



TC05768

Appeal number: TC/2013/06927

Income tax – self assessment – return filed late – penalty – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN FOTHERINGHAM

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 6 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 10 September 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 15 February 2017.

DECISION

Introduction

1. The appellant lodged an appeal against a late filing penalty of £100, daily
5 penalties totalling £900 and a six month late filing penalty of £300 for the late
submission of the self-assessment return for the year 2011/2012.

2. On 9 October 2013 the appeal was stood over pending issue of the decision of
*Donaldson v HMRC*¹. In the First-tier Tax Tribunal the taxpayer had succeeded in an
argument relating to daily penalties but HMRC succeeded in both the Upper Courts.
10 Accordingly *Donaldson* does not assist the taxpayer.

3. This appeal was on the basis that the appellant had a reasonable excuse for the
late submission of the return. The appeal included an application by the appellant to
appeal out of time and HMRC did not oppose that application. That application is
granted.

15 Legislation

4. The late filing penalty was imposed under paragraph 3 of Schedule 55 Finance
Act (FA) 2009, the daily penalties under paragraph 4 and the six month late filing
penalty under paragraph 5.

5. In summary, paragraph 3 provides for a penalty of £100 if a return is not
20 received by the filing date, which in this case was 31 January 2013, for an electronic
return.

6. Paragraph 4 provides that if after a period of three months beginning with the
penalty date, the return remains outstanding, then daily penalties of £10 per day up to
a period of 90 days are payable and paragraph 5 provides that if after a period of six
25 months beginning with the penalty date, the return remains outstanding, then a penalty
is payable which is the greater of 5% of any liability to tax or £300.

7. Paragraph 23 of Schedule 55 FA 2009 provides that a penalty does not arise in
relation to a failure to make a return if the person satisfies HMRC (or an appeal,
Tribunal) that they had a reasonable excuse for the failure and they put the right the
30 failure without unreasonable delay after the excuse has ended. That paragraph
specifies explicitly that insufficiency of funds is not a reasonable excuse unless
attributable to events outside the taxpayer's control and where the taxpayer relies on
any other person to do anything then that also is not a reasonable excuse unless the
taxpayer had a reasonable excuse to avoid the failure.

¹ 2016 EWCA Civ 761

The Facts

8. HMRC issued the notice to file to the appellant for the year ending 5 April 2012 on 6 April 2012. The electronic return for that year was received late on 25 July 2013 and processed on 1 August 2013.

5 9. Obviously, the return had not been received by the filing date of 31 January 2013. The late filing penalty in the sum of £100 was issued on 12 February 2013 and the remaining two penalties totalling £1200 on 14 August 2013. Mr Fotheringham has paid the penalties in full but on 1 May 2013 he appealed the penalties on the grounds that he had had problems filing online. His grounds of appeal are
10 summarised as being:-

(1) He could not recall the Gateway details and passwords, was unable to pass the security checks with HMRC, because his profile was out of date, and had to make many telephone calls to try and change his profile.

15 (2) HMRC sent the Gateway number to him but, since he was working in Oman, the correspondence took several weeks to arrive via his home in Muscat.

Discussion and decision

10. Was there any reasonable excuse? *Rowland v HMRC*² at paragraph 18 makes it clear that a reasonable excuse "... is a matter to be considered in the light of all the circumstances of the particular case".

20 11. There is no statutory definition of reasonable excuse but in my view the test articulated by Judge Medd in *The Clean Car Company Limited v CEE*³ should be applied. Judge Medd said:-

25 "The test of whether there is a reasonable excuse is an objective one. In my judgement it is an objective test in the sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?"

30 The same principle applies to all taxpayers, whether traders or not. It would have been prudent to have submitted the return timeously in compliance with the provisions of Section 8 Taxes Management Act 1970.

35 12. Applying this test to the facts, the question is whether a reasonable taxpayer, knowing that he was living and working abroad should have ensured that he knew how to access HMRC's online system for filing. The blindingly obvious answer is – yes.

² 2006 STC (SCD) 536

³ 1991 VTTR 234

13. HMRC have reported that Mr Fotheringham had encountered some trouble filing his 2010/11 tax return in the previous year and that should have made it even more compelling that he ensured that he kept his profile and other details up-to-date. He did not and although I accept that he has now done so for the following years, that cannot affect the decision for this year.

14. Although the case was not cited I agree with the statement of the Tribunal in *Garnmoss Ltd t/a Parham Buildings*⁴ at paragraph 12 where it is stated:

“What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter from mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse ...”.

15. That case concerned a failure to pay VAT on time but the same principles apply in this case. Obviously there was a muddle and/or mistake but it does not amount to a reasonable excuse.

16. Paragraph 16 of Schedule 55 FA 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. I find no reason to disagree.

17. HMRC’s decision in that regard does not appear to be flawed.

18. Lastly, Parliament had laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality.

19. The appeal is therefore dismissed and the late filing penalties are confirmed.

20. 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.

JUDGE ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2017

⁴ 2012 UKFTT 315 (TC)