



TC05745

Appeal number: TC/2013/02374

5

INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns - Yes.

10

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

15

CHRISTINA MARY MCDONALD

Appellant

- and -

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

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

20

The Tribunal determined the appeal on 3 April 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 1 April 2013, and HMRC's Statement of Case received by the Tribunal on 31 January 2017 with enclosures. The Tribunal wrote to the appellant on 1 February 2017 indicating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days. No reply was received.

30

DECISION

1. Introduction

5 This considers an appeal against penalties totalling £1,300 imposed by the respondents (HMRC) under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of her self-assessment (SA) tax return for the tax year 2010-2011.

10 The bundle of papers received by the Tribunal includes documents that suggest the appellant is appealing against penalties totalling £1,200. The bundle of papers includes two copies of the standard Notice of Appeal form completed and submitted by the appellant's agent. Both copies are incomplete as page 2 is missing in both cases. Page 2 of the standard Notice of Appeal form contains a box in which to indicate the total amount appealed against. It is clear from comments in the rest of the Notice of Appeal that the appellant is concerned with the penalties totalling £1,200
15 levied in August 2012. However in their statement of case HMRC have taken this to be an appeal against all penalties imposed for the late submission of the appellant's tax return for the year ended 5 April 2011, which total £1,300. The Tribunal has decided to accept that the appeal is in respect of all penalties imposed for the late submission of the appellant's tax return for the year ended 5 April 2011 .

20 2. Legislation

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

3. Case law

25 *Crabtree v Hinchcliffe (Inspector of Taxes)* [1971] 3 ALL ER 967
Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152
Keith Donaldson v HMRC [2006] EWCA Civ 761
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
30 *David Collis* [2011] UKFTT 588 (TC)
Customs and Excise Commissioners v Salevon Ltd [1989] STC 907

4. Facts

35 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.

40 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:

"(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

5 (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).

Paragraph 5 of the Schedule provides

10 (1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of –

15 (a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300

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

20 5. In this case in respect of the tax year ended 5 April 2011 HMRC issued a notice to file to the appellant on 6 April 2011. The filing date for a non-electronic return was 31 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant failed to submit her tax return until 17 September 2012. As the return was not submitted by the latest filing date of 31 January 2012 HMRC issued a notice of penalty assessment on or around 14 February 2012 in the amount of £100. As the
25 return had still not been received 3 months after the penalty date of 1 February 2012, HMRC issued a notice of daily penalty assessment of £900 on or around 7 August 2012, calculated at £10 per day for 90 days. As the return still had not been received 6 months after the penalty date HMRC issued a notice of penalty assessment of £300 on or around 7 August 2012.

30 6. 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
35 assessment does not affect the validity of the notice.

7. The appellant is a self-employed therapist and counsellor.

8. Appellant’s submissions

On 6 January 2013 the appellant’s agent wrote to HMRC submitting an appeal against the £1,200 penalties levied in August 2012.

His letter included

“In early June 2012 I was called by (the appellant) to visit her at home in order to assist her to get out of her predicament of being so stretched and distressed in the prior four years with the care of her two elderly parents in their terminal decline; her
5 mother with a succession of strokes and her father latterly with cancer., as her accompanying letter relates.”

The accompanying letter to HMRC is dated 10 December 2012 and is set out below:

“May I respectfully appeal against the £1,200 penalty for late submission of tax return
10 on the following grounds of personal circumstances which regretfully contributed to the delay.

Here is a brief account of my parents’ final years.

15 mum and dad moved to East Saltoun in 2004. My mother had at that stage already had 4 strokes and the stairs in their house in Edinburgh had become too dangerous for them to continue to live there. They bought a house very close to my own, less than 100 yards away and all on one floor. Shortly after they moved we had to get a wheelchair so that Mum could continue to go out in the car with dad and in the next 4
20 years she became less mobile and needed more personal care. Eventually I was bathing her and helping her dress in the morning and get to bed at night as well as helping with the cooking and everything else about the house. Carers began to come in to make this more manageable as I was becoming exhausted, keeping my own work on the go as well as helping care for mum.

25 In August 2008 she had a fifth stroke which proved to be more damaging than any of the previous strokes. She was taken into Edinburgh Royal Infirmary first then transferred to Liberton Hospital for assessment and intensive therapies e.g physiotherapy, occupational and speech therapy. After three months there they felt
30 they could do no more. My mother could not speak, or move independently and it was unclear if she understood what was said to her. She was transferred to Astley Ainslie for 6 weeks and finally we managed to get her moved to Haddington, our local hospital, which has a unit, like a hospice but not called that, where people who are very seriously ill go and who are dying. She spent her last 15 months there and died
35 there. From the time she first went into hospital, for the months she was in three different Edinburgh hospitals ; I was driving my father in to see her twice a day i.e. a 36 mile round trip twice a day. And was in a state of great anxiety, as you might imagine.

40 Additionally I was looking after my father which was, at first helping him and supporting him but in April 2009 he had the first severe symptoms of what turned out to be bowel cancer which had spread into his liver and so from then on I was increasingly involved with his daily care. Latterly full care, personal and domestic and also helping him visit my mother daily. He never told her he has cancer as he didn’t
45 see what good it would do., so he became thinner and thinner and more and more visibly ill while my mother lay helplessly in bed. Latterly he too had carers at home and this was very difficult as the local council had contracted the home care service to

5 various companies and they seemed unable to get the system set up with any consistency. My dad had dozens of carers and finally I waited in his kitchen till the carer arrived and I would ask each new carer “Will you be coming back again?” If the answer was ‘No’ , I would send the carer away and do the tasks myself as dad was not able to manage being intimately dealt with by strings of strangers.

10 After mum died at the end of April 2010 dad had just under 5 months grieving and suffering before he died in September 2010 in the same unit in Haddington where mum had died.

15 Then followed the sorting out of everything; the house, the belongings, the estate, dad’s financial affairs, their pensions etc. Now, in November 2012 probate is about to be finally granted on the estate and we can begin properly to move on, me, my brother and my sister.

I hope this gives an adequate explanatory account on compassionate grounds for HMRC to re-consider in these exceptional circumstances.

20 Further , I would earnestly hope that it is taken in account my rapidly catching up with all outstanding returns in the past three months, including this week my return for the year to 5 April 2012.

Likewise the fact that I have paid in one sum all dues up to 5th April 2011, and am now gathering funds for the sum due on the year to 5 April 2012.....”

25 The agent’s letter of 6 January 2013 also included
“I telephoned a person in HMRC to indicate that I could see a heavy amount of work to be caught up with, not just for the year in question, to 5 April 2011. I had to complete for the years to 5th April 2008 and following.
We are relieved to inform you that this has been accomplished....”

30 9. On 21 January 2013 HMRC dismissed that appeal on the grounds that it was out of time. The letter included the following:

35 “The only circumstances which we can accept a late appeal is if you have a reasonable excuse for not completing the tax return on time. This reasonable excuse must be an unexpected or unusual event, either unforeseeable or beyond your control, which continued for 30 days beyond the receipt of the penalty notice.”

10. On 17 February 2013 the appellant agent replied observing that HMRC’s response does not refer to the contents of the appeal letter.

40 He also states the 4 years of caring for two parents, both suffering and dying, ...requiring every spare moment outside her rendering therapy and counsel to her own private patient and client case load; and to the bereavement trauma that lasted right through until the end of 2012.

45 In summary once the appellant was beginning to come through her bereavement she set about diligently getting 5 years worth of her affairs sorted out between mid-June

and mid-September 2012 and paying HMRC in October 2012 over £11,000 to include all interest and reasonable penalties of £2000 for each year late.

5 11. In the Notice of Appeal dated 1 April 2013 the appellant's agent refers to the letter dated 10 December 2012. The agent requests that that letter is given a full reading.

12. HMRC's submissions

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 2010-2011 tax returns was filed by the legislative date.

10 13. HMRC records show that the appellant submitted her online SA return on 17 September 2012.

14. HMRC say that the SA return for the 2010-2011 year issued to the appellant clearly showed the due dates for filing the return online or in paper format.

15 15. 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 decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer,
20 in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard".

16. HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

25 17. HMRC say that serious illness can only be accepted if the situation meant that the customer (taxpayer) was incapacitated for the whole period from the filing date to the date the return was received. The appellant did provide dates during which she was caring for her parents, 2004 to September 2010, and then dealing with her bereavement and her late parent's affairs from September 2010 to November 2012.
30 However during this period the appellant's self-employment continued and HMRC records show profits of over £19,000 each year for 2008-2009, 2009-2010 and 2010-2011.

18. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.

35 19. HMRC say the penalties are not disproportionate. They say that in order for a national measure to be considered disproportionate it must be "not merely harsh but plainly unfair." They refer to the decision in *International Transport Roth GmbH v SSHD*.

40 20. 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 observe that throughout the period the appellant continued being self-employed and was able to deal with practicalities of her business. They therefore expect her to be able to deal with the paperwork associated with that business or make arrangements for an agent to deal with her returns. They therefore consider that there are no special circumstances which would allow them to reduce the penalty.

21. Tribunal’s Observations

The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit SA returns on time. The return for the periods 2010-2011 was due to be submitted by 31 January 2012 but it was submitted late on 17 September 2012. Penalties totalling £1,300 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.

22. The Tribunal notes HMRC’s response to the appellant’s appeal to them dated 10 December 2012. It is true that the appeal was made outside the time limits. However HMRC’s response states “The only circumstances which we can accept a late appeal is if you have a reasonable excuse for not completing the tax return on time. This reasonable excuse must be an unexpected or unusual event, either unforeseeable or beyond your control, which continued for 30 days beyond the receipt of the penalty notice.”

Firstly the Tribunal finds it difficult to understand why HMRC considered that the appellant’s letter did not lead them to conclude that these conditions had been fulfilled.

Secondly the Tribunal is aware that the phrase “an unexpected or unusual event, either unforeseeable or beyond your control” is taken from the dissenting judgement of Scott LJ in the case of *Salevon Ltd*. It being from the dissenting judgement the Tribunal considers it inappropriate for HMRC to use it to consider whether the appellant had a reasonable excuse in this case.

The Tribunal got the impression that the person replying saw that the date of the letter made it out of time so issued a standard response letter to out of time appeals without properly considering either the appeal letter or the wording of their standard response.

23. It is clear that the appellant had gone through a prolonged period of difficulty. The experience was traumatic and involved the appellant in running her own self employed business, looking after her own home, looking after her ailing parents and their home; attending to her parents personal needs and for a time driving her father to visit her mother in various hospitals sometimes twice a day. It would have been physically and mentally exhausting for her. She then suffered the loss of her parents in April and September 2010. During this period of bereavement she had to deal with her parents personal effects and deal with their financial affairs.

The Tribunal considers it understandable that during this period the appellant omitted to give proper attention to her tax affairs.

HMRC say that the appellant was able to continue her business so there is no reasonable excuse or special circumstances that could allow them to cancel or reduce the penalty.

5 The Tribunal disagrees. The appellant had to work to support herself and pay the
everyday expenses of keeping her home. The fact that she did that and was able to
look after her parents in the way described is remarkable. Caring for her parents and
attending to their needs required almost every spare moment outside her rendering
therapy and counsel to her own private patient and client case load. Following the
10 death of her parents the appellant was faced with dealing with disposing of her
parents' personal effects and possessions and dealing with her father's financial
affairs including obtaining probate. She continued working beyond retirement age.
One reason for that was that she was conscious that she needed to sort out her tax
affairs which she with the help of her agent achieved by 6 January 2013. In the
15 Tribunal's view the appellant went through a period of trauma and great personal
difficulty culminating in the loss of both of her parents in a short period of time. She
had then to cope with her bereavements. Once her situation eased she attended to her
tax responsibilities without too much delay. The Tribunal considers the appellant has
established that she had reasonable excuse for the late submission of her return for the
period ended 5 April 2011

20 25. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the
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 disagrees. The Tribunal has found that the appellant had
25 reasonable excuse for her failure to submit her return on time. Should it be found to
be wrong on that conclusion the Tribunal records that it would have found that there
were special circumstances and it would have reduced the penalty to nil.

26. The Appellant has established a reasonable excuse for the late submission of her
tax return for the period 2010-2011. Therefore the appeal against the late filing
30 penalties of £1,300 is allowed.

27. 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
35 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.

40

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 4 APRIL 2017