



TC03606

Appeal number: TC/2012/07731

Income Tax – PAYE – Penalty for late submission of PAYE return pursuant to Section 98 (2) and (3) TMA 1970 – reasonable excuse - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER COLLINS

Appellant

- and -

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

**TRIBUNAL: JUDGE IAN W HUDDLESTON
 MS CELINE CORRIGAN**

Sitting in public at Bedford Street, Belfast on 28 August 2013

Kate Murphy, Officer of HMRC

Mr Brian Shortt, Accountant for the Appellant

DECISION

Appeal

5 1. This is an Appeal against a penalty of £600 levied pursuant to Section 98(2) and
(3) of the Taxes Management Act 1970 in relation to the late filing of a PAYE return
on behalf of the Appellant. The first penalty notice (for £400) covered the period
from the 20 May 2011 to the 19 September 2011. The second (in the sum of £200)
10 was for the period from the 20 September 2011 to the 21 October 2011 when the
Appellant finally submitted its return.

2. The penalties are calculated at the rate of £100 per month per block of 50
employees.

Evidence/Appearances

3. HMRC were represented by Kate Murphy, Officer.

15 4. The Appellant was represented by Mr Brian Shortt, Accountant.

The Facts

5. The facts are not in dispute. Mr Collins operates a veterinary practice which,
during the relevant time, employed only one employee. In terms of his tax affairs,
including the submission of his PAYE returns, he relied on his accountant, a Mr G.
20 Marley who was also his friend. Evidence was produced to the Tribunal to the effect
that Mr Marley had suffered poor health from 2004 onwards but that leading up to the
relevant period (ie. the tax year ending April 2011) that his health had substantially
deteriorated. Mr Marley subsequently died.

6. The Tribunal received a copy of the medical report given by his GP dated 20 June
25 2013 which, in essence, confirmed that in May 2011 Mr Marley had been admitted to
hospital, required a blood transfusion and heart treatment and subsequently developed
renal impairment. In Dr Carlisle's opinion by August/September 2011 he had become
confused and he was advised that he was not fit to be working.

7. In any event the net effect was that Mr Collin's return for the tax year end April
30 2011 was not filed and, as a result, the penalties were levied.

The Appellant's Case

8. The Appellant's case is relatively shortly put. In essence the Appellant, through
his accountant, says that it reasonable to rely upon Mr Marley to act in his role as
accountant and in support of that proposition the Appellant referred us to the case of
35 Maxwell v HMRC [2013] UK FTT 459 which the Appellant relies upon to advance
the proposition that it is reasonable to rely on a third party agent to ground a defence
of reasonable excuse.

9. Further to that Mr Shortt also pointed out to the Tribunal that a case on largely
similar facts, also involving Mr Marley's practice (which Mr Shortt had taken over

and had advanced for the Taxpayer) had been considered by HMRC and had resulted in the penalty being reversed. Indeed Mr Shortt produced evidence of the case involving a Mr B. Rafferty whose default period also ran from the 19 May 2011 but in this case did not end until the 19 December 2011 where, on advancing the same argument as the Appellant, HMRC reduced the penalty to nil. The nil penalty notice was furnished to the Tribunal as evidence of that fact.

HMRC's Case

10. HMRC's case is equally simply put namely that it is the employer's statutory responsibility to ensure that a PAYE return is submitted. On the facts of the present case HMRC say that the Appellant was aware of Mr Marley's declining health and whether based on the friendship between the two or not continued to rely upon him to perform a function which he clearly was unable to perform. HMRC state that in those circumstances it was not reasonable to rely on a third party agent and that steps ought to have been taken to ensure that the statutory obligation which the employer faced was discharged some other way.

11. It clearly not having been discharged, on the facts, left the Appellant open to a penalty and that the penalties as levied were calculated in accordance with the statutory provisions.

Decision

12. In the first place we have to emphasise that the jurisdiction of this Tribunal is curtailed by statute. It is not open to us to assess whether or not HMRC were correct to raise the penalty. The only function we have is to assess whether or not, in the opinion of this Tribunal, the Appellant had a reasonable excuse for his failure to submit a PAYE return on time. To assess that we are entitled to have regard to all of the circumstances.

13. Whilst we accept HMRC's position that there was clearly evidence of Mr Marley's declining health nonetheless based on the medical opinion given by Dr Carlisle we find that Mr Marley's health clearly deteriorated much more markedly in the later stages of 2010 and into 2011. The Appellant continued to rely upon Mr Marley to perform his function as an accountant notwithstanding that deterioration of health and we have heard that largely that loyalty arose from a long standing friendship between the two.

14. In this context the provision of the defence of "reasonable excuse" arises under Section 118(2) of the Taxes Management Act which provides that "*where a person had a reasonable excuse for not doing anything required to be done he should be deemed not have failed to do it unless the excuse ceased and after the excuse ceased, he should be deemed not to have failed to do it if he did it without unreasonable delay after the excuse ceased*".

15. There is no actual statutory definition of what constitutes reasonable excuse although the taxing legislation generally makes it clear that reliance on a third party per se is not sufficient to ground the defence. As I have said, however, it is open to the Tribunal to consider all of the circumstances. In the present case we are prepared

to find reasonable excuse. We do so for the following reasons. In the first instance, we find that the illness of Mr Marley did sufficiently deteriorate in 2010/2011 to render him incapable of performing the functions for which he was retained. We have also taken into account the fact that HMRC have also clearly accepted that Mr
5 Marley's illness constituted "reasonable excuse" in relation to other cases (namely that of Mr B. Rafferty) and, therefore, we think applying the ordinary principles of proportionality, fairness and transparency that it would seem wrong that if HMRC were prepared to accept reasonable excuse in one case that the same circumstances should not be equally applied to another.

10 16. The overriding principal of fairness must be one to which we have regard. Whilst HMRC were correct to say that we are not bound by the decision in one case in terms of its application to another nonetheless we do feel that consistency is one of those circumstances to which we can have regard.

15 17. On the basis of that conclusion we allow the appeal.

18. 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
20 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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30 **IAN HUDDLESTON**
TRIBUNAL JUDGE

RELEASE DATE: 16 May 2014