

[2018] UKFTT 44 (TC)



TC06322

Appeal number: TC/2017/05571

*INCOME TAX – penalty for late filing of returns – reliance upon agent –
whether reasonable excuse – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBIN MACINNES

Appellant

- and -

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

**TRIBUNAL: JUDGE ASHLEY GREENBANK
 PETER SHEPPARD**

Sitting in public at Bradford on 15 January 2018

Kevin McDaid, of Tax Facts Limited, for the Appellant

Paul Hunter, officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This decision notice relates to appeals made by the appellant, Mr Robin MacInnes
5 (“Mr MacInnes”) against decisions of the respondents, the Commissioners for Her Majesty’s Revenue & Customs (“HMRC”) to impose penalties under Schedule 55 to the Finance Act 2009 (“Schedule 55”) on Mr MacInnes for the late filing of self-assessment tax returns for the tax years 2012-13, 2013-14 and 2014-15.

2. The penalties that have been charged include: late filing penalties, in each case, of
10 £100 under paragraph 3 of Schedule 55 (“initial penalties”); “daily” penalties under paragraph 4 of Schedule 55; and “six month” penalties under paragraph 5 of Schedule 55. The total amount of the penalties in dispute is £3,900. Further details of the penalties are set out at [20] and [21] below.

The hearing and the evidence

3. We were provided with a bundle of documents by HMRC at the hearing. In
15 addition, Mr MacInnes gave oral evidence. He was a credible witness.

Late appeal

4. The appeals against all of the penalties were made to HMRC on 3 January 2017.
20 The appeals against the initial penalties were outside the 30 day period that is permitted by s 31A Taxes Management Act 1970. The appeals against the other penalties were in time.

5. Mr MacInnes applied for permission to appeal against the initial penalties outside the 30 day time limit. HMRC did not object to the application. We granted permission for the appeal to proceed out of time.

25 Findings of fact

6. We make the following findings of fact.

7. Mr MacInnes is a self-employed ice cream salesman.

8. On 5 February 2016, a warrant was issued for the search of Mr MacInnes’s
30 property in connection with an investigation by the police and the British Phonographic Industry into illegal file sharing of music and videos. His house was searched by the police in execution of the warrant whilst Mr MacInnes was on holiday. Various items of Mr MacInnes’s property were seized including his computer.

9. On 25 February 2016, a restraint order was issued by the Crown Court in
35 Bradford. The order prohibited Mr MacInnes from disposing of assets. His bank accounts were also frozen.

10. Mr MacInnes has always denied all of the allegations made in connection with the investigation. The investigation into Mr MacInnes has subsequently been dropped. However, throughout the period which is relevant for the purposes of these appeals, Mr MacInnes did not have access to his computer records and his bank accounts remained frozen. Some of Mr MacInnes's property was returned to him in November 2017 and the orders prohibiting use of his bank accounts and disposal of his assets were removed at that time. At the time of the hearing, Mr MacInnes's computer had still not been restored to him.
11. At or about the same time as the police search of Mr MacInnes's property, Mr MacInnes instructed an accountant, Mr George Poppleton, to advise him in respect of his tax affairs.
12. Mr MacInnes had not previously filed a self-assessment tax return. In the periods prior to the tax year 2014-15, his income was too low to give rise to an income tax liability.
13. Mr Poppleton registered Mr MacInnes as self-employed for income tax and national insurance contributions.
14. HMRC issued Mr MacInnes with tax returns for the tax years 2012-13 and 2013-14 on 11 March 2016. Mr MacInnes was required to submit the tax return for these tax years by 18 June 2016.
15. HMRC issued Mr MacInnes with a tax return for the tax year 2014-15 on 25 March 2016. Mr MacInnes was required to submit the tax return for this tax year by 24 June 2016.
16. Although his computerized records were held by the police, at their initial meeting in February 2016, Mr MacInnes provided other documentation to Mr Poppleton in order to enable Mr Poppleton to complete the tax returns. After that meeting, Mr Poppleton did not ask Mr MacInnes for any further information. We infer that Mr MacInnes provided Mr Poppleton with all the necessary information at that time.
17. In the period leading up to the due dates for the filing of his returns, Mr MacInnes was in regular contact with Mr Poppleton regarding the submission of his returns. His mobile phone records show that he contacted Mr Poppleton over 70 times between his initial meeting with Mr Poppleton in February 2016 and the due date for submission of the tax returns. Mr MacInnes also visited Mr Poppleton on various occasions.
18. Mr Poppleton assured Mr MacInnes that the tax returns had been filed electronically before the due dates.
19. HMRC have no record of the tax returns ever having been filed electronically. Mr MacInnes now accepts that the tax returns were not filed by Mr Poppleton at any time.
20. HMRC issued late filing penalties for each of the three tax years under Schedule 55. The initial penalties of £100 for each of the tax years 2012-13 and 2013-14 were issued on 21 June 2016. The initial penalty of £100 for the tax year 2014-15 was

issued on 28 June 2016. Daily and six month penalties were issued on 20 December 2016 and 27 December 2016.

21. Further details of the penalties issued by HMRC are set out in the table below.

Tax year	Penalty	Issue date	Amount (£)
2012-13	Initial	21 June 2016	100
	Daily	20 December 2016	900
	6 month	20 December 2016	300
2013-14	Initial	21 June 2016	100
	Daily	20 December 2016	900
	6 month	20 December 2016	300
2014-15	Initial	28 June 2016	100
	Daily	27 December 2016	900
	6 month	27 December 2016	300

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22. We will not attempt to set out in full the history of the correspondence and other contacts between Mr MacInnes and Mr Poppleton or between Mr MacInnes and HMRC between the due date for filing of the returns and the date on which they were actually filed. However, we have summarized the main points below.

10 (1) Mr MacInnes's telephone records for this period and HMRC's contact records show that Mr MacInnes was in regular contact with HMRC regarding the filing of the returns. In particular, the records of telephone calls show that Mr MacInnes would always contact HMRC shortly after he had received letters or notices from HMRC reminding him to file returns or giving notice of penalties.

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(2) In this period, Mr MacInnes was also in regular contact with Mr Poppleton. The telephone records show that Mr MacInnes contacted Mr Poppleton by telephone over 60 times in this period – and always at or around times when he received any communication from HMRC – concerning the filing of his returns. We are told by Mr MacInnes, and we accept his evidence, that he also visited Mr Poppleton's office on several occasions to enquire about the filing of his returns.

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(3) Mr MacInnes was consistently told by Mr Poppleton that the returns had been filed on time electronically on more than one occasion and that there must be a problem with HMRC's systems if the filing of the returns was not being recognized by them. This was the first time that Mr MacInnes has made a self-assessment return and he accepted Mr Poppleton's assurances in good faith.

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(4) On 20 December 2016, Mr MacInnes contacted HMRC once again. The records show that this phone call lasted approximately 13 minutes. Mr MacInnes once again repeated the assurances that he had been given by Mr Poppleton that the returns had been filed electronically, but he undertook to submit the returns in paper form.

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(5) Following that call, Mr MacInnes arranged to visit Mr Poppleton. He requested paper copies of the returns. Mr Poppleton was not able to provide copies immediately, but, after a short delay, he produced paper copies of the returns. Under a cover of a letter dated 27 December 2016, which was sent by recorded delivery on 28 December, 2016, Mr MacInnes sent paper copies of the returns to HMRC. The returns were received by HMRC on 29 December 2016.

23. The tax returns submitted by Mr MacInnes showed that he had no income tax to pay in any of the three tax years in question.

24. Even though his bank accounts had been frozen, Mr MacInnes arranged for all of the penalties that had been issued to be paid. He was put in funds to do so by his partner.

25. Mr MacInnes appealed against the penalties to HMRC in a letter dated 3 January 2017. The grounds of the appeal were that the returns had been submitted on time by Mr Poppleton.

26. In a letter dated 24 January 2017, HMRC rejected his appeal on the grounds that there was no evidence that the returns had been submitted on time and that Mr MacInnes did not have a reasonable excuse for the late filing of his returns.

27. Mr MacInnes arranged to meet Mr Poppleton at his offices on 2 February 2017 in order to obtain proof that the returns had been filed. Mr Poppleton failed to attend the meeting. On a subsequent visit to Mr Poppleton's offices, Mr MacInnes was told that Mr Poppleton was ill and in hospital.

28. In March 2017, Mr MacInnes appointed Mr McDaid of Tax Facts Limited as his tax agent.

29. Mr MacInnes requested a review of HMRC's decision. In a letter dated 17 March 2017, the review officer, Miss V Hubbard, confirmed HMRC's original decision.

30. Mr MacInnes appealed to the Tribunal.

The relevant legislation

31. Schedule 55 provides for the imposition of penalties for the late filing of returns. In particular, paragraph 3 provides for a penalty of £100 where a tax payer fails to file a return by the due date. Paragraph 4 provides for a daily penalty of £10 for a period of up to 90 days where the failure to file a return continues after the end of three months beginning with the penalty date. Paragraph 5 provides for a penalty of the greater of 5 per cent. of any liability of tax which would have been shown in the return in question and £300 where the failure continues after the end of the period of six months beginning with the penalty date.

32. Mr MacInnes accepts that the penalties imposed by HMRC were properly calculated and charged under paragraphs 3, 4 and 5 of Schedule 55.

33. Paragraph 23 of Schedule 55 provides, however, that the penalties do not arise if the taxpayer satisfies HMRC or, on appeal, the Tribunal that there is a “reasonable excuse” for the failure.

34. Paragraph 23 provides:

5 “23

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

(2) For the purposes of sub-paragraph (1)—

10 (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P’s control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

15 (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

35. The only issue in this case is whether there was a “reasonable excuse” for Mr MacInnes’s failure to file his returns by the due dates.

The parties’ submissions

20 *Mr MacInnes’s submissions*

36. Mr McDaid made the following points on behalf of Mr MacInnes.

25 (1) Mr MacInnes had a reasonable excuse. He had acted throughout as a responsible taxpayer should. He had appointed an agent to complete his returns. But he had not left the matter in the hands of his agent. He had been in regular contact with both his agent and with HMRC throughout the process.

(2) Mr MacInnes relied upon Mr Poppleton to file his returns. He reasonably relied upon the assurances that he was given by Mr Poppleton that the returns had been filed. As soon as it became apparent to him that his returns might not have been filed, he took steps to ensure that the returns were filed in paper form.

30 (3) In the circumstances, there was little more than Mr MacInnes could have done. He did not have access to his computer records, which were held by the police, and he did not have access to his paper records, which were held by Mr Poppleton.

HMRC’s submissions

35 37. For HMRC, Mr Hunter made the following points.

(1) It is the responsibility of the taxpayer to ensure that his or her return is completed and delivered by the relevant deadline. Reliance on a third party is

not a reasonable excuse. In support of this submission, Mr Hunter referred to the decision of the Upper Tribunal in *Ryan v HMRC* [2012] UKUT 9 (“*Ryan*”).

5 (2) Even if a reasonable excuse existed at the due date for the submission of the returns, it must exist throughout the period. Given the number of times that Mr MacInnes sought to contact Mr Poppleton, it must have become apparent to Mr MacInnes at some point that there was a problem with the filing of his returns. At that point, he should have taken steps to ensure that his returns were filed.

10 (3) The seizure by the police of Mr MacInnes’s computer is not relevant. It is clear that Mr MacInnes retained sufficient records to enable him to file his returns. After all, he provided the documentary evidence to Mr Poppleton after the police had confiscated his computer. It was open to Mr MacInnes to obtain those records from Mr Poppleton and to complete his returns.

Discussion

15 38. Mr MacInnes accepts that his returns were not filed by the due dates. He does not challenge the calculation of the penalties. So, as we mentioned above, there is only one issue in this case: that is, whether there was a “reasonable excuse” for Mr MacInnes’s failure to file his returns by the due dates within the meaning in paragraph 23 of Schedule 55.

20 39. There is no definition of “reasonable excuse” in the legislation. The statute does, however, give some examples of matters that cannot of themselves amount to a reasonable excuse. In particular, the fact that the taxpayer has relied upon a third party, such as an agent, to file his returns cannot be a reasonable excuse, unless the taxpayer took reasonable care to avoid the failure (paragraph 23(2)(b)).

25 40. Having taken all of the facts in this case into account, we have concluded that Mr MacInnes did have a reasonable excuse for his failure to file the returns by the due dates. Our reasons are set out in the following paragraphs.

30 41. Mr MacInnes relied upon his agent to file his returns. He had no experience of dealing with self-assessment returns. In his circumstances, that was a reasonable decision to take.

35 42. Mr Hunter says that Mr MacInnes had an obligation to submit his return and it is his duty to ensure that the return is filed. He cannot escape a penalty if, having chosen to engage an agent to file the returns, the agent fails to do so. He referred us to the decision of the Upper Tribunal in *Ryan* in support of his argument that a taxpayer is not entitled to rely upon the default of a third party as a reasonable excuse for the failure to file a return.

40 43. *Ryan* was a case concerning the imposition of a penalty for failure to file a stamp duty land tax return under Schedule 10 to the Finance Act 2003. Under s 97(2) Finance Act 2003, a person is relieved of a liability to pay a penalty for the failure to submit a return if he or she has a “reasonable excuse”. The legislation is not in the same form as paragraph 23 of Schedule 55 - in particular, there is no specific

reference to reliance on a third party as there is in paragraph 23(2)(b) of Schedule 55 – but the underlying concept is the same.

44. At [4] – [6], Judge Bishopp said:

5 “4 The Act does not say what is meant by a reasonable excuse, and it does not specifically exclude (as other similar legislation does) reliance on a third party from amounting to a reasonable excuse.

10 5 I cannot, however, see how the failure of the landlord, his solicitors or HMRC to advise Mr Ryan that he should submit a return could conceivably amount to a reasonable excuse. A landlord has no obligation of that kind to his tenant, particularly so when the tenant is represented by a solicitor; and, even if there were an obligation on a landlord's solicitor to advise an unrepresented tenant to submit a return (which I very much doubt) it would be a professional discourtesy for the landlord's solicitor to offer Mr Ryan such advice if he had a solicitor of his own. It may well be
15 correct, as he contends, that HMRC knew of Mr Ryan's existence, and that he had set up in business, but I do not understand how that could impose on them the duty (as Mr Ryan's argument implies) to make a prompt enquiry into his affairs in order to advise him of any requirements imposed on him which he had not then observed. That is not, and never has been,
20 HMRC's function. Moreover, as s 76(3) makes perfectly clear, stamp duty land tax is a self-assessed tax; the obligation to calculate and declare his liability is placed firmly upon the taxpayer.

25 6 On the other hand I have to agree with Mr Ryan that if he was represented in the transaction by a solicitor, he should be entitled to expect the solicitor not merely to advise him of his obligation to submit a return but to perform the obligation for him. But that is not the same as saying that he has a reasonable excuse, within the meaning of the legislation. The plain purpose of the legislation is to encourage the prompt submission of returns by imposing penalties on those who submit them late. The penalty
30 is imposed on the person concerned, and not upon his solicitor or any other representative. The purpose of the legislation would be defeated if a penalty could be escaped by the expedient of placing the blame on a dilatory solicitor. If Mr Ryan believes he has been let down by his solicitor, his remedy is to take the matter up with the solicitor.”

35 45. We acknowledge that – consistent with the comments of Judge Bishopp in *Ryan* and for the reasons that he gave – the circumstances in which reliance on a third party can amount to a reasonable excuse will be very limited. However, even within the context of the stamp duty land tax legislation, we do not take Judge Bishopp's
40 comments as precluding the possibility that, in appropriate circumstances, reliance upon a third party might be regarded as a reasonable excuse.

45 46. In the context of penalties charged under Schedule 55, and as we have seen, paragraph 23(2)(b) specifically provides that the fact that the taxpayer has relied upon a third party, such as an agent, to file his returns cannot be a reasonable excuse, unless the taxpayer took reasonable care to avoid the failure. It is therefore clear that there must be some circumstances in which reliance on a third party to submit returns can

amount to a reasonable excuse provided that the taxpayer has exercised reasonable care. In our view, this is one such case.

47. As can be seen from our findings of fact, Mr MacInnes did not simply pass on his information to Mr Poppleton and rely upon Mr Poppleton to submit the returns. He made regular contact with Mr Poppleton to check that his returns were being prepared and submitted. He received assurances that he relied upon in good faith that the returns had been filed. Given Mr MacInnes's lack of familiarity with the system, in our view, it was reasonable for Mr MacInnes to rely upon Mr Poppleton and to accept his assurances. Furthermore, through his other actions – regularly checking with Mr Poppleton and seeking assurances regarding the submission of the returns - Mr MacInnes did exercise reasonable care to avoid the failure.

48. That excuse continued after the due dates for the submission of the returns when Mr MacInnes continued to rely on the assurances of Mr Poppleton. In our view, Mr MacInnes also continued to exercise reasonable care to avoid any continued failure for the purpose of paragraph 23(2)(b). When he received communications from HMRC that suggested that the returns had not been filed, Mr MacInnes promptly contacted Mr Poppleton and HMRC and attempted to resolve the position. In the final event, he took matters into his own hands and acted diligently to ensure that the returns were submitted in paper form. These are not the actions of a taxpayer who is abdicating responsibility for his tax affairs. Indeed it is difficult to imagine what more he could reasonably be expected to have done in his circumstances.

49. For all of these reasons, in our view, Mr MacInnes did have a reasonable excuse for the failure to file his returns throughout the period until his returns were filed in paper form.

50. Mr Hunter argued that Mr MacInnes should have begun to doubt the assurances given by Mr Poppleton at an earlier point - for example, following his conversation with HMRC on 20 December 2016 - at which point the excuse would have ceased. Even if that could be said (which we do not accept), Schedule 55 provides (in paragraph 23(2)(c)) that where a taxpayer had a reasonable excuse but the excuse has ceased, the taxpayer is to be treated as having the excuse if the failure is remedied without unreasonable delay after the excuse has ceased. In our view, Mr MacInnes took steps to submit his returns without unreasonable delay after the conversation with HMRC on 20 December 2016. So the excuse should be treated as continuing until the date on which Mr MacInnes filed the returns himself.

51. This may be an exceptional case. However, in our view, following the receipt of the notice requiring him to submit returns, Mr MacInnes acted in an exemplary manner to resolve his tax affairs: he was not familiar with the self-assessment system and so he quite reasonably appointed an adviser; he was in regular contact with his adviser and HMRC to ensure that his returns were submitted; he acted to correct the default of the adviser as quickly as could reasonably be expected; and he has arranged for the penalties to be paid even though his bank accounts were frozen. In our view, the penalty system would be missing its mark if it were to impose penalties upon him in such circumstances.

Decision

52. We allow these appeals.

53. We cancel the penalties.

Rights of appeal

5 54. 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
10 “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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**ASHLEY GREENBANK
TRIBUNAL JUDGE**

RELEASE DATE: 7 FEBRUARY 2018