



**TC05778**

**Appeal number: TC/2013/03401**

***TAX RETURN- LATE FILING PENALTIES- TAX RETURN LATE –  
WHETHER LONG TERM ILLNESS A REASONABLE EXCUSE OR  
SPECIAL CIRCUMSTANCE – NO – APPEAL DISMISSED***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GUY CHOAT**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE IAN HYDE**

**The Tribunal determined the appeal on 7 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 9 May 2013 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 February 2017.**

## DECISION

1. This is an appeal against penalty notices issued to the appellant under paragraphs 3 and 4 of schedule 55 Finance Act 2009 for the late filing of the tax return for the year ending 5 April 2011.

2. This appeal was stood over pending the decision of the Upper Tribunal in *Donaldson v Revenue and Customs Commissioners* which having been decided ([2014] UKUT 536 (TCC)) was then appealed to the Court of Appeal. The decision of the Court of Appeal has now been released ([2016] EWCA Civ 761) and permission to appeal by the taxpayer to the Supreme Court refused and so this appeal was set down for determination.

### Facts

3. On 6 April 2011 a tax return for the year ending 5 April 2011 was issued by HMRC to the appellant.

4. On 14 February 2012, the return not having been filed by the filing date for electronic returns of 31 January 2012, HMRC issued a notice of penalty assessment for £100.

5. On 7 August 2012 HMRC issued two notices of assessments being

(1) A 3 months late filing penalty of £900 being a daily penalty of £10 a day for 90 days.

(2) A 6 months late filing penalty of £300

6. On 19 February 2013 HMRC issued a notice of assessments being a 12 months late filing penalty of £300.

7. On 28 February 2013 an electronic tax return of the year ending 5 April 2011 filed by the appellant was received by HMRC.

8. On 20 September 2012 the appellant appealed to HMRC against the late filing penalty.

9. On 31 January 2013 HMRC issued a decision to the appellant rejecting his appeal and offering a review.

10. On 26 February 2013 the appellant requested a review.

11. On 10 April 2013 HMRC notified the appellant of the outcome of the review upholding the penalties.

12. On 10 May 2013 the appellant appealed to the Tribunal against both penalties.

### The appellant's arguments

13. In his notice of appeal, his request for review and the note he prepared in support of his appeal, the appellant argues that he has been too ill to complete his tax

return. In any event, as he has retired, there is no tax to pay and so completing it is a formality.

14. The appellant provided an extensive note detailing his medical and professional history since 2005 but did not produce any medical reports. However, HMRC have not taken up his offer to inspect his medical records or otherwise challenged his evidence and so I accept it.

15. From 2005 the appellant has suffered from frequent and severe attacks of a condition which, whilst not precisely diagnosed by consultants, is most likely a form of Myleo-Encephalitis or migraine often accompanied by dystonia, muscular tremors, most noticeably in the appellant's hands. The condition results in episodes often starting with a headache but progressing to pain throughout the body and is physically and mentally disabling. The appellant estimates that over the 23 month period from his retirement in September 2010 he has been able to work on his financial affairs for at most three weeks made up of periods of at most five hours a day. Most days during the last year he had been unable to work at all and has slept for about half the working day, reading recreationally for the remainder.

16. The condition prevented the appellant from carrying on his profession as a sole practitioner solicitor. He could not devote sufficient time to his clients and the business became less profitable. In September 2010 he had to retire because he could not obtain professional indemnity cover. In the five years prior to his retirement the appellant did not make a profit. As part of his retirement he arranged for clients to be transferred to other firms. Throughout this period the appellant's priority was regaining his health (or at least preventing further decline) and making a living. In that respect he prioritised his client's work over any concerns of his own such as his tax return.

17. Finally, in response to HMRC's argument, the appellant says that he could not afford to pay someone to complete his tax return for him.

### **HMRC's arguments**

18. HMRC argue that the appellant has been filing self assessment tax returns since prior to 2000 and so is experienced with the system.

19. HMRC accept that ill health can be a reasonable excuse but it must be so serious that it prevented the taxpayer from controlling his personal and business affairs immediately before the due date for the return and from that date until the tax return was received.

20. As the appellant has suffered ill health for a number of years HMRC would have expected the appellant to have made other arrangements for completing and filing his tax return on time.

21. The appellant worked for part of the 2010-11 tax year before he retired on 30 of September 2010 and so he was required by law to complete a tax return and there is no link to liability to pay tax.

22. It is no defence to a filing penalty that there is no tax to pay. Penalties are in place to promote efficient operation of the tax system and are intended to prevent taxpayers who file late from getting any advantage over those who file on time.

### Legislation

5 23. In order for the appellant's arguments on penalties to succeed they must amount to a reasonable excuse or special circumstances within schedule 55 which applies to failure to file a return

24. Paragraph 16 of Schedule 55 provides that a penalty may be reduced if there are "special circumstances";

10 "(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 –

(a) ability to pay..."

15 25. Further, there is a defence in paragraph 23 to the imposition of penalties if there is a "reasonable excuse" for the failure;

"(1) liability to a penalty under any paragraph of this Schedule does not arise in relation to the failure to make a return if the person satisfies HMRC or (on appeal) the First-tier Tribunal .... that there is a reasonable excuse for the failure

(2) for the purposes of sub-paragraph (1)-

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

(b) ...

25 (c) Where the person had a reasonable excuse for the failure but the excuse ceased he/she is to be treated as having continued to having the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

### Decision

30 26. I note as a preliminary point that, whilst this appeal was stood over pending the appeal in *Donaldson*, the appellant is not challenging the penalties on the grounds argued in *Donaldson*, that is to say HMRC's procedure for issuing automatic late filing penalties did not satisfy the conditions imposed by Schedule 55. In any event I note that the taxpayer's arguments were dismissed by the Court of Appeal in *Donaldson* and that decision is binding on me.

35 27. The standard to be applied in determining whether a taxpayer has a reasonable excuse is that of a taxpayer with a responsible attitude to his duties as a taxpayer.

28. The appellant is suffering from a long term ill-health and ill-health can amount to a reasonable excuse. However, if the illness is long-term a reasonable taxpayer, conscious of his responsibilities, is expected to make arrangements for someone to act on his behalf.

5 29. The appellant's argument as why he could not use a third party to prepare and file his return is that he could not afford to pay anyone. On that point Schedule 55 is very clear, and with one exception, inability to pay is neither a reasonable excuse (paragraph 23(1)(a)) nor a special circumstance (paragraph 16(2)(a)). The exception is that paragraph 23 does allow a reasonable excuse to exist where insufficiency of  
10 funds is "attributable to events outside the person's control" but in my view that exception is not intended to apply to the current circumstances. This is not a case of a sudden incapacity preventing a taxpayer from completing his return at the last minute. How the taxpayer manages his long term illness must, for these purposes, be within his control.

15 30. The appellant has just argued that he cannot afford to pay the penalties. There is no further explanation of the circumstances, but the appellant has not argued that this is the case. Parliament has specifically legislated for the appellant's circumstances and I therefore have no jurisdiction to accept the appellant's argument.

31. I find therefore that the appellant did not have a reasonable excuse.

20 32. Finally I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context are limited by paragraph 22 of Schedule 55 to circumstances where it considers HMRC's decision in respect of the application of paragraph 16 was flawed when considered in the light of the principles applicable in judicial review  
25 proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC's decision.

33. I therefore dismiss the appellant's appeal.

30 34. 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)"  
35 which accompanies and forms part of this decision notice.

**IAN HYDE**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 11 APRIL 2017**