



TC05756

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Appeal number: TC/2013/02405

INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns – No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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WALTER J. WYLIE T/AS INKSLINGERS

Appellant

- and -

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

Respondent

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

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The Tribunal determined the appeal on 5 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 15 March 2013, and HMRC's Statement of Case received by the Tribunal on 31 January 2017 with enclosures. The Tribunal wrote to the appellant's agent on 1 February 2017 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received.

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DECISION

1. Introduction

5 During 2010-2011 the partners of Inkslingers were Walter J. Wylie and Mr. D.K.McBride. Mr.Wylie was the representative partner.

2. This considers an appeal against penalties totalling £1,300 imposed by the respondents (HMRC) under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of its self-assessment (SA) tax return for the tax year 2010-2011.

10 3. Legislation

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

4. Case law

15 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
HMRC v Hok Ltd. [2012]UKUT 363 (TCC)
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
20 Rowland v HMRC [2006] STC (SCD) 536
David Collis [2011] UKFTT 588 (TC)

5. Facts

25 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.

30 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.

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,
- 35 (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.”

(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).

Paragraph 5 of the Schedule provides

5 (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 –

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

(b) £300

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

15 6. 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 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant failed to submit its tax return until 16 August 2012. 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 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, 20 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.

25 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 30 assessment does not affect the validity of the notice.

8. History

On 21 September 2012 the appellants' agents, Full Circle Accountancy, wrote to HMRC. Their letter states

35 "We have been forwarded the latest statement dated 5 September regarding our ...client that shows penalties due of £1,933.70.

We note the penalties that have been applied by HMRC and consider these to be out of all proportion to the circumstances in this case.

You will be aware from the submission of the outstanding return that there was no income tax or national insurance liability. Mr. Wylie has been charged with the penalties we assume as being the nominated partner.

5 Mr. Wylie has stated that he had no idea that there were any outstanding returns (until relevant penalty notices started being issued) and had not been made aware by his former accountants that returns were to be submitted, as he had assumed that his former accountants had already submitted the necessary returns. Mr. Wylie is not familiar with the Income Tax process or with the penalty regime, having relied on his previous advisers.

10 He is now employed locally under Schedule E and there is very little likelihood of him entering self-employment as far as we can ascertain.

The level of penalties levied on our client is out of all proportion to the situation as we know it. We therefore request that his case be reviewed as a matter of urgency as the penalty notices are causing him significant stress and anxiety....”

15 9. On 5 October 2012 HMRC replied to Mr. Wylie. They had taken the letter as an appeal. They stated that they did not agree that he had a reasonable excuse for filing his return late.

20 HMRC said in their view 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.

They said that in their view Mr. Wylie had been self-employed for a number of years and should have been aware that a tax return was required each year. It does not matter what the level of income is. A new penalty regime commenced in the 2010/2011 tax year and from this time penalties stand even if there is no tax liability.

25 The letter offered a review.

10. On 24 October 2012 the appellant’s agent responded to HMRC’s letter.

We refer you to S102 TMA 1970 and manual reference EM5310 with particular reference to item 3 regarding disproportionate penalties.

30 Our previous letter raised this issue which has not been addressed and we believe has validity. This was a partnership whose accounts now show a turnover of £7,385 and a net profit of £3,666. There is no income tax liability. The partnership penalties appear to be at least £1,933.

We repeat our contention that the level of penalties is out of all proportion to the offence.

35 As an addendum you need to be aware Mr. Wylie is on a weekly wage of £182 gross

HMRC has the power of discretion and we urge you to exercise that discretion in this instance.

11. On 7 December 2012 HMRC advised Mr. Wylie of the conclusion of their review which was that the decision to charge the penalties was correct.

5 The letter was similar to the letter of 5 October 2012 but did not include HMRC's view of reasonable excuse. It did include

10 "It is ultimately the nominated partner's responsibility to ensure that a partnership return is submitted by the due date. The first penalty notification advising you that a partnership return was late was sent to you on 14 February 2012 and the statement sent to you on 26 February 2012 would also have shown the partnership penalty. Following these first penalty notifications the submission of an online return by 30 April 2012 would have avoided further penalties. An online partnership return was not received until 16 August 2012 more than six months after the first penalty notice. I am unable to agree that you have provided reasonable excuse extending throughout
15 the period that the return was overdue.

The amount of the penalties cannot be regarded as contributing to a reasonable excuse for the late submission of a return. The penalties are set in legislation and applied equally to all taxpayers. HMRC have no discretion in either the application or the level of the penalties set by legislation."

20 That appeared to conclude HMRC's discussion on the appellant's agent's submissions because there follows a separate heading "Action to take within 30 days of this letter" which gives details of appealing to the Tribunal if you disagree with the decision.

There then appears a heading "What will happen if you do not act" which gives details of settlement of the claim and paying the penalties.

25 That is then followed by the heading "Interest" which gives details of the interest charged on unpaid penalties

Unexpectedly the section headed interest concludes with the following two paragraphs

30 "Your agents have requested that HMRC use discretionary powers to mitigate the penalties where penalties are considered to be wholly disproportionate. The guidance referred to by your agents makes it clear that it is only considered in exceptional circumstances. Given that parliament has specified the level of penalties which a taxpayer has incurred and denied a tribunal the ability to alter this HMRC will only mitigate in certain narrowly constrained circumstances.

35 In any event a request for mitigation will only be considered after has exhausted or abandoned all appeal rights. As your appeal is still ongoing a request for mitigation could not be considered at this stage in the process."

12. On 21 December 2012 the appellant's agents wrote to HMRC complaining that they had again not addressed their point about disproportionate penalties and suggest use of HMRC's discretion.

5 13. On 16 January 2013 HMRC replied disagreeing with the appellant's agent and pointing to the paragraphs quoted above which address the point about disproportionate penalties and use of discretion. It is understandable in the Tribunal's view, that the agent had missed them.

14. Appellant's submissions

10 The Appellants submissions are included in the above paragraphs.

The Grounds for appeal in the Notice of Appeal dated 15 March 2013 state "The fact that a penalty is due is not disputed – it is the quantum that is considered disproportionate given that the partnership ceased 5/4/11 showing turnover of £7,385 and profits of £3,666 divisible equally between the partners. No income tax was due.
15 Mr. Wylie is employed earning approx. £182 gross per week. HMRC are demanding total penalties of approximately £2,000 which is considered disproportionate.

15. HMRC's submissions

HMRC say that in accordance with Paragraph 25(4) Schedule 55 Finance Act 2009 an appeal under paragraph 20 in connection with a penalty payable by virtue of this
20 paragraph may be brought only by the representative partner or a successor to the representative partner.

16. Walter J. Wylie is the representative partner therefore in accordance with paragraph 25 (5) Schedule 55 Finance Act 2009 HMRC have treated this as an appeal against the determination of the penalties on all of the partners in respect of the
25 failure.

17. HMRC say that the self-assessment and partnership returns for the 2010-2011 year issued to Inkslingers and each partner on 6 April 2011 clearly showed the due dates for filing the return online or in paper format. It also explained that penalties would be charged if the return was filed late.

30 18. HMRC records show that the appellant submitted its online partnership return on 16 August 2012 over 6 months late.

19. 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
35 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”.

20. 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 21. HMRC say that the law specifies two situations that are not reasonable excuse

(1) an insufficiency of funds unless attributable to events outside the appellant’s control and

(2) reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

10 22. HMRC note that Mr.Wylie thought his accountant had already submitted the necessary returns. HMRC do not consider that an agent who does not fulfil expectation constitutes a reasonable excuse for failing to submit a tax return on time. In such situations they consider redress should be sought from the agent.

15 23. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the return.

24. 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*.

20 25. 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.

25 **26. Tribunal’s Observations**

30 The Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit SA returns on time. The return for the periods 2010-2011 was due to be submitted by 31 January 2012 but it was submitted late on 16 August 2012. Penalties totalling £1,300 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.

27. The appellant has agreed that the tax return was late and that penalties are due. His main arguments are that the penalties are disproportionate and unfair.

35 28. The appellant claims that the level of the penalties is disproportionate to the offence. The Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power to amend them unless they are incorrectly imposed or they are inaccurately calculated.

29. In HMRC v Hok Ltd the Upper Tribunal at paragraph 36 said "...The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of the perception that it is unfair."

30. The Tribunal is aware that the phrase "an unexpected or unusual event, either unforeseeable or beyond your control" used by HMRC in response to the initial appeal 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 the appellant had a reasonable excuse in this case. In addition HMRC's response did not consider the main point made by the appellant's agent which was that the penalty was disproportionate. The first response to the appeal was therefore flawed in both respects.

31. 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.

32. The Appellant has not established a reasonable excuse for the late submission of his tax return for the period 2010-2011. The Tribunal has no power to amend the level of the penalty which is laid down in legislation. Therefore the appeal against the late filing penalties of £1,300 is dismissed.

33. 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.

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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

RELEASE DATE: 7 APRIL 2017