



**TC02200**

**Appeal number: TC/2012/04742**

*CORPORATION TAX – late filing of company tax return – penalties  
under paragraph 17(2) and 18(2) Schedule 18 Finance Act 1998 – serious  
illness of company's accountant and agent – whether reasonable excuse*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WG & TN GARRAD LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN  
LESLIE HOWARD**

**Sitting in public at Bedford on 26 July 2012**

**William Garrad, Director, for the Appellant**

**Mark Ratcliff, Presenting Officer, for the Respondents**

## DECISION

5 1. This is an appeal against penalties totalling £1,747.42 imposed under paragraphs 17(2) and 18(2) Schedule 18 Finance Act 1998 in respect of the late filing of the appellant's company tax return the accounting period ended 30 August 2008.

### **The facts**

10 2. The appellant's company tax return in respect of the accounting period ended 31 August 2008 was due by 31 August 2009. It was received by HMRC on 23 August 2010. There is no dispute that the return was filed late. The issue in this appeal was whether there was a reasonable excuse for the late filing.

3. The appellant is a small company operating in the healthcare industry supplying products to help disabled people to live independently.

15 4. In 1999 the appellant appointed Mr Richard Kau, of the accounting firm Fisher Kau, to advise it in respect of its accounting and tax affairs. Mr Kau remained the appellant's adviser and tax agent until his death from cancer in September 2011.

20 5. Mr Garrad and his wife were the directors of the appellant, although Mrs Garrett had a full-time employment with another employer. Mr Garrad devoted himself to running the business and relied on Mr Kau in respect of all accounting and tax issues. He would meet Mr Kau once a year to finalise the appellant's accounts and Mr Kau would advise Mr Garrad the amount of corporation tax that was due. Mr Garrad would then arrange for the appellant to pay the amount of corporation tax due.

25 6. Mr Garrad stated that there had been occasions in the past when Mr Kau had not filed documents and on some occasions Mr Garrad had not been aware of this, with Mr Kau taking responsibility for any penalties that ensued. On one occasion Mr Kau acknowledged that a late filing had been his fault and deducted the £100 penalty from his own fees.

30 7. On 14 January 2009, several months before the due date for the filing of its tax return (31 August 2009), the appellant submitted accounts for the year ended 31 August 2008 to Companies House. These abbreviated accounts showed Capital and Reserves from the appellant's profit and loss account of £134,601 (an increase of approximately £10,000 from the equivalent figure of £124,809 full year ended 31 August 2007).

35 8. On 23 September 2009, HMRC issued a £100 penalty notice under paragraph 17(2) Schedule 18 Finance Act 1998 in respect of the late filing of the appellant's company tax return. A further penalty determination was issued on 16 December 2009 increasing the penalty to £200, also pursuant to paragraph 17(2), on the basis that the return had not been delivered within three months of the due filing date. According to HMRC's records, these two penalty determinations were sent to Mr  
40 Kau's office address in Milton Keynes, which was also the registered office of the

appellant. HMRC's records show different addresses (but in the same street) in Milton Keynes for the registered office of the appellant and for Mr Kau's offices. We were informed at the hearing that both these addresses were offices from which Mr Kau and his firm operated. We understand that the address shown as the registered office of the appellant was the address of Mr Kau's original office and that his firm moved to the second office in, apparently in the early part of 2010.

9. On 9 June 2010, a penalty determination was issued by HMRC. This was a tax-related penalty of 10% of the estimated corporation tax charge and was issued pursuant to paragraph 18(2) (a) Schedule 18 Finance Act 1998 in circumstances where a company failed to deliver a company tax return within 18 months after the end of its accounting period. HMRC estimated the appellant's corporation tax charge at £46,574.80 and the penalty was, therefore, (at 10%) £4,657.48. This penalty determination was also sent to Mr Kau's (second) office address.

10. HMRC received the appellant's company tax return on 23 August 2010. The corporation tax charge was revised to £15,474.21 and this replaced the original, estimated amount. An amended penalty notice was issued on 27 August 2010, reducing the 10% tax-related penalty to £1,547.42.

11. The appellant paid the outstanding corporation tax (which was due on 1 May 2009) by a BACS transfer in the amount of £15,474.21 on 31 August 2010. On 2 March 2011 the appellant paid by cheque the outstanding interest charge of £553.22 in respect of the late paid corporation tax.

12. We accept Mr Garrad's statement at the hearing that he believed that he had not seen the penalty notices. In our view, Mr Garrad was a transparently honest witness who was at pains to tell the truth. His account of events was not challenged by HMRC at the hearing, although they did contest the assertion that a reasonable excuse existed throughout the period of default.

13. On 27 February 2011, Mr Garrad, wrote to HMRC referring to telephone calls with HMRC in the previous few days concerning the penalty determinations. Mr Garrad wrote:

30 "As I explained during my recent telephone calls, we only received the letters regarding this matter in recent weeks, and upon receipt referred the matter to our Accountant who, as you will know from your records, takes care of our tax matters and makes required submissions to HMRC on our behalf....

35 After a period of investigation with Richard Kau of Fisher Kau, and some explanations from your office, we now understand that the amount you are requesting is made up of a penalty plus interest charges for the late filing of the annual accounts of the period ending 31 August 2008.

40 Richard Kau has advised us that the filing of accounts by his firm was late, due to our files and papers being misplaced during an office relocation for his firm that took place around the time. We anticipate that he will also be writing to you to confirm that this is the reason for

the late submission. Fisher Kau have taken care of our accounts for more than 10 years and as far as we know there has never been such an error previously, and we have always made the returns on payments on time."

5 14. Mr Garrad's letter continued by requesting a cancellation of the penalty charges.

15. At the hearing, Mr Garrad had said that when Mr Kau had told him that the appellant's papers had been mislaid, Mr Kau had also assured him that he had matters in hand and that he would deal with the outstanding matters.

10 16. It appears from this letter that it was at some stage in February 2011 that Mr Garrad first became aware that the return for the accounting period ended 31 August 2008 had not been submitted on time and that penalty notices had been issued. This conclusion was not challenged by HMRC at the hearing.

15 17. In late August 2011, in the course of the conversation with one of Mr Kau's assistants, Mr Garrad became aware for the first time that Mr Kau had been seriously ill with cancer for some period and had been admitted to a hospice. Mr Garrad visited Mr Kau in the hospice and realised that Mr Kau was dying.

20 18. It was at this point, as Mr Garrad put it, that "bells rang". Mr Garrad realised that Mr Kau and misinformed him in February 2011 about the reasons for the failure to file a tax return (ie that the papers have been mislaid in an office move). Mr Garrad did not know whether this was because Mr Kau did not want to inform his clients of the nature of his condition or whether he was "in denial" or combination of both these factors.

25 19. Looking back, over many months, Mr Garrad had sometimes tried to speak to Mr Kau by telephone but was told that he was at home suffering from illness but that he was recovering. There were frequent bouts of illness. With hindsight, Mr Garrad recognised that there had been a number of small indications that Mr Kau was not attending to his affairs. Mr Garrad was open about the fact that he was unable to give dates concerning when these indications occurred. He was, however, aware of the fact that his relationship with Mr Kau had for some time not been as good as it had. We  
30 accepted Mr Garrad's evidence, which was not challenged.

20. Mr Garrad said that he has spoken to other clients of Mr Kau who had experienced similar difficulties with him and who found he had not been attentive in dealing with their affairs. We accept Mr Garrad's evidence.

35 21. Mr Garrad could not remember whether Mr Kau had asked for his approval when the appellant's company tax return was eventually submitted in August 2010.

22. The appellant had been charged late filing penalties for the accounting periods ended 31 August 2002 and 2003. It had also paid tax late in the nine out of ten accounting periods accounting periods ended 31 August 2001 to 31 August 2010.

## The legislation and case law

23. As noted above, the flat rate penalties were charged under paragraph 17(2) Schedule 18 Finance Act 1998. The 10% tax-related penalty was charged under paragraph 18 (2) of the same Schedule.

5 24. Section 117 (2) Finance Act 1998 provides that Schedule 18 of that Act shall be construed and have effect as if that Schedule were contained in the Taxes Management Act 1970 ("TMA1970").

25. Section 118 (2) TMA 1970 provides:

10 " For all the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the [tribunal] or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

26. As to the jurisdiction of this Tribunal, Section 100 B (2) TMA 1970 provides:

20 (1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to . . . the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax[, except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

25 (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

30 (i) if it appears . . . that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears . . . to be correct, confirm the determination, or

(iii) if the amount determined appears . . . to be incorrect, increase or reduce it to the correct amount,

35 (b) in the case of any other penalty, the First-tier Tribunal may—

(i) if it appears . . . that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears . . . to be appropriate, confirm the determination,

40 (iii) if the amount determined appears . . . to be excessive, reduce it to such other amount (including nil) [as it considers] appropriate, or

(iv) if the amount determined appears . . . to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

27. As regards mitigation of penalties section 102 TMA 1970 provides:

5 "The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for [a penalty], and may also, after judgment, further mitigate or entirely remit the penalty."

28. In *HMRC Commissioners v La Senza Ltd* [2007] STC 901 Lindsay J, in a short judgment, held in relation to paragraph 17 Schedule 18 Finance Act 1998 that that  
10 provision conferred:

"... no discretion upon the General Commissioners to lessen the penalty by reference to some unexpressed yardstick such as reasonableness or unreasonableness."

29. In that case, the General Commissioners had held that the amount of the penalty  
15 levied under paragraph 17 was unreasonable. It is plain that Lindsay J was not intending to exclude the application of section 118(2) TMA 1970. His comments were intended to indicate that the General Commissioners (one of the forerunners to this tribunal) did not have a general power under paragraph 17 to mitigate a penalty imposed by that paragraph by reference to concepts of reasonableness.

## 20 **Arguments of the parties**

30. HMRC argued that the appellant had not demonstrated that it had a reasonable excuse for its failure to file the return throughout the period of that failure, for the purposes of section 118 (2) TMA 1970.

31. Mr Ratcliff argued that the directors of the appellant should have been aware of  
25 the basic requirements to file annual returns and pay corporation tax on profits. They should have realised that they had not been asked to approve the return and should have pressed Mr Kau for an explanation. Although Mr Garrad challenged Mr Kau about the delay this appeared to have been only at the point when they received the demand for the tax, interest and penalties in February 2011, some 18 months after the  
30 return should have been submitted and six months after the return had, in fact, been submitted.

32. Mr Ratcliff argued that the appellant appeared to have left matters to Mr Kau with no checks in place. This was not reasonable. The directors should have taken  
35 steps that a reasonable person would have taken to ensure that the appellant filed its return on time and made the correct payment of its tax liability when it was due.

33. Mr Garrad felt he had been let down by Mr Kau, albeit in difficult circumstances. Mr Garrad considered that he had acted with integrity. He had paid interest charges on the late paid corporation tax but considered that the penalties were unfair.

34. Mr Garrad argued that Mr Kau's illness had meant that Mr Kau had not discharged his responsibilities in dealing with the appellant's tax affairs. These were exceptional circumstances which constituted a reasonable excuse.

5 35. Mr Garrad said that he had thought Mr Kau would advise him as to the amount of corporation tax that the appellant needed to pay. He trusted and relied on Mr Kau. It had come as a surprise that the appellant's corporation tax had not been paid and that there were penalties.

### Decision

10 36. In our view, the directors of the appellant should have realised that the appellant had not filed its company tax return for the accounting period ended 31 August 2008.

37. It is, of course, perfectly acceptable and normal for a small business such as the appellant to rely on the advice of an accountant, such as Mr Kau, in the preparation and filing of its tax return. However, the appellant cannot reasonably abdicate all responsibility for ensuring that the return is filed on time.

15 38. It is too broad to state, as HMRC did in its Statement of Case, that reliance on a third party cannot be a reasonable excuse for the, for the purposes of section 118 (2) TMA 1970. The various authorities were summarised by this tribunal in *Dale Services Contracts Limited v HMRC Commissioners* [2012] UKFTT 299 (TC). The Tribunal stated at [43]:

20 "Broadly speaking, therefore, the position in this Tribunal can be summarised as follows. Reliance on a third-party may be a reasonable excuse, but it is not *necessarily* a reasonable excuse. Much will depend on the nature of the task entrusted to the third-party. Thus, specialist tax advice may well give a taxpayer a reasonable excuse if the advice proves to be wrong or misleading. On the other hand, relatively straightforward tasks which are delegated to an agent will not absolve the taxpayer if the agent fails to perform those tasks correctly."

25 39. It may be added that a taxpayer, such as the appellant, should generally be aware of the date by which its tax returns needed to be filed. In *Dunscar Garden Centre Limited v HMRC Commissioners* [2011] UKFTT 564 (TC) the tribunal, in respect of the filing of Form P 35, stated:

35 "The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet its obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse."

40. Whilst we agree with the view expressed by the tribunal in *Dunscar* the circumstances of this case are unusual. Mr Garrad's evidence indicated that, for whatever reason, Mr Kau concealed from his client the fact that he was unable to deal with the appellant's affairs in an efficient and timely manner on account of his ill-  
5 health. We think it reasonable to infer that Mr Kau's illness had lasted for some time. Mr Garrad stated that "bells rang" when he realised in August 2011 the true seriousness of Mr Kau's illness, and his recollection of the previous bouts of illness, absences from the office and small indications that Mr Kau had not been attending to his affairs. It was not clear, and Mr Garrad honestly admitted he could not remember,  
10 for how long a period Mr Kau's illness may have affected his work.

41. The relevant period for determining whether there was a reasonable excuse for the purposes of section 118(2) Taxes Management Act 1970 is the period 31 August 2009 (the latest date by which the appellant's company tax return should have been filed) and 23 August 2010 (the date on which the return was filed).

15 42. The letter of 27 February 2011 indicates that Mr Kau concealed the truth from Mr Garrad at a time after the date on which the appellant's return had been filed and, therefore, at a time which is not strictly relevant for the purposes of reasonable excuse. Moreover, it is not clear from the evidence whether Mr Kau's illness did, in fact, prevent him from preparing the appellant's tax return by 31 August 2009 or  
20 during what period his illness affected the performance of his duties. The onus of proof is on the appellant to show that there was a reasonable excuse for the failure to file the return. We do not consider that the appellant has discharged this burden of proof.

43. Moreover, Mr Garrad as a director of the appellant should have known the due  
25 date for the filing of the appellant's tax return and should have challenged Mr Kau in the period leading up to 31 August 2009. His failure to do this until February 2011 (at which time Mr Kau apparently misled him as to the true state of affairs) does not seem to us to be the course of action that would have been followed by a reasonably prudent director. Mr Garrad should have asked himself why no return had been filed  
30 and no tax paid. As HMRC noted, the appellant's accounts for the year ended 31 August 2008 indicated an accretion to reserves from the profit and loss account of approximately £10,000. Subject to the usual adjustments to accounting profits that need to be made for tax purposes, this should have indicated to the appellant that there was a potential liability to corporation tax. We accept that the penalty notices were  
35 sent to the appellant's registered office at Mr Kau's business address and that Mr Garrad was not aware of these penalty notices.

44. For these reasons, we confirm the penalty determinations under paragraph 17 (2) and paragraph 18 (2).

45. We should add that this tribunal has no general power to mitigate a penalty  
40 charged under paragraph 17 and 18 of Schedule 18 Finance Act 1998. Section 100B (2) (a) TMA 1970 limits the jurisdiction of the tribunal in the case of a penalty which is required to be "of a particular amount." In our view, the fixed and tax-related



penalties under paragraphs 17 and 18 respectively constitute penalties which are required to be "of a particular amount."

5 46. We cannot interfere with HMRC's discretion to mitigate penalties pursuant to section 102 TMA. Nonetheless, we think it correct to record our view that, although falling short of a reasonable excuse, there are significant mitigating factors in this case which we hope will be taken into account when HMRC come to exercise their discretion under section 102.

10 47. 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.

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**GUY BRANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 16<sup>th</sup> August 2012**

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