



**TC06236**

**Appeal number: TC/2017/04984**

*INCOME TAX – failure to file returns by due date – penalties under Schedule 55 FA 2009 – whether to grant permission for all but two appeals to be given to HMRC outside time limit – whether reasonable excuse where reliance on third party – appeals allowed in part.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SAMUEL PHIPPS (trading as OCEAN TILERS)                      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**

**The Tribunal determined the appeal on 16 November 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 13 June 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 August 2017 and the appellant's further submissions dated 4 September 2017.**

1. This case concerned appeals by Mr Samuel Phipps (“the appellant”) against penalties imposed by the respondents (“HMRC”) for his failure to file tax returns on time in five consecutive tax years.

2. The penalties totalled £2,900. I have decided that the appellant must pay £600 of them, but I have cancelled the rest.

### **Facts**

3. I have taken the facts from the papers in the bundle prepared by HMRC, including letters from the appellant and accountants acting for him, as well as a large amount of documents and letters emanating from HMRC. There is no apparent dispute about that which I state below in §§4 to 32 and I find those statements as fact.

#### ***2010-11***

4. The appellant was issued with a notice to file an income tax return for the tax year 2010-11 on 6 April 2011. That notice required the appellant to deliver the return by 31 October 2011 if filed in paper form or by 31 January 2012 if filed electronically (“the due date”).

5. On 14 February 2012 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

6. The return was filed electronically on 13 March 2012.

#### ***2011-12***

7. The appellant was issued with a notice to file an income tax return for the tax year 2011-12 on 6 April 2012. That notice required the appellant to deliver the return by 31 October 2012 if filed in paper form or by 31 January 2013 if filed electronically.

8. On 12 February 2013 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

9. The return was filed electronically on 21 March 2013.

#### ***2012-13***

10. The appellant was issued with a notice to file an income tax return for the tax year 2012-13 on 6 April 2013. That notice required the appellant to deliver the return by 31 October 2013 if filed in paper form or by 31 January 2014 if filed electronically.

11. On 18 February 2014 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

12. The return was filed electronically on 31 March 2014.

#### ***2013-14***

13. The appellant was issued with a notice to file an income tax return for the tax year 2013-14 on 6 April 2014. That notice required the appellant to deliver the return

by 31 October 2014 if filed in paper form or by 31 January 2015 if filed electronically (“the due date”).

14. On 18 February 2015 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

15. On 18 August 2015 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

16. In the same notice HMRC informed the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

17. The return was filed electronically on 27 March 2015.

### ***2014-15***

18. The appellant was issued with a notice to file an income tax return for the tax year 2014-15 on 6 April 2015. That notice required the appellant to deliver the return by 31 October 2015 if filed in paper form or by 31 January 2016 if filed electronically (“the due date”).

19. On 17 February 2016 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

20. On 12 August 2016 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

21. In the same notice HMRC informed the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

22. The return was filed electronically on 11 October 2016.

### ***The appeals***

23. On 12 September 2016 the appellant appealed (by his wife who is an assistant accountant) to HMRC against penalties of £1,200 for each of 2013-14 and 2014-15.

24. On 12 October 2016 HMRC rejected the appeals for 2014-15 as they said that the appellant had shown no reasonable excuse for the failure to file on time. They informed Mrs Phipps that her husband could request a review or notify his appeal to the Tribunal.

25. Also on that date HMRC also wrote to the appellant refusing to accept his appeal against the 2013-14 penalties because they said it was late. They informed the appellant that he could provide HMRC with the reason for the lateness or seek permission from the Tribunal to bring a late appeal to HMRC.

26. On 1 November 2016 the appellant, through RRR Accounting Solutions (“RRR”), wrote three further letters about the years 2010-11, 2011-12 and 2012-13 in identical terms to the two other letters for the later years. These were treated by HMRC as late appeals.

27. On 13 December 2016 HMRC replied to RRR referring to “your letter [singular] dated 1 November 2016” and said that an appeal had already been made against the late filing penalties for 2014-15. This was true only in relation to daily and 6 month penalties. Nothing is in the failure to suggest that the letters for the other years were considered.

28. On 1 March 2017 RRR gave information concerning the appellant’s reasonable excuse for 2014-15. HMRC took this letter to be a request for a review.

29. On 11 April 2017 HMRC wrote to the appellant with the conclusion of the review. This conclusion was that the penalties of £1,200 for 2014-15 were upheld.

30. On 25 April 2017 the appellant gave further information and explanations in relation to many years.

31. On 22 May 2017 HMRC explained that there could not be more than one review.

32. On 13 June 2017 the appellant notified appeals to the Tribunal showing the amounts as c £2,900.

### **The law in brief**

33. The law imposing these penalties is in Schedule 55 Finance Act 2009. If a person who was required by a notice to file a tax return including a self-assessment does not do so by the due date they become liable to penalties as follows:

- (1) under paragraph 3 for the initial failure there is a penalty of £100,
- (2) under paragraph 4 if the failure continues past the 3 month point after the due date, there are penalties of £10 a day until the return is filed, with a maximum of 90 days (£900), and
- (3) under paragraphs 5 and 6 if the failure continues past the 6 and 12 month point after the due date, there are penalties of a minimum of £300 on each occasion.

34. The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC’s decision as to whether there are special circumstances was flawed. In that case I can substitute any decision that HMRC had the power to make, eg by reducing or cancelling the penalty.

35. The burden of proof of showing that the penalties were properly imposed is on HMRC. If they show that, then the burden is on the appellant to show that they had a reasonable excuse for the failure.

### **The appeals**

36. HMRC have taken the position that, based on the amount of the penalty shown on the Notice to Appeal, that appeals against all penalties for 2010-11 to 2014-15 were notified to the Tribunal.

37. HMRC say that the notice includes an application to make appeals to HMRC out of time. These appeals are those for all years except the daily and 6 month penalties for 2014-15 where HMRC have accepted the appeals.

38. HMRC oppose the application for permission to appeal late to them.

39. The notification of the appeals against the daily and 6 month penalties for 2014-15 is late by about one month. It is not clear if HMRC oppose the application for permission for the notification of those two appeals to be made to them. Given that they have prepared a statement of case covering these 2014-15 appeals I am assuming that they do not object to those appeals being notified late. I give permission for the late notification of these two appeals to the Tribunal.

40. Because the grounds of appeal in all cases is reliance on another I will consider the 2014-15 daily and 6 month penalties first before considering the late appeal application.

### **Ground of appeal**

41. The ground of appeal is essentially that the appellant is a victim of the malpractice of a firm of accountants in Birmingham, Mahmood & Co.

42. As to particulars, the appellant says that:

(1) They (the appellant and Mrs Phipps) had just found out (in September 2016) that Mr Mahmood, the principal of Mahmood & Co, had disappeared and later the appellant said that Mr Mahmood was being investigated by HMRC.

(2) They had sat in Mahmood & Co's office on 23 December 2015 "directly in front of him" and emailed the figures for the 2014-15 return to him. A copy of the email is included in the bundle.

(3) Similar emails for earlier years are in the bundle and are dated 7 January 2015, 14 January 2014 and 10 January 2013.

(4) Mahmood & Co assured the appellant that all the returns were filed on time and that the penalties had been waived by HMRC.

(5) They were in no position to know that anything was wrong until late 2016.

43. RRR's letter of 21 March 2017 also adds that that firm had been picking up the pieces caused by the disappearance of Mr Mahmood and had dealt with 200-250 former clients of Mahmood & Co. Most appeals, they say, have been accepted by HMRC under s 54 Taxes Management Act 1970 (settlement of appeals by agreement).

### **HMRC's submissions**

44. HMRC do not dispute anything said by the appellants (so I find the matters in §42 as fact). They say that if a taxpayer employs an agent to complete and file the tax return on their behalf the taxpayer nonetheless remains responsible for ensuring it is received by HMRC by the relevant deadline.

45. They argue that waiting until 2 to 4 weeks before the deadline to submit details to the agent in the business period for completion of self-assessment returns is not in good time.

46. HMRC have, in the period covered by the appeals, sent 4 penalty reminders, 7 penalty notices, a number of self-assessment statements and numerous requests for payment. They were all sent to the relevant address on HMRC's records.

47. From this they argue that:

(1) As the appellant had an agent he was responsible for ensuring the agent carries out the task. He cannot claim he had a reasonable excuse merely because he delegated.

(2) HMRC expect taxpayers to take reasonable care to explain to the agent what they were required to do, to set deadlines for the work and to make regular checks on progress, reminding where appropriate.

(3) HMRC expect taxpayers to be able to tell them what action a taxpayer took to ensure the obligation to file the return is met and normally, but not always, to know the reason why the failure occurred.

(4) The correct test is to consider the actions of the appellant from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts.

(5) Neither the appellant nor his wife had contacted HMRC until 9 September 2016 despite the voluminous correspondence sent by HMRC. That is not the action of a prudent person exercising reasonable foresight and due diligence.

48. After all of this HMRC say:

“failure by an agent would not normally be treated as a reasonable excuse unless the person took reasonable care to avoid the failure”.

49. HMRC *may* accept, they say, that an agent who suddenly absconds leaving clients with penalties for the late submission of a return or because the return has not been submitted would constitute a reasonable excuse, but in this case because there was persistent late filing HMRC say the appellant did not take reasonable care to ensure his tax affairs were in order. They do not say whether this applies to the 2014-15 return as well but I assume it does.

50. The treatment of other taxpayers let down by Mr Mahmood is irrelevant as the facts have to be considered in each case.

## **Discussion**

### ***HMRC's burden of proof***

51. I am satisfied that the penalties were correctly calculated and that a notice of each was sent to the appellant at the correct address and received by him.

### ***The in time appeals***

52. In relation to 2014-15 where there were in time appeals against the daily and 6 month penalties, the question is whether the appellant had a reasonable excuse for the lateness in filing of the return for that year. The reasonable excuse put forward is that the appellant relied on Mr Mahmood.

53. Paragraph 23(2)(b) Schedule 55 says that such reliance on another cannot be a reasonable excuse unless the appellant took reasonable care to avoid the failure.

54. In my view HMRC's account at §47(2) of what a client of an accountant must do is wholly unrealistic in the circumstances of the appellant. He was entitled to believe that if he had sent his information (likely in this case to be simple – the

appellant is a handyman) before January 2016 to the accountant then the accountant would do what he said he would do and what the appellant paid him for or would inform him of any problems in time. The appellant and his wife in fact attended Mr Mahmood's offices and spoke to him and gave him the relevant return details by email.

55. In my view then the appellant had a reasonable excuse for the failure to file by 1 February 2016 and the £100 initial penalty should be cancelled (subject to the question whether I should allow the appeal against it to be made).

56. HMRC say that the issue of various documents from them should have made the appellant realise that something was wrong. They have not produced any evidence that these documents were in fact received by the appellant, but I am prepared to accept that the appellant would have received at least one reminder about daily penalties as is indicated in the SA Notes.

57. But those Notes show that the first reminder for daily penalties was issued on 31 May 2016. By then the deadline for daily penalties to start had passed – it was 30 April. The appellant therefore had no cause at that time to think from any reminders that anything was wrong.

58. Collection Notes made on the IDMS system however show that on 18 April 2016 a form IDMS99 was issued to the appellant. There is an example of a Form IDMS99P in the papers, which on its face says in bold “You need to file your tax return urgently” and (not in bold) that “we have charged you a £100 penalty”.

59. If the appellant received that Form exactly as it is in the specimen in the papers, that should have alerted him to enquire of Mahmood & Co. But the Collection Notes refer to several Forms IDMS99 (not IDMS99P) being issued each with a different set of acronyms etc by it. I cannot be sure that what the appellant may have received in the period before 30 April 2015 by way of an IDMS99 letter was in the same form as the specimen.

60. In my view, despite the wording of the specimen IDMS99P, the appellant continued to have a reasonable excuse, reliance on Mr Mahmood.

61. But in relation to the daily penalties it does not in fact matter. For this year there is no “SA reminder” or “SA 326D” in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with (see *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)). I therefore cancel them.

62. But I do not think that reliance on Mr Mahmood can explain away the failure to file by 31 July 2016, 6 months after the due date. The daily penalty reminder on 31 May was followed by another on 5 July. These should have set the alarm bells ringing, whatever Mr Mahmood's previous assurances might have been about the initial penalties.

63. In relation to this penalty the reasonable excuse of reliance on Mr Mahmood had ceased because the appellant did not take reasonable care to avoid the failure to file before 1 August 2016. I uphold the 6 month penalty.

### ***The application for permission to appeal late to HMRC***

64. Before going on to decide this issue, I note that HMRC have ignored in all five years the fact that the appellant has put forward what he says is a reasonable excuse for filing the returns late, even in relation to 2013-14 where HMRC specifically asked him for his excuse for appealing late. In fact they ignored the appeals for the first three years altogether. That does not however affect the legal question I have to decide which is whether to give permission to appeal late or not.

65. I am not bound by the apparent limitation that HMRC say they are bound by, that they can only consider whether there was a reasonable excuse for notice of the late appeal being given to HMRC. My approach to this application for permission follows a well trodden path by taking the questions set out in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) (“*Data Select*”) and *Advocate General for Scotland v General Commissioners for Aberdeen City* (“*Aberdeen GCs*”) [2006] STC 1218 and considering them by following the three stage approach in *Denton & Others v T H Whyte & Another* [2014] EWCA Civ 906 (“*Denton*”).

66. The first *Denton* stage is to consider whether the delay was serious or significant.

67. The delay runs in each case from 30 days after the notice of penalty assessment was issued, which would be in mid-March of the relevant years, 2012 to 2016 inclusive. The appeals were made in September (last 2 years) and November (first 3 years) 2016. The delays are therefore about 4 years 8 months, 3 years 8 months, 2 years 8 months, 1 year 6 months and 6 months. All of these constitute significant and serious failures, which tells against the appellant, though I accept no hearing dates have had to be postponed as a result – because no litigation had started before the application to the Tribunal which I am now considering.

68. The second *Denton* stage is to ask what the reason for the delay was. The blame is put squarely at the door of Mr Mahmood. This tells for the appellant but only if such reliance was reasonable. I have explained why I believe that, particularly in a case where there is a failure to file such that only the initial penalty is incurred, reliance may be placed on an accountant in Mr Mahmood’s position. 2013-14 is different in that daily and 6 month penalties were incurred. In that year the reliance is less persuasive.

69. The third *Denton* stage if it is reached, which it is here, is to consider all the circumstances, giving particular weight, where it is relevant, to the need for litigation before the Tribunal to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders of the Tribunal.

70. It is here that some of the *Data Select* and *Aberdeen GCs* questions come in. I should consider as part of this third stage exercise why the time limit is there, whether the reason for the delay was a good one and the prejudice to each side that would arise from granting or denying permission, as well as any other matter that seems to me to be relevant.

71. There can really be no dispute that the time limit for appeals enabling HMRC to have finality and to assume that after a decent interval of say a month or two that matters are settled and papers can be literally or, if digital, metaphorically filed away and perhaps later destroyed or put to storage. It is because of the need for finality in



tax administration that the seriousness and significance of the delay plays an important part in the Tribunal's consideration.

72. The issue of finality can also affect the prejudice to HMRC if I give permission. In this case the delay has not prejudiced HMRC's ability to react, as they have computer records covering the whole period including contacts with the appellant. HMRC have had in any event to deal with the in time appeals in which the Mahmood & Co issue arises and are not prejudiced to any significant extent by having to address the earlier years where the issues are the same.

73. The lack of serious prejudice to HMRC if I grant permission tells for the appellant.

74. The prejudice to the appellant would be serious for someone in his circumstances. He would have to pay penalties of £1,700 which is a very substantial sum for what appears to be primarily the fault of a professional he trusted and from whom he is unlikely to get any redress. This tells in his favour.

75. Finally, although Tribunals are discouraged from examining the merits of the appellant's case, there can be exceptions where the case is clear one way or the other. I have already considered the merits for 2014-15 and from that consideration I would say that the appellant would succeed for all years in showing that his reliance on Mr Mahmood gave him a reasonable excuse for the failure to file by the due date.

76. But for the reasons I have given in relation to 2014-15, the position for the larger amounts of daily and 6 month penalties in 2013-14 is more nuanced. So the merits tell for the appellant in relation to some appeals but no others.

77. Standing back and weighing all the circumstances I am persuaded that I should give permission for all the appeals to be given late to HMRC. I am particularly influenced by the fact that the two factors which should be given particular weight and which are based on CPR 3.9 and which I have adapted in §69 to refer to the Tribunal are not significantly engaged in a case where a person seeks permission to even be able to start litigation and where there are no Rules of the Tribunal that are engaged, but a statutory provision, in this case s 49 TMA.

78. In these circumstances I waive any formalities that might be necessary to get all these appeals properly before the Tribunal and I now deal with them.

79. Turning then to the appeals now admitted, as I have indicated, I cancel all the initial £100 penalties on the basis that the appellant had a reasonable excuse.

80. As to the daily penalties for 2013-14 I cancel them for the same reasons I cancel the 2014-15 penalties.

81. As to the 6 month penalty the reminders for the daily penalties were issued on 2 and 30 June 2015. The position therefore is as it was for 2014-15 and I uphold this penalty.

82. I should mention that this is the fourth or fifth case of this sort I have dealt with where the appellant has relied on Mahmood & Co's conduct. The fact that I am familiar with excuses based on that conduct means that RRR's argument that their other clients have had s 54 agreements cannot be universally true in all the cases

affected by Mahmood & Co other than this one. I have taken no account of what may have happened in other cases, including in particular the other “Mahmood” cases I have decided both on paper and in oral hearings.

### **Special circumstances**

83. HMRC have addressed the question whether there were special circumstances, but have found none. I cannot say that this decision was flawed.

### **Decision**

84. Under paragraph 22(1) Schedule 55 FA 2009 I affirm HMRC’s decisions to assess a penalty under paragraph 5 Schedule 55 of £300 for 2013-14 and 2014-15.

85. Under paragraph 22(1) Schedule 55 FA 2009 I cancel HMRC’s decisions to assess a penalty under paragraph 3 Schedule 55 of £100 for 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15.

86. Under paragraph 22(1) Schedule 55 FA 2009 I cancel HMRC’s decisions to assess a penalty under paragraph 4 Schedule 55 of £100 for 2013-14 and 2014-15.

### **Observations**

87. I am well aware that in recent months HMRC have had to prepare thousands of statements of case for Schedule 55 paper cases, and that a certain amount of cutting and pasting or the use of a template is inevitable. I have considered about 80 of these cases on paper this year and I confess to using a template of my own devising for all my decisions.

88. But in this case, although there was voluminous and helpful documentation attached to the statement of case and a clear exposition of the facts, there were a number of things about the statement which perturbed me.

89. HMRC said that they take the view that a reasonable excuse is “an exceptional event beyond the person’s control which prevented submission of the return by the due date, for example due to severe illness or bereavement”.

90. This notion, that for there to be a reasonable excuse there has to be an exceptional event outside the appellant’s control, has been blown out of the water by this Tribunal on numerous occasions. Some of HMRC’s guidance, eg on VAT default surcharges, has now been changed to recognise this. It should not appear in a Statement of Case in 2017.

91. But even more astonishing is this:

“reasonable excuse is not defined in legislation and *there are no supporting tax case authorities* [my emphasis].”

92. The author of this clearly does not appreciate the irony in his reference to “exceptional events” as being the only things that can show a reasonable excuse. This HMRC-beloved formulation of what a reasonable excuse is was shown by this Tribunal in *Barrett v HMRC* [2015] UKFTT 392 (TC) (Judge Roger Berner) (“*Barrett*”) to be based on the minority decision of Scott LJ in *Commissioners of Customs & Excise v Steptoe* [1992] STC 757 (“*Steptoe*”), not supported by the majority. In *Barrett* Judge Berner said (in 2015):

“it is inappropriate for HMRC to seek to rely on that formulation as representing the state of the law on reasonable excuse.”

93. *Stepto* and *Barrett* are tax case authorities, as are other cases on which HMRC frequently rely such as *Rowland v HMRC*. The statement in §91 is just wrong.

94. Nor should a statement like this appear in a Statement of Case:

“the legal obligation, as set out under [*sic*] Section 7 Part 2 [*sic*] TMA 1970 makes clear the responsibility [for filing the return on time] rests with the customer and cannot be transferred to a third party.”

95. Section 7 TMA (the fact that it is indeed in Part 2 of that Act does not need to be mentioned) is about the obligation to notify HMRC that a person is chargeable to tax, subject to exceptions which apply to most UK taxpayers. The appellant must have notified as he was registered for self-assessment in 2006. But in any event s 7 has nothing to do with the filing of returns and does not contain any reference at all to a taxpayer’s responsibilities. Nor for that matter does any other part of TMA.

96. I also wonder (or rather I don’t because I know the answer) what qualifies HMRC in this case, or any other, to contend that:

“Waiting until 2-4 weeks before the filing deadline to submit details to your agent, in the busiest period for completion of self assessment returns, is not in good time.”

97. The author of HMRC’s Statement of Case can have no idea whether each person who has an agent has agreed with that agent, or is told by them, when they should submit their details, having regard to the complexity of their affairs and their ability to keep proper records. HMRC do not say at this point that they offer this view to show that the appellant did not take reasonable care to avoid the (agent’s) failure, though I cannot think of any other reason for making this otherwise gratuitous and uninformed comment. HMRC do not mention their views on paragraph 23(2)(b) Schedule 55 for another page and a half, and there simply paraphrase that paragraph of sub-paragraph (2).

98. 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.

**RICHARD THOMAS  
TRIBUNAL JUDGE**

**RELEASE DATE: 23 NOVEMBER 2017**

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