



TC05791

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Appeal number: TC/2013/04480

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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FAWZIA A. SHUTTARI T/A SHUTTARI PAUL & Co. 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 13 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 prepared on 2 February 2017 with enclosures. The Tribunal wrote to the appellant on 7 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.

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DECISION

1. Introduction

5 This considers an appeal against penalties totalling £420 imposed by the respondents (HMRC) under Paragraphs 3 and 4 of Schedule 55 Finance Act 2009 for the late filing by the appellant of its Partnership tax return for the tax year 2011-2012.

2. Legislation

Finance Act 2009 Schedule 55
Taxes Management Act 1970, in particular Section 12AA

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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
Keith Donaldson v HMRC [2006] EWCA Civ 761
15 International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
David Collis [2011] UKFTT 588 (TC)
Customs and Excise Commissioners v Salevon Ltd [1989] STC 907

20 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 The filing date is defined in paragraph 1(4) of Schedule 55 Finance Act 2009. This states "'filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC."

30 The penalty date is also defined in paragraph 1(4) of Schedule 55 Finance Act 2009. This states "'penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date)."

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.

35 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

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

5 (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).

10 5. In this case in respect of the tax year ended 5 April 2012 HMRC issued a notice to file to the appellant on 6 April 2012. The filing date for a non-electronic return was 31 October 2012 whereas for an electronic return the filing date was 31 January 2013. The appellant submitted a non-electronic partnership tax return on 4 March 2013. As the return was not submitted by the filing date HMRC issued a notice of penalty assessment on or around 12 February 2013 in the amount of £100. As the return had still not been received 3 months after the penalty date , HMRC issued a notice of daily penalty assessment of £320 on or around 12 March 2013, calculated at £10 per day for 15 32 days, (1 February 2013 to 4 March 2013 is 32 days).

6. As the appellant submitted the return by non-electronic means the filing date was 31 October 2012. It follows that the penalty date was 1 November 2012 and 3 months after the penalty date is 1 February 2013.

20 7. 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.

25 8. The appellants are a partnership of solicitors. During the tax year 2011-2012 the partners in Shuttari Paul & Co. were Miss Fawzia A. Shuttari and Mr. A. Yaqoob. Miss Fawzia A Shuttari was the representative partner.

9. On 22 February 2013 she wrote to HMRC. The letter included:-

30 “We refer to your letter dated 12th February 2013 and to advise you that we are appealing the penalty imposed of £100.00 as we tried to complete the self-assessment online but were stopped from doing so as we did not have the relevant codes. We did therefore try to comply but your system would not let us do so.”

10. On 2 April 2013 HMRC dismissed the appeal. The letter included the following.

35 “I do not agree that you have a reasonable excuse for not sending the partnership tax return in on time because you should have applied for the correct software, and activation codes, as it is not the first year you have been in self-assessment.

HMRC's view is that a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from sending the tax return on time."

The letter offered a review.

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11. On 5 April 2013 the appellant replied requesting an independent review. The letter included

10 ".....I tried to send the Partnership Return online and your system blocked all my efforts to do so. It is simply not reasonable to state that I should have applied for the correct software and activation code as I had instructed my accountant to deal with the accounts. When I realised he had failed to do so I tried to do it myself and I fail to understand why your offices should adopt a system which basically thwarts an individual's efforts to complete the form online. Why is it not user friendly?"

15 You should make provision for people who are trying to complete online on the last day instead of preventing them from complying. It is not reasonable to put in place obstacles and then argue that a person has failed without reasonable excuse. It appears that your offices are intent on preventing people from complying so that you can then penalise them. This is an abuse of the powers vested in you. And I seek an independent review"

20 12. HMRC gave the result of the review in a letter dated 12 June 2013 which was that the decision to levy penalties was correct. The letter included:-

25 "you relied on your agent to complete and file your 2011-2012 partnership tax return. When you discovered that your agent had not filed your 2011-2012 tax return you were unable to file the return online by the deadline because you did not have the required commercial software and were not enrolled to use the online service.

I will address these points:

If you employ an agent to complete and file your partnership tax return you remain responsible for ensuring that the return is received by the relevant deadline. Each partner remains liable to a penalty if the return is received late.

30 HMRC does not accept failure by an agent is reasonable excuse for sending a late return."

13. Appellant's submissions.

35 Many of the appellant's submissions are detailed in the letters quoted above.. In the Notice of Appeal dated 1 April 2013 the appellant gives the following grounds for appeal:-

"The HMRC decision is wrong because they have not accepted the reason I have set out for the failure to submit the partnership tax return online by the due date. We had appointed an agent to deal with the partnership tax return and we repeatedly contacted

the agent to make sure that the partnership tax return would be submitted on time. The agent did not respond to our calls so we contacted our other accountant to deal with the matter but he advised that he could not access the online service as our firm's name had been removed from his list of clients. We then tried to complete the form online ourselves and also tried repeatedly to phone the Helpline number but all in vain. We were denied access as we were not enrolled to use the Online Service. All our attempts to complete and submit the form online ourselves by the deadline were thwarted by the system which actively prevents people from accessing and submitting the form. The HMRC stated that it is our responsibility to ensure that the return is received by the relevant deadline but when we tried to accept that responsibility and tried to fulfil that duty we were prevented from doing so. It is simply not fair to set up systems in such a manner that partners of businesses cannot access the form – in the interests of justice access should be allowed and we should at least be allowed to obtain an emergency code to enable us to access the form. Instead to actively deny a person access and then impose a penalty because the deadline has been breached is an abuse of the power vested in the authority. HMRC say that failure by an agent is not a reasonable excuse for sending a late return but they have not explained why failure of their system to allow access is not a reasonable excuse and why the imposition of a penalty in such circumstances is justified.”

20 The appellant considers that the penalty should be waived because reasons beyond their control prevented them from submitting the form online.

14. HMRC's submissions

Some of HMRC's submissions are included in the extracts from their letters quoted above.

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 its 2011-2012 partnership tax return was filed by the legislative date.

15. HMRC records show that the appellant submitted its non-electronic return on 4 March 2013.

30 16. HMRC say that the partnership return for the 2011-2012 year issued to the appellant clearly showed the due dates for filing the return online or in paper format.

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 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, in the position of the taxpayer, would have done in those circumstances and by

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reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

18. 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.

5 19. HMRC say the appellant has been late in submitting its returns in the last four years and penalties were levied. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.

20. 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*.

21. 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*). They say the special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*)

They consider that reliance on a third party and difficulty accessing HMRC online functions do not represent special circumstances which would allow them to reduce the penalty.

22. Tribunal’s Observations

The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit its Partnership tax returns on time. The return for the periods 2011-2012 was due to be submitted by 31 January 2013 but it was submitted late on 4 March 2013. Penalties totalling £420 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.

23. The Tribunal notes HMRC’s response to the appellant’s appeal to them dated 2 April 2013. Included “a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from sending the tax return on time”. 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 or not the appellant had a reasonable excuse in this case.

35 Whilst it is true that the return was made outside the time limits the Tribunal considers that HMRC failed to address why it was submitted outside the time limits. They did not consider what an appellant should do in a situation where in the week

before the deadline for submission of its return it finds out that its agent will not be submitting the return.

Thus in these two ways the appeal decision was flawed.

5 24. In respect of the review HMRC said “you relied on your agent to complete and
file your 2011-2012 partnership tax return. When you discovered that your agent had
not filed your 2011-2012 tax return you were unable to file the return online by the
deadline because you did not have the required commercial software and were not
10 enrolled to use the online service. The review whilst understanding the problem the
appellant had did not address what an appellant should do in a situation where shortly
before the deadline for submission of its return it finds out that its agent will not be
submitting the return.

15 25. The appellant has incurred penalties in past years and wanted to ensure that the
return was submitted by the deadline. They appointed an agent to do this. Attempts to
contact the agent to establish that he had submitted the return were unsuccessful so
the appellant tried to appoint another agent but he no longer had access to the online
service for the appellant’s account. It was now close to the deadline so the appellant
tried to submit the return themselves but were barred from doing so, so they tried
20 repeatedly to phone the HMRC helpline but with no success.

26. In considering both the appeal and the review HMRC failed to address the
problem the appellant had encountered which was that having discovered a few days
before the deadline that his agent was not going to submit an electronic return what
could be done to submit a return on time when electronic returns by anyone other than
25 the agent were barred.

27. In the Tribunal’s view the appellant was placed in difficult circumstances. It acted
responsibly in checking its agent had submitted the return. When it found that the
agent had failed to do so. It immediately sought assistance from another agent. Once
that agent reported that it could not help it tried to submit the return itself and then
30 tried to get help from the HMRC helpline. All of this proved of no avail. It is hard to
see what else the appellant could have done. It could have applied for the required
activation code but it was likely that this would have been received after the deadline
so a penalty would have been occurred. The appellant therefore completed a non-
electronic return which was received by HMRC on 4 March 2013 only 32 days after
35 the online filing deadline of 31 January 2013 which it had tried to meet. Faced with
the unexpected difficulties in submitting an electronic return the appellant acted
responsibly in submitting within a reasonable time a non-electronic return. In the
Tribunal’s view the appellant has established that it had reasonable excuse for not
submitting its partnership return on time. Where the reasonable excuse ceases the
40 matter must be put right within a reasonable time. In the Tribunal’s view the
submission of a non-electronic return on 4 March 2013 put the matter right within a
reasonable time.

5 . 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. Having decided that the appellant has established a reasonable excuse the Tribunal had no need to consider whether or not special circumstances applied.

26. The Appellant has established a reasonable excuse for the late submission of her tax return for the period 2011-2012. Therefore the appeal against the late filing penalties of £420 is allowed.

10 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 than 56 days after this decision is sent to that party. The parties are referred to
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

PETER R. SHEPPARD
TRIBUNAL JUDGE

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RELEASE DATE: 18 APRIL 2017