



TC06130

Appeal number: TC/2014/06622

*INCOME TAX – penalty for failure to make returns - reasonable excuse -
no appeal refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**DR KOLA A AKINDELE
T/A**

THE CHIROPRACTIC & COMPLEMENTARY HEALTH CENTRE Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 7 June 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 8 December 2014 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 11 March 2017.

DECISION

Introduction

- 5 1. The appellant lodged an appeal against daily penalties totalling £620 for the late submission of the self-assessment return for the year 2012/2013.
2. The respondents' ("HMRC's") Statement of Case includes a late filing penalty of £100 but since the appellant did not lodge a Reply, there is no comment on that. I have had regard to Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and decided that it is in the interests of justice to
10 extend the time to appeal the late filing penalty of £100.
3. On 4 February 2015, the appeal was stood over pending issue of the decision of *Donaldson v HMRC*¹. In the First-tier Tax Tribunal the taxpayer had succeeded in an argument relating to daily penalties but HMRC succeeded in both the Upper Courts.
15 Accordingly *Donaldson* does not assist the taxpayer.
4. This appeal is on the basis that the appellant had a reasonable excuse for the late submission of the return.

Legislation

5. The late filing penalty was imposed under paragraph 3 of Schedule 55 Finance Act (FA) 2009 and the daily penalties under paragraph 4.
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6. In summary, paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return.
7. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to
25 a period of 90 days are payable.
8. Paragraph 23 of Schedule 55 FA 2009 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.
- 30 9. That paragraph specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control and where the taxpayer relies on any other person to do anything then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

¹ 2016 EWCA Civ 761

The Facts

5 10. The appellant had been self-employed for more than 13 years before the filing deadline for this tax return and he has filed online since 2007/08.

11. The return for the year ending 5 April 2013 was issued to the appellant on 6 April 2013 and there was a filing date of 31 October 2013 for a paper return or 31 January 2014 for an electronic return.

10 12. A penalty notice for the £100 late filing penalty was issued on 18 February 2014, the electronic return was filed on 1 July 2014 and the daily penalty notice was issued on 8 July 2014.

13. On 8 April 2014, the appellant had called HMRC and was given the Online Services Helpdesk number but there is no record of any contact with them.

15 14. The appellant is recorded as having logged onto the online system on 26 and 31 January, 20 March, 8 April, and 3, 13 and 16 June 2014 but did not complete the online submission of the 2012/13 return on any of those occasions.

20 15. On 17 July 2014, the appellant appealed the penalties on the basis that someone else had logged into the account and the name KKK Ltd had been inserted. He had been unable to insert his own details and had required technical help from HMRC (see paragraph 32 below).

16. There appears to have been further correspondence which is not included in the Bundle.

17. HMRC rejected the appeal on 22 September 2014 on the following basis, which reflects additional information that had been provided by the appellant:

25 (a) Although the appellant states that he tried to ring HMRC on several occasions for assistance, but to no avail, the only telephone call logged was on 8 April 2014. There was no call to online services.

(b) Online services can find nothing on the appellant's record that would connect him to KKK Limited.

30 (c) The appellant has provided no medical evidence of the alleged distress and psychological trauma caused to him by seeing the name KKK Limited.

(d) An arson incident some four years previously is not relevant to the filing of the 2012/13 self-assessment tax return.

18. On 4 October 2014 the appellant sought a review of that decision on the basis that:

(a) HMRC had failed to accept the evidence provided and, in particular, had failed to accept his own diagnosis of distress and psychological trauma, stress and depression as a clinician with “extensive training in diagnoses, pathology, psychology, examination and more than 20 years of experience in patient care”.

5 (b) He is competent enough to know his own medical problems without a third party’s ideas.

(c) HMRC had failed to show discretion in his favour despite evidence of financial and business loss since 2010 due to the fire and an adverse economic climate and in the face of “overwhelming evidence provided by him”.

10 (d) HMRC showed a lack of compassion for a business on the brink of collapse and the psychological effects on the owner.

(e) HMRC showed a lack of understanding of the effect of the insulting and racially sensitive issue on his file.

15 (f) HMRC did not accept that he had attempted to file as he had done in previous years.

19. On 21 November 2014, HMRC replied upholding the original decision, on the same basis as previously, but also pointing out that entries made on the online submissions for self-assessment tax returns can only be made by someone with input access to the online account, not by HMRC. They also pointed out that his self-
20 diagnosed ill health could not have continued throughout the period of non-submission since by contacting HMRC on 8 April 2014 he was clearly dealing with his business affairs.

20. On 8 December 2014, the appellant lodged the appeal with the Tribunal on broadly the same grounds as the review request. He stated that HMRC failed to
25 consider his qualifications, to objectively diagnose his state of mind and feelings or to consider his financial position. In addition, he claimed hardship stating that he had no funds available because he had lost about 70% of his business income because of the fire four years previously. He enclosed a copy of his bank statement and a statement by himself.

30 21. That statement is to the effect that reasonable efforts were made to file on time but due to the distress and psychological trauma suffered by him as a “black African man” as a result of the offensive Ku Klux Klan reference on his “file” he had found it very difficult to delete each reference to that offensive company. He had not received
35 help from HMRC. The fact that it was the first time that that had happened made that ground of appeal “valid”.

22. On 24 March 2016, HMRC wrote to the appellant asking for any information regarding the psychological trauma and resulting depression. They also pointed out that they had written to him on 21 November 2011 explaining that only he should
40 have access to his on-line account. They therefore asked if any fraudulent activity had been reported to the police.

23. On 16 April 2016 the appellant responded stating:-

“For your information, as a health practitioner myself with training in diagnoses, different diagnoses, psychological disorder, pharmacology, I did not see it necessary to consult my GP or hospital specifically for distress and stress caused by this matter. As a hypertensive patient it was necessary for my medications to be increased – letter from my GP and medications taken.”

5 24. No GP letter was enclosed. In his inappropriate appeal to the Upper Tribunal, after
the summary decision in this matter was issued (and it had stated that no GP letter was
produced), he lodged a GP letter with a summary of prescriptions. Firstly, that can
form no part of this decision since it was produced after the decision was made.
Secondly, and in any event, if that was what he had meant to send to HMRC it is
10 completely irrelevant since it was dated 3 October 2011.

25. He went on to say that “unfortunately” he did not find it necessary to report the
matter to the police as he thought it was a mistake by HMRC.

Discussion and Decision

15 26. Was there any reasonable excuse? *Rowland v HMRC*² at paragraph 18 makes it
clear that a reasonable excuse “... is a matter to be considered in the light of all the circumstances
of the particular case”.

27. There is no statutory definition of reasonable excuse but in my view the test
articulated by Judge Medd in *The Clean Car Company Limited v CEE*³ should be
applied. Judge Medd said:-

20 “The test of whether there is a reasonable excuse is an objective one. In my judgement it is an
objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing
for a responsible trader conscious of and intending to comply with his obligations regarding tax,
but having the experience and other relevant attributes of the taxpayer and placed in the
situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?”

25 The same principle applies to all taxpayers, whether traders or not. It would have
been prudent to have submitted the return timeously in compliance with the
provisions of Section 8 Taxes Management Act 1970.

28. Applying this test to the facts, the question is whether the appellant had acted
reasonably and prudently.

30 29. The first and obvious point is that only the appellant or his wife (who is his
bookkeeper) had access to the self-assessment return. HMRC cannot access the
return. Further the appellant’s argument has changed. Originally he stated that an
unknown “someone else” had accessed his account but latterly he said that it was a
mistake by HMRC.

35 30. I find it surprising indeed that, when the appellant first accessed the return on 26
January 2014, he appears to have taken no action on seeing those entries. If indeed he
thought HMRC was responsible for the offensive intrusion then he would have been

² 2006 STC (SCD) 536

³ 1991 VTTR 234

5 expected to have lodged a vigorous complaint with HMRC demanding that the situation be rectified. At no stage has he done so. Even if he thought that someone had hacked into his account, again it would have been expected that he would have immediately contacted HMRC. He did not. His first contact was the telephone call on 8 April 2014 after the first penalty had been issued.

31. When HMRC told him that they had no access to his return until it was submitted to them, he would have been expected to have reported the issue to the police. Hacking into tax records is a very serious matter.

10 32. His description of the handling of this issue is inconsistent. In the appeal dated 17 July 2014 he states that he got help from the “technical” (sic) people at HMRC, yet elsewhere he says that he tried to contact HMRC but to no avail. Both cannot be true.

15 33. HMRC have detailed records as to when he went online. They have a record of only one phone call. On the balance of probability I find that the appellant neither sought nor got any technical assistance. I do accept that he made a number of efforts to file online, albeit only the two in the last few days of January would have been in time. I make that point because he is not correct in the statement filed with the appeal when he states that “On several occasions (sic) before the due date, I made efforts to file the self assessment on line...”. He made only the two attempts.

20 34. Further, when he received the first penalty in February 2014 that would have been expected to be a trigger to file the return yet he only went online a month later. That was not acting prudently. When he was given the online telephone number on 8 April 2014 it would have been reasonable to contact HMRC but he did not. If he had filed the return before 30 April 2014 he could have avoided daily penalties notwithstanding the delay. He did not.

25 35. The arson incident and the economic climate cannot be a reasonable excuse for filing a return late. They may be a reason for having limited funds but, in terms of the legislation, that cannot be taken into account when looking at reasonable excuse for late filing (see paragraph 9 above). The general economic climate, although beyond the appellant’s control, cannot be a reasonable excuse. The arson four years
30 previously is an historic event and he was able to file his returns in the intervening years.

35 36. The appellant’s self-diagnosis is not evidence of any illness. It is an unsupported assertion. Although he states that it was necessary to increase his medication for his blood pressure, that is certainly not evidence of psychological trauma or indeed distress at a level which left him unable to file a tax return for a period of months. I agree with HMRC’s argument that his contact with them on 8 April 2014 was indicative of the fact that he was attending to his tax affairs. There is no suggestion that he did not attend to his business.

40 37. A taxpayer’s ability to pay penalties cannot be a factor in considering what amounts to a reasonable excuse for late filing of a return. The penalties are simply the result of the late filing.

38. In all these circumstances I find that the appellant has failed to establish a reasonable excuse for the late filing of this return.

39. Paragraph 16 of Schedule 55 FA 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. I find no reason to disagree.

40. HMRC's decision in that regard does not appear to be flawed in a judicial review sense.

41. Lastly, Parliament had laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are held to be proportionate.

42. The decision of the Upper Tribunal in *HMRC v Hok*⁴ is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

43. The appeal is therefore dismissed and the late filing penalties are confirmed.

44. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 26 September 2017

⁴ 2012 UKUT 363