that this work consumed all her time and attention during the period.

10 The appellant gives details of her appeals to HMRC against the penalties and requesting them to remove the notices to file self-assessment returns. She also gives evidence supporting telephone calls made to HMRC. She maintains there was no income that requires an SA return for the years 2012-2013, 2013-2014, and 2014-2015. She claims to have been wrongly advised that the only way she could cancel the notices to file and the late penalties would be to file SA returns. She says that it is within HMRC powers to withdraw or cancel notices to file.

15 After filing the returns she was advised there was no tax liability for the years 2012-2013 and 2013-2014 and that she was due a refund of £778.59 in respect of 2014-2015. That refund has been retained by HMRC pending the outcome of this appeal.

20 The appellant accepts that the returns were submitted after the 9 May 2016. She also accepts that once the notices to file had been issued she had a legal obligation to complete them.

11. HMRC's submissions

25 HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the appellant to ensure her 2012-2013, 2013-2014, and 2014-2015 tax returns were filed by the due date.

12. HMRC records show that the appellant submitted the SA returns for all three years on 16 October 2016.

13. HMRC say that the appellant appealed to them against the penalties on 4 and 21 May 2016 saying

30 "According to your own manual HMRC Manual EM4551 (TMA 1970/S7) – there is no requirement to notify chargeability where there is no liability to Income Tax or Capital Gains Tax or where sufficient tax has been deducted at source to meet liability for the year.

35 As a director I had no liability for the year and no self-assessment return has been issued by HMRC."

14. On 6 June 2016 HMRC wrote to the appellant rejecting the appeal and offering a review.

15. On 20 October 2016 the appellant requested a review saying

40 "The fact that I myself volunteered to file SA tax return in January 2016 and thus brought the entire issue of being both employed and a director to HMRC's attention for a second time.

That according to HMRC's guidelines and up to date online information, I am not required to do so in my current employed position and no taxable income from the company.

5 I consistently attempted to clarify the matter and was always in touch with HMRC advisors, informing them in a collaborative and law-abiding manner about my reasons....”

On 29 November 2016 HMRC wrote to the appellant advising that the result of the review was that the HMRC's decision was upheld.

10 16. On 7 December 2016 the appellant provided further information to HMRC in respect of Vintage Films Ltd and asked for a further review,

HMRC replied on 13 December 2016 explaining that a taxpayer is only entitled to one review.

15 17. In respect of reasonable excuse HMRC say that they consider the actions of a taxpayer should be considered from the perspective of a prudent person. Exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts.... The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done.....”.

20 18. In respect of the penalty being unfair HMRC say for a penalty to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

25 19. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances 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*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

20. Tribunal's Observations

30 The Tribunal agrees with HMRC that it is the Appellant's responsibility to submit SA returns on time. The returns for the periods 2012-2013, 2013-2014, and 2014-2015 were due to be submitted by 9 May, 2016, 9 May 2016, and 18 May 2016 respectively, but they were all submitted late on 16 October 2016. Penalties totalling £2,250 are therefore due unless the appellant can establish a reasonable excuse for the delay as referred to in Paragraph 23(1) Schedule 55 Finance Act 2009. A reasonable excuse is normally an unexpected or unusual event that is unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to
35 file on time.

21. In the tribunal's view HMRC are entitled to satisfy themselves that no tax is due in any tax year. This is what they set out to do by means of asking the appellant to complete SA returns for the periods in question. The appellant appears to take the view that because she is satisfied that no tax is due she does not need to complete a

return. The appellant is responsible for meeting the deadlines for filing her tax returns whether or not she considers any tax is due.

22. In respect of reasonable excuse the appellant points out that she was very busy in writing and correcting a thesis for a PhD and all her time was focussed on that. Many
5 people in many and varied walks of life are very busy but they recognise that other responsibilities can impinge on their time. Completing SA returns is one such responsibility. Completing a PhD, whilst an admirable achievement, does not provide the appellant with a reasonable excuse for the late completion of tax returns.

23. The appellant complains that she was given a short deadline to complete the
10 returns. The notice to file was given in early February 2016 with dates for submission over 3 months later in May 2016. The Tribunal observes that the appellant considers that the returns show no taxable income from the film distribution business and that tax on income from Ghersons was paid at source which suggests that completion of the returns would be a straight forward task and would not consume a great deal of
15 time. Thus the Tribunal considers the appellant was given ample notice to file the returns.

24. The appellant complains she was grossly misadvised by HMRC yet she states “I was advised to file the SA against my belief that I was not supposed to do...”
20 Irrespective of what the gross misadvice was the appellant was correctly advised to file the SA, as she admits in her ‘witness statement’, but she delayed doing so.

25. The appellant accepts that once the SA return notices were issued she was legally obliged to complete them. She also accepts she filed them after the May 2016 deadlines.

26. The appellant claims that the level of the penalties is disproportionate to the
25 offence, harsh and unfair. The Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power to amend them unless they are incorrectly imposed or they are inaccurately calculated.

In *HMRC v Hok Ltd* the Upper Tribunal at paragraph 36 said “...The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a
30 penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no
35 *statutory* power to discharge, or adjust, a penalty because of the perception that it is unfair.”

27. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the
40 penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded there are none. The Tribunal sees no reason to disagree.

28. HMRC has applied the late filing penalties in accordance with legislation. The Appellant has not established a reasonable excuse for the late submission of her tax returns for the period 2012-13, 2013-2014, and 2014-2015. There are no special circumstances to allow reduction of the penalty. Therefore the appeal against the late filing penalties of £2,250 is dismissed.

29. 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.

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PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 3 APRIL 2017