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TC05748

Appeal number: TC/2013/02745

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INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns – Yes until 23 January 2015, after that date - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

15

ANDREW P. JELLEY

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 30 March 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 a letter from the appellant to the Tribunal dated 17 April 2013 which has been taken as an appeal, 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 he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

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DECISION

1. Introduction

5 This considers an appeal against a penalties totalling £1,600 imposed by the respondents (HMRC) under Paragraphs 3,4,5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment (SA) tax return for the tax year 2010-2011.

2. Legislation

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

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
15 Keith Donaldson v HMRC [2006] EWCA Civ 761
Garnmoss Ltd trading as Parham Builders [2012] UKFTT 315 (TC)
HMRC v Hok Ltd. [2012]UKUT 363 (TCC)
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
20 David Collis [2011] UKFTT 588 (TC)

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
25 taxpayers for the late filing of tax returns.

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.

30 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
- 35 (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).

40 Paragraph 5 of the Schedule provides

(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—

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

Paragraph 6 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 12 months beginning with the penalty date.

(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
15 (b) £300

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

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
20 October 2011 whereas for an electronic return the filing date was 31 January 2012. At the date HMRC prepared their statement of case (30 January 2017) the appellant had failed to submit his tax return. 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
25 February 2012 in the amount of £100. As the 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. As the return still had not been received 12 months after the penalty date HMRC issued a
30 notice of penalty assessment on or around 19 February 2013 in the amount of £300.

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
35 correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice.

7. The bundle of papers provided to the Tribunal commences with a letter dated 27 August 2012 to HMRC from the appellant. It is a response to a letter to the appellant from HMRC dated 7 August 2012. A copy of that letter was not provided to the
40 Tribunal but it is presumed that it was the notice advising of the daily penalties totalling £900 and the 6 months late penalty of £300 referred to in paragraph 5 above.

8. The letter from the appellant states “In reply to your latest letter dated 7th August I am having to write to you again. I am currently serving a prison sentence and obviously have no way to submit a self-assessment form. I have written at least ten times, but you are still sending me your letters showing an ever increasing bill. I cannot call you as we do not have touch tone phones here. I am at my wits end, Please can you acknowledge receipt of this letter.”

9. None of the ten letters referred to were included in the bundle.

10. On 12 September HMRC acknowledged receipt of the letter which they treated as an appeal. They said that they could not consider the appeal until the appellant had submitted his return, and warning of further penalties if the return was further delayed.

11. On 1 November 2012 HMRC wrote to the appellant saying they still have not received his return and therefore could not consider his appeal. The letter included a warning of further penalties including daily penalties. It also advised that “You can print out a return form from our website...”

12. On 7 November 2012 the appellant wrote to HMRC but a copy of that letter is not included in the bundle before the Tribunal. The Tribunal is aware of it because HMRC wrote to the appellant on 29 November 2012. The letter included

13. “Thank you for your letter of 7 November 2012.

I am sorry to learn that you are experiencing problems in getting in touch with us. I enclose HMRC factsheet for your reference....” The remainder of the letter repeated the letter of 1 November 2012.

14. On 15 January 2013 HMRC wrote to the appellant about his appeal. They did not agree that the appellant had a reasonable excuse for the late return because the appellant had not advised them of the date when his self-employment ceased and the date he went into prison. The letter also said that the appellant had not returned blank forms HMRC had sent him. The letter also said

“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 your return in on time.

30 15. **Appellant’s submissions**

On 23 January 2013 The appellant requested a review of the decision.

His request stated

“ I was sent to prison on 27 October 2011. This was unexpected. I received 6½ years. I had stopped working as a self-employed person at that point. Even though I haven’t earned any money for the whole of 2011 – I was exploring new avenues. How can I complete blank tax returns in prison?”

16. On 1 March 2013 HMRC wrote to the appellant giving him the result of the review. The review confirmed the penalties. It also included the following;

5 “I understand that you went to prison on 27 October 2011, you would have been expected to take steps to contact HMRC or a tax adviser for assistance in order to complete the return by the due date. The time given for completion of a return is considered to be sufficient to allow you to arrange your affairs to ensure that the return is completed by the due date.”

10 “I have updated your records to show your self-employment ceased on 27 October 2011. Your 2008-2009 tax return shows that you had income from land and property and are therefore required to complete a self-assessment tax return.”

“Where you are unable to obtain all the information to complete the tax return, the guidance issued with the tax return states that estimated information and an explanation in the additional information space should be submitted.”

15 17. On 8 March 2013 the appellant wrote to HMRC responding to the result of the review. His response included

20 “I was entirely unprepared for being sent to prison – I did not expect to be unable to file my return electronically by 31st January deadline as I have done in the past. As you can probably imagine being sent to prison for the first time was unbelievably traumatic and upsetting and my immediate thoughts were for my young family. There is a lack of communication ability in prison as any research into the prison system will tell you. I have a controlled amount of telephone numbers that I am able to call and I have to get each one vetted before I am allowed to add it to my account. Also any number that produces a recorded person giving a list of keys to press is useless as
25 the prison telephones do not allow this type of touch tone activity.

I was moved around various prisons for the first 4 months of my sentence and mail would eventually find me after considerable delays. As soon as I started to receive letters from you I started writing back explaining my situation. – at the last count I had written 21 letters, It took many months of writing to even get an
30 acknowledgement from you of receiving any letter.

When you eventually sent a paper return to me to fill out, you never explained that I could just fill in some estimated information – I thought the whole purpose of the return was to be an accurate statement of my financial affairs.....

35 ...I am locked up and unable to carry out the simplest administration in my life because I am in prison – it is very frustrating, but I will be free in January 2015 and will pick up the pieces of my life then.

I have tried my hardest to communicate with you over this period, and for you to say that, basically my reasons are not good enough I find absolutely ridiculous.....”

40 18. On 28 March 2013 HMRC responded to the appellant’s letter. They advised that a taxpayer is only entitled to one review and suggested an appeal to the Tribunal.

19. In his letter to the Tribunal dated 17 April 2013 the appellant states:

“I am writing to you as a last resort as I am at a total loss as to what to do with regards to my outstanding tax problems.

5 I have only just been informed of your address and understand that I have to ask that you my appeal even though I am past the 30 day appeal deadline. I am currently serving a 6 ½ year sentence in prison and have a current release date of 24 January 2015 and ever since coming into prison I have had the same ongoing problem with HM Revenue & Customs.

10 I have written an unbelievable number of letters to them explaining my situation and my obvious inability to properly prepare any tax return or to address any of my financial affairs. I do not think they are aware of how difficult it is to communicate with the outside world whilst in prison.

15 I am finding I am going round in circles and am finding this incredibly stressful and ask that some sort of common sense is applied in my situation. When communicating with me last time, they told me I could write to you to look at my case, but simply gave me the internet address so that I might find out the details required to contact you. This is a standard example of the lack of understanding of how I am severely
20 limited in what I can do.

I have taken the liberty of enclosing examples of communication between the revenue and myself for your information. I cannot call any of your telephone numbers because the system in prison will not accept them – I wonder if the Revenue is aware of this –
25 so have to rely on the postal system.

I am so concerned as to this situation that I have appointed my solicitors to look at it with me as I feel nobody is looking at my situation in a just manner.”

30 **20. 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 his 2010-2011 tax returns was filed by the due date.

35 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.

21. In respect of the appellant’s claim to have written numerous letters HMRC say that the first contact made by the appellant since 2 February 2010 was the letter of 27 August 2012 which they received on 31 August 2012.

40 22. In respect of the appellant’s claim that he was not told that he could complete the returns with estimated information HMRC say the return guidance issued with all returns clearly states ‘Do not miss the filing deadline because you are waiting for final figures. Instead provide provisional figures and make sure you send the final figures

as soon as you can.’ HMRC say they would have expected the appellant to make provisional returns until his release from prison.

23. HMRC say that though the appellant has been in prison and his self-employment ceased they still require the completed forms for 2009-2010 and 2010-2011 tax years as the appellant was in receipt of income from property. They confirm that at the date of preparation of their statement of case (30 January 2017) the returns remained outstanding.

24. 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 do not consider the appellant has provided reasonable excuse for the late submission of the return.

25.. In respect of the penalty being unfair HMRC say for a national measure to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

26. 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 consider that there are no special circumstances which would allow them to reduce the penalty.

27. Tribunal’s Observations

All the letters written by the appellant to HMRC and which were included in the bundle provided to the Tribunal have been referred to or quoted in this decision. They number less than 10.

28. The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit SA returns on time. The return for the period 2010-2011 was due to be submitted by 31 January 2012 but as at 30 January 2017 it had not been submitted. Penalties 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.

29. The appellant received a 6½ year prison sentence from 27 October 2011 which he says was unexpected and affected his plans to submit his tax return by 31 January 2012.

Whilst the appellant says the prison sentence was not expected he would have had to appear in court before the sentence was given and he must have considered it a possibility.

30. However the Tribunal accepts that the appellant would have no financial records with him making estimation of income very difficult. It is clear that communication with the outside world was not straightforward for him. In their responses HMRC do not seem to have grasped the difficulties involved. An example is that HMRC advised
5 that estimation is covered in the guide sent to the appellant with his SA return. That return was sent to him before he went to prison so it was not available to him. In their letter of 28 March 2013 HMRC suggest that the Tax Tribunal can be contacted by telephone or use of their website, or by writing. The first two alternatives were not available to the appellant.

10 It was confusing of HMRC to include warnings of daily penalties in their letters to the appellant dated 1 and 29 November 2012. These warning were clearly given after the maximum for daily penalties had already been imposed on 7 August 2012.

31. The appellant says in the first 4 months of his sentence he was moved around various prisons and mail would eventually find him after considerable delays. Four
15 months from 27 October 2011 takes one to 27 February 2012 that is after the deadline for submission of the appellant's tax return.

32. In their letter of 15 January 2013 HMRC say that a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from sending your return in on time. That wording is based
20 on the dissenting judgement of Scott LJ in the case of Salevon Ltd and the Tribunal has placed no reliance on it.

33. The Tribunal has decided that in the circumstances it accepts that the prison sentence created difficulties which severely limited the appellant's ability to submit his tax return on time, and limited his ability to get assistance in doing so.

25 34.. The Tribunal finds that the appellant has established a reasonable excuse for not submitting his tax return due on 31 January 2012 by that date. However that reasonable excuse ceases once the conditions giving rise to the excuse no longer exist. Thus as the appellant was released from prison on 23 January 2015 there was no longer anything limiting his ability to submit his tax return. He therefore no longer
30 had a reasonable excuse for not submitting it. He has not submitted the return and has not established any reasonable excuse for not submitting his return within a reasonable time after the date of his release.

35. 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
35 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. As the Tribunal has allowed the appeal The Tribunal does not need to comment on that conclusion.

40 36. The Appellant has established a reasonable excuse for the late submission of his tax return for the period 2010-2011. That excuse ceased with effect from the date of

his release from prison on 23 January 2015. That being the case the onus was then on the appellant to put right his failure within a reasonable period of time.

5 The Tribunal finds that by 30 January 2017 the appellant still had not submitted his self-assessment return for the 2010-2011 period. In the Tribunal's opinion over two years (23 January 2015 to 30 January 2017) cannot be considered as within a reasonable period of time. Whilst this appeal against the original penalties is allowed it follows that because of that continued failure HMRC may level penalties and interest for the period since 23 January 2015.

10 37. 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)" 15 which accompanies and forms part of this decision notice.

PETER R. SHEPPARD
TRIBUNAL JUDGE

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RELEASE DATE: 5 APRIL 2017