



TC05913

Appeal number: TC/2013/07023

INCOME TAX – penalty for failure to make returns – whether reasonable excuse for failure – No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN THOMAS ADAMSON

Appellant

- and -

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

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

The Tribunal determined the appeal on 18 May 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 9 October 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 February 2017. The Tribunal wrote to the appellant on 24 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns for the tax years 2010/2011 and 2011/2012 on time.
2. The penalties that have been charged can be summarised as follows:

In respect of the tax year ended 5 April 2011.

- (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 14 February 2012
- (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 7 August 2012
- (3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on or around 19 February 2013
- (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 7 August 2012. This penalty is calculated at £10 per day for the maximum period of 90 days. (1 May 2012 to 29 July 2012 is 90 days)

In respect of the tax year ended 5 April 2012

- (5) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 12 February 2013
- (6) “Daily” penalties totalling £760 under paragraph 4 of Schedule 55 imposed on or around 16 July August 2013. This penalty is calculated at £10 per day for a period of 76 days (1 May 2013 to the filing date of 15 July 2013 is 76 days)

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

- (1) The appellant’s agent argues that the appellant had “reasonable excuse” for the failure to submit the returns on time.
- The appellant’s agent argues that reliance on a third party can be considered a reasonable excuse. The appellant had changed accountants in 2011 and had been assured his affairs would be kept up to date.
- (2) The appellant’s wife had been diagnosed with ME and he had to spend time caring for her
- (3) Two close friends died suddenly.

Findings of fact.

4. A notice to file a self-assessment tax return for the year ending 5 April 2011 was issued by HMRC to the appellant on 6 April 2011. The filing date for a non-electronic return was 31 October 2011 and for a return submitted electronically the deadline date

was 31 January 2012. The appellant's electronically submitted return was received late by HMRC on 3 July 2013.

5 5. A notice to file a self-assessment tax return for the year ending 5 April 2012 was issued by HMRC to the appellant on 6 April 2012. The filing date for a non-electronic return was 31 October 2012 and for a return submitted electronically the deadline date was 31 January 2013. The appellant's electronically submitted return was received late by HMRC on 15 July 2013.

10 6. The appellant changed his accountant in 2011. That accountant failed to submit the self-assessment returns on time. At some time shortly before 3 July 2013 the appellant appointed a new agent Clark Jenner Angove, accountants. Clarke Jenner Angove agrees that the return for both years were filed late.

Appellants submissions

15 The appellant's agent argues that reliance on a third party can be considered a reasonable excuse and cites the following cases;

Stephen Rich v HMRC [2011] UKFTT 533 (TC), and

Angela M Rowland v HMRC [2006] STC (SCD) 536.

20 It wasn't until a debt collection agency became involved that the appellant realised the seriousness of the situation

HMRC Submissions

25 7. 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 his 2010/11 and 2011/12 tax returns were filed by the legislative due dates. They say the appellant has been registered for Self-Assessment since 13 October 1996 and HMRC contend he would have been aware of his obligation to file returns in a timely manner since that date.

30 8. HMRC say they do not have any record of an agent other than Clerk Jenner Angrove being authorised to deal with the appellant's tax matters. As such any other agent would only be able to file returns on the appellant's behalf as a filing only agent. HMRC have no supporting evidence such an appointment was made by the appellant.

35 9. In respect of the illness of the appellant's wife HMRC say that the serious illness of a domestic partner can only be accepted (as a reasonable excuse) if the situation took up a great deal of the appellant's time and attention from the filing date to the date the return is received to the detriment of his business affairs. HMRC contend that this was not entirely the case since the level of business, with one exception, remained fairly constant between November 2011 and April 2013. Statistics obtained from the 6 VAT returns for the period a total of inputs and outputs of over £72,000 for four of the quarters, £51,527 for the quarter ended 31 July 2012 but only £21,440 for the quarter ended 31 January 2013.

10. HMRC say that in addition to the penalty notices they wrote a number of letters to the appellant concerning the outstanding returns and debts. There were letters from the self-assessment system which were dated 5 June 2012, 3 July 2012, 4 June 2013 and 2 July 2013. There were also letters from the Integrated Debt Management System dated 24 March 2012, 31 March 2012, 12 June 2012, 28 June 2012 and 14 March 2013. HMRC records show that the appellant telephoned HMRC on 13 February 2013, 19 March 2013 and 12 June 2013. During the call on 19 March 2013 the appellant was advised that his agent would not have been able to submit paper returns without him signing them first. The appellant said he would contact his agent. During the call on 19 June 2013 the appellant said he had been unable to contact his agent or obtain his records back.

11. HMRC say that they do not consider failure by an agent is a reasonable excuse. They say it is the appellant's responsibility to ensure all his tax obligations are met. If the appellant feels that his accountant has failed in their professional capacity or not followed specific instructions then he should seek redress directly from the accountant or appropriate regulatory authority.

12. HMRC contend that the appellant did not ensure he took sufficient care in relation to his statutory obligations.

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

HMRC also 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.

With regard to the cases cited HMRC say each case turns on its own facts. They do not think facts of a previous case are useful to serve as a precedent.

14. 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 say they have considered the appellant's contentions regarding reliance on another party and carer responsibilities but submit these are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

40 **Discussion**

15. Relevant statutory provisions are included as an Appendix to this decision.

16. It is common ground that the returns were made late. The tax return for the 2010/11 tax year was submitted electronically on or around 3 July 2013. It should have been submitted by 31 January 2012. The tax return for the 2011/12 tax year was submitted electronically on or around 15 July 2013. It should have been submitted by 31 January 2013.

17. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

In respect of reasonable excuse in their letter of 1 August 2013 which considered an appeal by the appellant’s agent HMRC say that a “reasonable excuse must be an unexpected or unusual event, either unforeseeable or beyond your control...” The Tribunal observes that the words “an unexpected or unusual event that’s either unforeseeable or beyond your control” are very similar to words used in the dissenting judgement of Scott LJ in the case of *Steptoe*. The majority of the Court of Appeal in *Steptoe* considered that an event did not have to be “unforeseeable or inescapable” in order to constitute a “reasonable excuse”.

The Tribunal has been referred to the decision of Special Commissioner Adrian Shipwright in the case of Angela Rowland and the decision of Tribunal Judge Nicholas Aleksander in the case of Stephen Rich.

In the latter case Tribunal Judge Aleksander in considering reasonable excuse refers to the Rowland case. At paragraphs 26 to 28 he states:

“26. I now have to consider whether this amounts to a reasonable excuse. This is not defined in the legislation but “is a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [\[2006\] STC \(SCD\) 536](#) at [18]).

27. Although reliance on a third party is specifically precluded from being a reasonable excuse for VAT purposes by s 71 Value Added Tax Act 1994, there is no similar provision in relation to income tax. As this legislation came into effect many years after the VAT provisions had been in force it would have been open to the draftsman to adopt a similar restriction to the definition of “reasonable excuse” for income tax purposes. However as he did not do so I conclude that, in the absence of a specific provision to the contrary, reliance on a third party can amount to a reasonable excuse in cases such as this.

28. I find support for my view from the decision of the Special Commissioner (Adrian Shipwright) in *Rowland* where he said at [22 – 26]:

“The issue arises as to whether reliance on a third-party is prevented from being a reasonable excuse. For VAT purposes there is specific provision that where “reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied on is a reasonable excuse.” There is also specific provision that insufficiency of funds is not a reasonable excuse (see section 71 VATA). The legislation that I am concerned with in this case was passed after the VAT legislation but only contains a provision that insufficiency of funds is not a reasonable

excuse. There is no equivalent provision that reliance on a third party is not a reasonable excuse for direct tax purposes.

5 Whilst in the VAT context it was thought necessary to exclude reliance on a third party as presumably otherwise it could be a reasonable excuse in the direct tax context it is, at most only a indication that reliance on a third party can be a reasonable excuse. However, I consider it a very telling indication especially as it is a limited exclusion for VAT (see *Enterprise Safety Coaches* notwithstanding *GB Capital Ltd*).

10 The *Thorne* case and *Enterprise Safety Coaches* are clear authority that reliance on a third party can be a reasonable excuse.

I conclude that in the direct tax context reliance on a third party can be a reasonable excuse.....”

18. Direct tax legislation pertinent to reasonable excuse has changed since then.

15 Describing a person as “P” Schedule 55 paragraph 23 states

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P 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)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

19. It is clear that in this case the appellant relied on his former accountant to submit his self-assessment tax returns for 2010/2011 and 2011/2012 which tasks, it later became evident, she failed to do. I therefore have to consider whether the appellant took reasonable care to avoid the failure.

35 20. It is clear that many people do not have the skill or expertise to complete tax returns and that is why they appoint others such as accountants, lawyers and tax specialists to do it for them. This is particularly so where special rules apply to the tax treatment of certain activities for example the taxation of film finance partnerships as was the case in *Rowland*.

40 21. I have therefore considered what the appellant did in this case and whether in the circumstances he was in it could be said that he took reasonable care to ensure that his tax return was submitted on time. HMRC suggest (see paragraph 8 above) that the test is to determine what a reasonable taxpayer, 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”.

22. The appellant appointed a new accountant prior to the 2010/2011 tax return having been filed. The Tribunal has been given no explanation of why this was done.
23. The new accountant was professionally qualified and the appellant was assured of her competence to carry out all the required work for him which comprised of quarterly VAT returns and self-assessment returns. The VAT returns were always filed on time, he was therefore assured of her capability.
24. The Tax return for the year 2010-2011 was due to be filed by 31 January 2012 at the latest. As HMRC had not received it they wrote to the appellant on or around 14 February 2012 giving notice of a late filing penalty of £100 and warning of future penalties.
25. The appellant made enquiries of his accountant who explained that the matter had been sorted, and not to worry. He did not question that the matter had been sorted and took no further action in response to the many letters from HMRC.
26. In the Tribunal's view a person taking reasonable care to avoid failures to submit tax returns would exercise some form of supervision to ensure returns had been sent off especially after receiving both a penalty notice and subsequent letters from HMRC advising the return remained outstanding.
27. The Tribunal would have expected the appellant to telephone HMRC earlier than 13 February 2013. That call was likely to have been prompted by the notice of penalty imposed on 12 February 2013.
28. The Tribunal is surprised that it was not until a debt collection agency was involved that the appellant realised the seriousness of the situation. He had received five letters from HMRC Integrated Debt Management System in the period 24 March 2012 to March 2013. The Tribunal accepts that the first one or two of these may have been explained by the accountants explanation that it had been sorted but in the Tribunal's view further letters should have caused the appellant to make further enquiries especially shortly after penalties totalling £1,200 were notified to him on or around 7 August 2012. The new accountants were not appointed until shortly before 3 July 2013.
29. The Tribunal considers that the appellant's lack of supervision of his accountant and the delay in appointing new accountants demonstrate that the appellant did not take reasonable care to avoid the failures.
30. For the above reasons the Tribunal considers that the appellant has not established that he had reasonable excuse for his failures to submit tax self-assessment tax returns for the periods ending 5 April 2011 and 5 April 2012 until July 2013.
31. The Tribunal has some sympathy with the appellant in that during the period the appellant was using this accountant his wife was diagnosed with ME. The Tribunal has therefore considered whether this could explain why the appellant did not exercise sufficient supervision of his accountant. However apart from one quarter it does not appear that his wife's illness caused any serious detriment to the appellant's business affairs. Unfortunately no medical evidence was put forward to enable the Tribunal to

better understand the effect his wife's illness may have had on the running of the appellant's business and other financial affairs.

5 32. The Tribunal agrees with HMRC that if the appellant feels that his accountant has failed in their professional capacity or not followed specific instructions then he should seek redress directly from the accountant or appropriate regulatory authority.

10 20. 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 are any special circumstances in this case which would allow them to reduce the penalty and have concluded there are none. The Tribunal considers that their conclusion is not flawed and sees no reason to disagree.

21. **Conclusion**

15 HMRC has applied the late filing penalties in accordance with legislation. The Appellant has not established a reasonable excuse for the late submission of his tax return for the periods 2010-11 and 2011-2012. There are no special circumstances to allow reduction of the penalty. Therefore HMRC's decision is affirmed and the appeal against the late filing penalties totalling £2,460 is dismissed.

22. **Application for permission to appeal**

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
25 accompanies and forms part of this decision notice.

30 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE: 25 MAY 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

- 10 (a) P's 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 P specifying the date from which the penalty is payable.

15 (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).

(3) The date specified in the notice under sub-paragraph (1)(c)—

- (a) may be earlier than the date on which the notice is given, but
- 20 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

25 (1) P is liable to a penalty under this paragraph if (and only if) P's 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—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

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35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
- 5 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 10 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- 15 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 20 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- 25 (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—
- (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 30 (6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

- 23—
- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

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(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

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(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

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(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

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22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

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(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.