



TC01636

Appeal number: TC/2011/05608

Online filing. Discrimination. Reasonable excuse. Deficient online filing facilities.

FIRST-TIER TRIBUNAL

TAX

ST GEORGES BRICKLAYERS

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: GERAINT JONES Q. C. (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 14 November 2011 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 18 July 2011 and HMRC's Statement of Case submitted on 9 September 2011.

DECISION

1. The appellant, St Georges Bricklayers, is a partnership and thus it was required to serve a partnership tax return by the 31 January 2011. It could file a paper tax return by the end of October 2010 or file online by 31 January 2011.
2. The partnership did not file a paper tax return by the end of October 2010 as it intended to file online by the later filing date. When it went to make its online filing it found that the respondent did not provide the means for it to do so without the appellant going into the commercial market to purchase software that would allow it to file online, if available. That is in sharp distinction with other taxpayers who are provided with a comprehensive online filing service by the respondent and do not need to go into the commercial market to buy specialised software to allow online filing to take place.
3. The appellant partnership, by each of its five partners, says that once it was discovered that they could not file online, because the respondent did not provide a comprehensive online filing facility, they caused a paper tax return to be hand delivered to the respondent's Telford office on the 31 January 2011. The respondent contends that that is not an option that was open to the appellant notwithstanding that the appellant acted entirely reasonably in so doing. However, the respondent has preferred to display inflexibility rather than taking that the pragmatic view that a tax return has been filed timeously, albeit on dreaded paper.
4. The appellant asked for a review of the penalty of £500 by a letter of the 14 May 2011. The appellant pointed out that although the respondent required the appellant to provide its return by filing it online, the respondent had neglected to provide the technical facilities to allow that to happen.
5. The review decision letter is dated 19 June 2011. The response to the complaint that the respondent has failed to provide a comprehensive online filing facility is : *"Partnerships have always had to use third-party commercial software since the introduction of online filing for self assessment."* That is an assertion of fact, rather than a credible explanation as to why the respondent fails to provide a comprehensive online filing facility, immediately usable by a person required to file online, without going into the market to acquire expensive software.
6. The letter of 19 June 2011 goes on to say that : *"Lack of third-party software is not considered a reasonable excuse."*
7. The respondent has not pointed out, but could properly point out, that it is a statutory requirement that filing takes place online. If it is after 31 October in any year that is a proper point to make. However, there is no statutory requirement that the taxpayer should equip itself with the software with which to do so. The fact that the respondent chooses to desist from providing a comprehensive online filing facility, readily usable by people required to make an online filing, is not something provided for by Parliament. The provisions of section 12AA Taxes Management Act 1970 do not provide that the respondent can lawfully desist from providing a comprehensive

online filing facility, leaving it to the taxpayer to find appropriate software, if that is possible, so as to effect the necessary filing.

5 8. The difficulty with the respondent's position is that it does provide a comprehensive online filing facility for individual taxpayers but it has chosen not to do so, so far as partnerships are concerned. It does not explain why it discriminates between taxpayers in that way. It does not explain why it fails to provide a comprehensive online filing facility for some but not for others.

10 9. As the appellant was prevented from filing online by the failure of the respondent to provide a comprehensive online filing facility, the partners did the next best thing and delivered a paper tax return by 31 January.

15 10. Thus this appeal raises a simple issue. Is it a reasonable excuse for failing to file a tax return on time, that the authority requiring that tax return to be filed, has failed to provide a comprehensive online filing facility readily available for use by those required to file online. For an excuse to be a "reasonable excuse" there are only two requirements. The first is that an excuse must be put forward. The second is that when viewed objectively, that excuse must be reasonable. If those two requirements are met, then a reasonable excuse exists.

20 11. It is important that two separate issues are not confused. The first issue is that the appellant has, by statute, an obligation to file online by a given date, if the paper filing deadline has not been met. Thus, the respondent establishes that there has been a default in this case.

25 12. The second and quite distinct issue is whether or not there exists a reasonable excuse for that failure. It must be a matter of judgement as to whether, when a public authority such as the respondent chooses to discriminate between taxpayers by providing a comprehensive online filing facility to some of them but then desisting from providing a necessary comprehensive online filing facility to others, knowing that thereby it will put impediments in the way of people who are required to make an online filing, that permits such persons to claim that they have a reasonable excuse for their failure.

30 13. As I have said above, there is no evidence and no explanation available to me from the respondent as to why it discriminates between taxpayers in that way. There is no evidence from the respondent to show that there is any impediment whatsoever to its providing the appropriate and necessary comprehensive online filing facility. Indeed, there is an irresistible inference that if it can provide a comprehensive online filing facility for individuals, it could, if it wished, also provide such a facility for a partnership.

40 14. In my judgement the appellant establishes that it has an excuse for its failure to file online by 31 January, that is, that the authority requiring it to file online had failed to make available a suitable and comprehensive online filing facility for use by the appellant.

15. The next consideration is whether, when viewed objectively, that excuse is a reasonable one. The mere fact that the respondent chooses not to make such a comprehensive online filing facility available to all partnerships does not, in my judgement, inform the assessment of whether the appellant's excuse can be considered, when viewed objectively, to be reasonable. In my judgement the essential consideration is whether it was reasonable, from an objective viewpoint, for the appellant to fail to file online in circumstances where the respondent failed to make an online filing facility available to the appellant. It can be put another way. Is it reasonable to require the appellant to undertake the task of searching out and paying for third-party software, if available, which it may or may not have the skill and ability to deploy. I do not consider it remotely reasonable that the respondent should proceed in that way absent express authority from Parliament that it can and should do so. Upon my perusal of the relevant statute, there is no statutory basis for the respondent failing to provide a comprehensive online filing facility and/or providing that the respondent can require an appellant to search out and purchase software, if available, to allow an appellant to file on line. Indeed, that further pre-supposes that any such person or partnership has the technical skill and knowledge to manipulate such software in such a way as to persuade it to allow online filing.

16. It is my judgement that it is not objectively reasonable for the respondent to impose that burden upon a taxpayer, especially when it discriminates between different categories of taxpayer by providing a comprehensive online filing facility to some, but not for others.

17. I next have to consider whether the statutory requirement for online filing carries with it an implied statutory obligation upon a taxpayer to equip itself with the means (both in terms of materials and skills) by which to make an online filing. I reject that notion for a very simple reason. It is this. Quite regardless of what software a taxpayer might purchase from a third-party supplier, it would be quite useless unless and until the respondent has put in place at least a substantial part of the online filing facility. In other words, online filing relies overwhelmingly upon the respondent making the necessary technical or electronic wizardry available. Thus, in my judgement, it cannot properly be said that Parliament has impliedly required a taxpayer to provide an unspecified part of that wizardry, leaving it to the respondent to provide only such part as it might choose to provide. If Parliament had intended so to provide, it needs to have done so in very plain terms. It has not. Thus we arrive at a situation where the respondent has simply chosen to impose a burden upon certain categories of taxpayer, but not others. In my judgement it is entirely reasonable for a taxpayer who is discriminated against in that way, to say that by reason of the lack of a comprehensive online filing facility being provided by the respondent, it has a reasonable excuse for failing to make such a filing.

18. The appellant in the instant case will, no doubt, by reason of its experience to date, choose to file a paper return by the 31 October in each tax year rather than trying to rely upon the respondent's deficient online filing facility. However, for the purposes of this appeal, the appellant did not know that it would be faced with an inability to file online, by reason of the respondents failure as identified above, and so

it is my judgement that it has a reasonable excuse for failing to file a paper return by 31 October.

5 19. 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.

10

Decision.

15 Appeal allowed in full.

20

25

TRIBUNAL JUDGE
RELEASE DATE: 7 DECEMBER 2011

30