



TC05794

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Appeal number: TC/2013/03975

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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MARYSE DIANA KESAVAN

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 12 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 7 June 2013, and HMRC's Statement of Case prepared on 31 January 2017 with enclosures. The Tribunal wrote to the appellant on 7 February 2017 indicating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days. No reply was received.

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DECISION

1. Introduction

5 This considers an appeal against penalties totalling £810 imposed by the respondents (HMRC) under Paragraphs 3 and 4 of Schedule 55 Finance Act 2009 for the late filing by the appellant of her self-assessment tax return for the tax years 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

David Collis v HMRC [2011] UKFTT 588 (TC)

15 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

Rowland v HMRC [2006] STC (SCD) 536

20 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 taxpayers for the late filing of tax returns.

25 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)–

30 (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

(c) HMRC give notice to the person specifying the date from which the penalty is payable."

35 (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).

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 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant's electronic return was not submitted until 10 July 2012. As the return was not submitted by the 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, HMRC issued a notice of daily penalty assessment of £710 on or around 10 July 2012, calculated at £10 per day for 71 days (1 May 2012 to 10 July 2012 is 71 days)

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 correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice. However the Tribunal is critical of HMRC in that no copy of either of the penalty notices was included in the bundle of papers provided.

7. The appellant's husband, Kesavan Manoharan, wrote to HMRC on 18 December 2012. The letter includes:-

"Firstly I would like to apologise for having sent mine and my wife's self-assessment and also the partnership tax return (2010-2011) late. As soon as I received the penalty notice in July 2012, I replied to it in 6th August 2012 stating that due to my illness I couldn't send in our self-assessments on time. I mentioned in the said letter the full details regarding my illness.

I received my self-assessment statement dated 10th December 2012 and my wife's on 12th December 2012. I called HMRC and spoke to a member of your teamon 18th December 2012 and explained to him regarding my previous letter sent in 6th August 2012 but he told me that HMRC hadn't received the letter and advised me to send in another letter explaining the situation again

I was suffering from piles for more than a year and was travelling back and forth from hospital. The pain I was suffering was very very bad and I was bleeding almost every day until I had two operations in 9th March 2012 and 30th May 2012. The matter regarding self-assessment completely slipped my mind. I am very sorry again regarding not sending in our self-assessment forms on time....."

8. On 17 January 2013 HMRC wrote to the appellant advising that an appeal against a penalty notice has to be made within 30 days of the date of the penalty. The letter included the statement that

"The only circumstances in which we can accept a late appeal is if you had reasonable excuse for not completing the tax return on time. This reasonable excuse must be an unexpected or unusual event, either unforeseeable or beyond your control, which continued for the 30 days beyond the receipt of the penalty notice. We are unlikely to

agree that you were prevented from completing your tax return on time or appealing against the penalty within a 30 day period if, during the unexpected event, you were able to manage the rest of your private and business affairs.”

5 The appellants appeal was received outside that deadline so could not be considered. The letter suggested an appeal to the Tax Tribunal.

9. On 25 January 2013 the appellant’s husband wrote to HMRC. That letter included

10 “You mentioned in your letter that I was able to manage with my private life and business life normally but I had failed to submit my tax return but the ordeal and pain during my illness was so terrible and I can’t really explain it with words. I needed a lot of support from my family and friends to go about my daily activities. I really couldn’t think about anything else except when the pain was going to stop.”

10. On 5 March 2013 HMRC wrote to the appellant advising that they still could not accept the appeal and again suggested an appeal to the Tribunal.

11. Appellant’s submissions

15 Some of the appellant’s submissions are included in the paragraphs above. In the Notice of Appeal dated 7 June 2013 the appellant gives the following grounds of appeal:

20 “My husband was late in sending our self-assessment and partnership tax return as he was suffering from piles for more than a year and the pain and bleeding was getting worse and worse. We were constantly going back and fro to the hospital. The self-assessment and tax return was due round the time he was operated on 9th March and 30th May and he was completely bed ridden and had to rely on mine and the family’s support to get by. As a result the matter of sending in the forms completely slipped from our minds and we appealed to HMRC to consider our situation and waive the penalties issued to us.”

12. HMRC’s submissions

30 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 her 2010-2011 tax return was filed by the due date.

35 HMRC say the appellant said she failed to submit her individual tax return on time due to her husband’s ongoing illness. The self-assessment system places a greater degree of responsibilities on customers for their own tax affairs. This includes ensuring that they submit their tax returns at the correct time. The appellant has completed tax returns since 2007-2008 and HMRC would therefore expect her to be aware of her obligations to complete returns and the deadlines for doing so.

40 The appellant says that her husband’s illness was ongoing for more than a year. HMRC would consider this gave her sufficient time to make arrangements to file her return on time

13. HMRC records show that the appellant's self-assessment return was submitted electronically on 10 July 2012.

14. 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 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.

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

16. 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 the special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

17. Tribunal's Observations

25 The Tribunal agrees with HMRC that it is the Appellant's responsibility to submit her self-assessment tax returns on time. The Tribunal considers the appellant was given ample notice to file her return and therefore had ample time to either submit her return or to make arrangements for it to be submitted.

30 18. The return for the period 2010-2011 was due to be submitted by 31 January 2012, but was submitted late on 10 July 2012. Penalties totalling £810 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.

35 19. The Tribunal is aware that the Finance Act 2009 Schedule 55 paragraph 23 specifies two situations that are not to be regarded as providing a reasonable excuse. These are:-

- (1) an insufficiency of funds unless attributable to events outside the appellant's control and
- (2) reliance on any other person to do anything, unless the person took reasonable care to avoid the failure.

In this case the appellant relied on her husband to complete her return. Unfortunately he was unwell and failed to submit it.

20. The tribunal has therefore to consider whether the appellant took reasonable care to avoid the failure. It is clear and understandable that the appellant spent a great deal of time looking after her husband when he was incapacitated. The Tribunal understands that severe cases of piles are very painful and debilitating and it must have been difficult for the appellant to witness her husband suffering.

However the appellant has provided no evidence to show she considered any alternative means of submitting her return. She could have completed the return herself. She could have contacted another agent for assistance, and she could have contacted HMRC for help. She has not provided any evidence to show she did any of these things.

It is therefore with some regret that the Tribunal concludes that the appellant has established no reasonable excuse for her failure to submit her 2010-2011 tax return on time.

23. In respect of whether the level of the penalties is disproportionate to the offence, harsh and unfair 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.

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."

24. 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. The Tribunal sees no reason to disagree.

25. HMRC has applied the late filing penalties in accordance with legislation. The Appellant has not established a reasonable excuse for the late submission of her tax return for the period 2010-11. There are no special circumstances to allow reduction of the penalty. Therefore the appeal against the late filing penalties of £810 is dismissed.

26. 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**

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RELEASE DATE: 19 APRIL 2017