



TC06357

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Appeal number: TC/2013/06802

INCOME TAX – Whether reasonable excuse for the late submission of a Self-Assessment Tax return for 2010-2011. Yes.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

15

MARK RICHARD BEARDWOOD

Appellant

- and -

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

Respondent

**TRIBUNAL: PRESIDING MEMBER:
PETER R. SHEPPARD FCIS FCIB
CTA AIT
MEMBER: JULIAN STAFFORD**

20 **Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester on 28
November 2017**

The appellant in person

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Mary Hendrick for the respondent

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DECISION

1. Introduction

5 This considers an appeal against penalties totalling £1,600 imposed by the respondents (HMRC) under Schedule 55 Finance Act 2009 for the late filing by the appellant of his Self-Assessment Tax return for 2010-2011.

2. Legislation

Finance Act 2009 Schedule 55
Taxes Management Act 1970, in particular Section 8.

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3. Case law

Keith Donaldson v HMRC [2016] EWCA Civ 761
Crabtree v Hinchliffe [1971] 3 All ER 967
Clark's of Hove Ltd. v Bakers' Union [1979] 1 All ER 152
15 David Collis [2011] UKFTT 588 (TC)
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC (2006) STC (SCD) 536
Anthony Wood trading as Propave v HMRC (2011 UK FTT 136 TC 001010)
HMRC v Anthony Boshier [2013] UKUT 0579 (TCC)
20 HMRC v Hok Ltd. [2012] UKUT 363 (TCC)
The Clean Car Company Ltd v Customs and Excise [1991] VATTR 234
Krzysztof Kaczmarczyk v HMRC [2017] UKFTT 262 (TC)

4. Facts

25 The appellant first registered for self-assessment in 2001.

On 25 February 2010 the appellant submitted a "Leaving the United Kingdom" form P85 to HMRC advising he would be leaving the UK for 18 months.

30 In Section 4 of the form is the question "Will you be receiving rents, premiums, or any other income from any property in the UK?" To this the appellant answered "No"

In Section 6 of the form is the question "Will you have any other source of income in the United Kingdom after you have left?" To this the appellant answered "No".

35 Later in 2010 the appellant and his wife as joint owners of their UK home in Chester, let it for a short period. Before receiving any rent the appellant notified HMRC of the change and completed a form NRL1 Application to register as a non-resident landlord. This form was received by HMRC on 23 August 2010.

40 In the tax year 2010-2011 rent totalling £3,802 was received by the appellant and his wife (£1,901 each). Thus the appellant's taxable income in the UK was below his personal allowance of £6,475 and so no tax was due.

5. 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.

5 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 of the Schedule provides:

“(1) A person is liable to a penalty under this paragraph if (and only if)–

10 (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.”

15 (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 subparagraph (1)(c).

Paragraph 5 of the Schedule provides

20 (1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of –

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300

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The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

6. In this case in respect of the tax year ended 5 April 2011 penalties totalling £1,600 were levied by HMRC.

30 7. HMRC say they 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 received by HMRC on 9 May 2013.

35 8. 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.

9. 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 £900 on or around 7 August 2012, calculated at £10 per day for 90 days (1 May 2012 to 29 July 2012 is 90 days).

5 10. As the return had still not been received 6 months after the penalty date of 1 February 2012, HMRC issued a notice of a penalty assessment of £300 on or around 7 August 2012.

10 11. As the return had still not been received 12 months after the penalty date of 1 February 2012, HMRC issued a notice of a penalty assessment of £300 on or around 19 February 2013.

12. HMRC supplied a copy of their internal record showing the dates of issue of the return and the penalty notices. Copies of the actual notices were not provided so the Tribunal had no opportunity to check the date of issue, the amount levied, and to what address they had been sent.

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13. Appellant's submissions

In his Notice of Appeal dated 15 September 2013. The appellant gave the following Grounds of Appeal:

20 "I left the UK to work in Vietnam for 2.5 years with my family Feb 2010-Nov 2012. Upon departure I notified HMRC via the required P85 form, of which they acknowledged receipt.

I rented my house out 2011-2012. I as such submitted a tax return in October 2012 to cover for this.

25 In December 2012 I was advised of a late filing penalty for the year 2010-2011. During this time

1. I was non-resident (P85 submitted),
2. I had no UK income tax,
3. I received minor income for a short let, but below level required by HMRC Website to submit a tax return.
- 30 4. During the time frame concerned I received no correspondence from HMRC requesting a tax return for year 2010-2011. First correspondence was December 2012.

I do not believe, according to HMRC guidance notes, a tax return was due, but have been fined for non-submittal."

The appellant repeated that he considered no tax return should have been required for 2010-2011. He considered the fine was not appropriate and should be refunded.

5 14. The appellant wrote a number of letters to HMRC all making the same points as in the Notice of Appeal

15. In a letter to the Tribunal dated 9 April 2017 the appellant stated

10 “...after I left the country to work abroad in 2010; I received no further correspondence from HMRC until after I submitted my tax return for the year 2011/12 in 2013. If HMRC wished for a tax return to be filled out, I would have expected that this would have been sent to me – no correspondence was received until after my tax return for the year 2011/2012 when I rented out my UK residence and did incur UK income tax. HMRC website in the year 2010-2011 listed the basis on which a tax return had to be submitted. I did not fall into any of the categories advised.. HMRC’s 2010-2011 own website advice was not to submit a tax return.

15 HMRC in their Paper hearing submission, attached to their letter from 17th February 2017 indicate that there were some penalties for late filing for the year 2010/2011 submitted in 2012. I have no record of receiving these late filing penalties and suspect that (they) were never issued”

20 16. The appellant wrote to the Tribunal on 5 November 2017. That letter includes the following

“I left the country in February 2010 returning to the UK in November 2012; shortly after this my family came to join me in Vietnam. I was non-resident during the whole of this period. During the tax year 2010-2011 I did not spend one single day in the UK and had zero tax liability in the country.” And

25 “I received zero correspondence from HMRC after I left the country until just after the submission of my tax return for 2011-2012.” At the hearing the appellant explained that in Vietnam it was rare for him to receive any correspondence from the UK and he had received no tax return for completion nor had he received any penalty notifications.

30 The appellant also wrote “my wife.....was also erroneously fined for the same period. Mrs Beardwood’s fine was rescinded after a short correspondence between her and HMRC. A copy of a letter from HMRC to Mrs. Beardwood dated 4 October 2012, which accepted her appeal to them, was included in the papers presented to the Tribunal.

35 17. At the hearing the appellant repeated the above submissions. He accepted that in 2010-2011 he had earned a small amount of rental income (£1,901) but this was well below the threshold over which tax would be due. He said that HMRC guidance notice “Tax on your UK income if you live abroad” states “if you’re eligible for personal allowanceyou pay Income Taxon your income above that amount. Otherwise you pay tax on all your income.” The appellant said the rental income was his only UK

income. As this was below his personal allowance he had no tax liability. He also explained that his wife was in an identical position having received the same amount of rental income (£1,901) in 2010-2011.

18. HMRC's submissions

5 HMRC accept that the appellant completed forms P85 and NRL1. They point out that Form NRL 1 clearly states “Normally a letting agent or tenant deducts tax when paying rent to a landlord who usually lives outside the UK. This doesn't mean the rent is exempt from UK tax, and we may ask you to fill in a UK self-assessment tax return later.”

10 19. HMRC say that the fact that the appellant received rental income for the year 2010-2011 meant that a tax return was due to be submitted to account for any profit made. They say that as a non-resident landlord then any profit is taxable and must be accounted for. They say that having been issued with a Tax return on 6 April 2011 then the appellant was obligated to submit that return in accordance with the Taxes
15 Management Act 1970.

20. HMRC say there is no statutory definition of reasonable excuse. They say whether or not a person had a reasonable excuse is an objective test and “is a matter to be considered in the light of all the circumstances of the particular case” and they refer to the decisions in the cases of Rowland v HMRC, and Anthony Wood trading as Propave
20 v HMRC.

21. In respect of the appellant's submission pointing to the fact that HMRC had accepted that in identical circumstances his wife had reasonable excuse for her failure to submit a tax return for 2010-2011 on time HMRC said that they were not at liberty to discuss another person's tax position at the hearing.

25 22. HMRC submit the penalties are not disproportionate and they are neither harsh nor plainly unfair. HMRC refer to International Transport Roth GmbH v SSHD.

23. In respect of the late filing penalties HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009.) They refer to the cases of Crabtree v Hinchcliffe; Clark's of Hove v Bakers Union; and David Collis. HMRC say that in
30 considering whether there are special circumstances they have considered the reasons put forward by the appellant. They concluded that these were not special circumstances which were uncommon or exceptional that would merit a reduction in the penalty.

24. Guidance Notes

35 Included in the bundle of papers provided to the Tribunal were copies of HMRC guidance

Guidance on Self assessment tax returns includes under the heading “Who must send a tax return” the following

“You'll need to send a tax return if, in the last tax year

- You got more than £2,500 or more in untaxed income, for example from tips or renting out a property.....contact the helpline if it was less than £2,500.
- You lived abroad and had a UK income

5 This document bears no date but was printed out in October 2017. There is no indication that this was the guidance in place in 2010-2011.

The Guidance “Tax on your income if you live abroad” includes

“You usually have to pay tax on your UK income even if you are not a UK resident. Income includes things like Rental income.

10 You usually have to send a Self Assessment tax return.....if you rent out property in the UK.”

In a section headed “Property you personally own” the guidance states

“You must report income from property rental on a Self Assessment tax return if it is

- £2,500 to £9,999 after allowable expenses

If it is less than £2,500 a year, call the Self Assessment helpline

15 This also bears no date and was also printed out in October 2017. The heading says “This is a test version of the layout of this page. Take the survey to help us improve it.” This would seem to indicate that the document is recent and would not have been available in 2010-2011.

20 Another Guidance note also undated but printed off in October 2017 is also headed “Tax on your UK income if you live abroad.

Section 2. is headed “Rental Income” , and states

“You need to pay tax on your rental income if you rent out a property in the UK.”

The Tribunal observes that this statement is not always correct as it appears to ignore the possibility of the taxable rental income being within a person’s personal allowance.

25 Later the guidance says “You need to declare your rental income in a self-assessment tax return..... unless HMRC tells you not to.”

However the guidance also includes a section which includes

“If you want to pay tax on your rental income through Self Assessment fill in form NRL1iand send it back to HMRC.”

30 HMRC’s website advises that form NRL1 is available online as form NRL1i from 2014. Therefore this guidance notice did not exist in 2010 -2011. However it is clear that the appellant completed a form NRL1.

25. Tribunal's Observations

5 In respect of the appellant's complaint that the level of the penalties is disproportionate to the offence, 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.

10 26. 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."

15 27. The appeal is therefore concerned with whether or not the appellant had reasonable excuse for not submitting his self-assessment return for 2010-2011 by the due date.

28. Given the above facts and the almost exemplary way the appellant dealt with his tax affairs it was difficult for the Tribunal to see what more the appellant could have done.

20 Mr. Stafford therefore asked HMRC what more they considered the appellant could have done in the circumstances in which he found himself. In reply HMRC pointed to the guidance and suggested that the appellant could have contacted the HMRC Helpline. The appellant observed that telephoning HMRC from Vietnam was expensive and experience within the UK had taught him that there were often long delays by HMRC in answering calls. He had already worked out that no tax was due. He was also
25 aware that HMRC were trying to cut down on the number of returns processed. He considered that had he got through he would have been told no return was necessary.

30 The Tribunal asked whether the guidance had the force of law. It also asked whether there was any other relevant legislation under which the appellant was obliged to contact HMRC. No legislation was suggested and it appears that the guidance does not have the force of law. The Tribunal had difficulty in establishing whether the undated guidance provided in the bundle was a precise copy of the guidance available to the appellant in 2010 and 2011.

35 29. There is no definition of reasonable excuse. HMRC refer to what they consider the actions of a taxpayer should be when considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. This wording reminded the Tribunal of what his Honour Judge Medd OBE QC wrote in *The Clean Car Company Ltd v The Commissioners of Customs and Excise*. He wrote;

40 *"It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer*

who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse....”

30. The Tribunal is not convinced that a return or penalty notices were issued to the appellant before his return to the UK. No copy return or notices were supplied by HMRC. In their review letter of 12 June 2013 sent to the appellant HMRC state “The reason that HMRC did not send you out any correspondence prior to December 2012 is that according to your record you were still resident abroad until you informed HMRC of your change of address on 7 December 2012.”

31. In their statement of case HMRC say “The statement contained in HMRC letter of 9 May 2013 that HMRC does not issue correspondence to taxpayers whilst they are resident outside the UK is not in fact entirely correct. Tax returns and other computer generated items such as penalty notices would have in fact been issued to Mr. Beardwood at the address on record at the time of issue, even if the address is abroad, and none of these have been returned undelivered by Royal Mail.”

32. The Tribunal has been unable to trace in the bundle of papers presented to it any letter from HMRC dated 9 May 2013 or any other letter from HMRC saying they do not issue correspondence to taxpayers whilst they are resident outside the UK. The letter of 12 June 2013 quoted above is not made in such general terms, it is much more specific. It is addressed to the appellant and states that HMRC had not sent correspondence to him prior to December 2012.

33. In the Tribunal’s view HMRC’s submissions on this matter at the hearing and in the statement of case are unclear, and the Tribunal is in some doubt about their accuracy. A copy of the letter of 12 June 2013 was included in the bundle and it is clear that HMRC explained that they had not sent correspondence to the appellant. The Tribunal accepts the appellant’s submissions that he received no communications from HMRC during the period. He was totally unaware that HMRC required a return from him for the period 2010-2011. The Tribunal considered that the appellant had given reasonable priority to complying with his duties in regard to tax, and had conscientiously sought to ensure that his returns were accurate and made timeously. He was aware that HMRC guidance said that they may require a return from him but he had not received one. He was also aware that the level of his UK income for 2010/2011 was such that he had no tax liability for that year and so was not expecting a return. In the circumstances the appellant had acted reasonably. Once he became aware, in December 2012, that a return which showed no tax as being due was required by HMRC he took steps to complete one. Unfortunately because of his near 3 year absence from the UK his gateway password had expired. He eventually received a new password from HMRC on or around 27 April 2013 and submitted his return on 9 May 2013. The Tribunal therefore concludes that the appellant has established that he had a reasonable excuse for the late

submission of his self-assessment tax return for the period ended 5 April 2011. The appeal is therefore allowed in full.

34. This is a case which the Tribunal considers should never have come before it. The appellant notified HMRC of his departure from the UK, filled in a form NRL1 for the casual letting, and also notified HMRC of his address in Vietnam. He also consulted the HMRC web-site (something HMRC regularly criticise taxpayers for not doing) and concluded, not unreasonably, that he did not need to complete a tax return. The web-site guidance is at best unclear in places and caused puzzlement to the Tribunal with its conflicting, vague, and inconsistent advice. For example the guidance notes say you have to complete a return if income from UK property is over £2,500. If it is less you should call the Helpline. HMRC said at the hearing that the telephone advice would have been that a return was required for income of £1,901. This makes nonsense of the £2,500 figure in the web-site guidance. HMRC's assertion that the return was definitely issued is put in considerable doubt by the statement in HMRC's review letter of 12 June 2013 to the appellant referred to in paragraph 30 above. Even if it was issued the Tribunal found difficult to accept HMRC's contention that it must have been received because it was not returned undelivered by the Vietnamese postal system. The tribunal considers that HMRC have wasted everyone's time in bringing a case which has very little merit on their side and where the taxpayer seems to have acted in an exemplary manner. Nothing would have been gained by the issue and completion of the return, no tax was at stake, and another HMRC department had already realised that the appellant's wife, who was in very similar circumstances, should not be penalised.

35. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalties 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 penalties and have concluded there are none. As the Tribunal have found that the appellant had reasonable excuse for the late submission of his return it has not needed to consider whether or not HMRC's decision on special circumstances is flawed.

35. 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.

PETER R. SHEPPARD

TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 26 FEBRUARY 2018