



TC03267

Appeal numbers: TC/2013/04944, 4945, 4946, 4947, 4948, 4949, 4950 & 4951

INCOME TAX – Penalty for late submission of self-assessment returns (FA 2009 Sch 55) – Returns submitted by agent on 1 February – Whether a reasonable excuse required – Whether a reasonable excuse existed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**YAVOR VLADIMIROV
GEORGI MARINOV
MARIO MALIKYAN
PAVEL MIHOV
DIANA ZHELYAZKOVA
GEORGE PENKOV
VIOLETA PALIKAROVA
VASIL VASILEV**

Appellants

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The Tribunal determined the appeal on 3 December 2013 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 Notices of Appeal dated 24 July 2013 (with enclosures), HMRC's Statements of Case dated 10 October 2013 (with enclosures), and other papers in the cases.

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DECISION

5 The Tribunal issued a summary decision dismissing this appeal on 3 December 2013, which was released to the parties on 5 December 2013. The Appellants subsequently requested for full written findings and reasons, which are now provided.

Introduction

1. Each of the Appellants appeals against a penalty of £100 imposed in respect of the late filing of his or her income tax return for the tax year 2011-12. On 4
10 September 2013, the Registrar of the Tribunal directed that these appeals shall be joined and determined together by the same Tribunal.

2. Each of the Appellants was a client of the same agent. It has not been disputed in these appeals that the deadline for filing each of the tax returns was 31 January 2013 for an electronic return, and that each of the returns was filed electronically on 1
15 February 2013 by the Appellants' agent, that is to say, the day after the due date.

The relevant legislation

3. It has not been disputed by any of the Appellants that they were under an obligation to file a tax return pursuant to section 8 of the Taxes Management Act 1970 ("TMA").

20 4. Nor has any Appellant disputed that section 8 TMA required them to file the return (if filed electronically) on or before 31 January 2013.

5. Paragraph 1 of Schedule 55 to the Finance Act 2009 ("Schedule 55") relevantly provides that:

25 (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

30 (a) the circumstances in which a penalty is payable, and
(b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule—

35 "*filing date*", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“*penalty date*”, in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

- 5 (5) In the provisions of this Schedule which follow the Table—
- (a) any reference to a return includes a reference to any other document specified in the Table, and
 - (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

Tax to which return etc relates Return or other document

1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970
		(b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

10 ...

6. Paragraph 2 of Schedule 55 provides that “Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table”.

7. Paragraph 3 of Schedule 55 provides that “P is liable to a penalty under this paragraph of £100”.

15 8. Paragraph 16 of Schedule 55 provides that:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

20 (2) In sub-paragraph (1) “*special circumstances*” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

25 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

30 9. Paragraph 23 of Schedule 55 provides that:

(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)—

- 5 (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
- 10 (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.

The Appellants' case

15 10. The Appellants do not dispute that 31 January 2013 was, by virtue of section 8 TMA, the “date by which [the return] is required to be made or delivered to HMRC” for purposes of paragraph 1 of Schedule 55.

11. The Appellants also do not dispute that their returns were filed on 1 February 2013, that is to say, on the day after the date by which the return is required to be
20 made or delivered to HMRC.

12. Rather, the Appellants' case is that there is a reasonable excuse within the meaning of paragraph 23 of Schedule 55, or alternatively that they do not need to establish a reasonable excuse for 1 February 2013.

13. The Appellants' agent stated to HMRC, in letters dated 7 March 2013, that “As
25 at 31.01.2013 we have 124 other tax returns to complete and lodge with HMRC by the filing date”, that “Our office has worked all day and night through 31.01.2013”, and that “The return has been filed on the next day without unreasonable delay”. In support of that contention, the Appellants have provided computer printouts showing that a large number of tax returns were filed by their agent on 31 January 2013, and
30 that some 20 tax returns were filed on 1 February 2013.

14. The Appellants contend that they have relied on a third party (their tax advisor) and have taken reasonable care as explained in CH61640. It is said that the Appellants took action to ensure that the returns were filed on time, and approved the tax advisor's tax calculation in advance of the deadline.

35 15. The Appellants also raise an alternative argument (referred to below as the “alternative argument”) as follows. The HMRC Self-Assessment Manual states at paragraph SAM10090 as follows:

40 For a late filing penalty, you should consider whether the customer had a reasonable excuse at the date the relevant penalty arose. For example, if you have an appeal against a daily penalty assessment,

consider whether the customer had a reasonable excuse at the time the daily penalties first became payable.

5 In this case, the penalties first became payable on 1 February 2013. Therefore, the Appellants were not required to have a reasonable excuse on 31 January 2013, because the penalties were not payable on that day. Furthermore, the Appellants were not required to establish a reasonable excuse in relation to 1 February 2013 because the returns were filed on that date, so that there was no default on that date. Even if SAM10090 is only guidance rather than legislation, previous decisions of the Tribunal have concluded that reliance on information or guidance from HMRC which turns out to be incorrect can constitute a reasonable excuse.

The HMRC case

16. HMRC contends as follows.

15 17. The Appellants could have filed their returns personally, and did not require an agent to do so. It was the responsibility of each Appellant to ensure that he or she complied with his or her obligation to file a tax return on or before the filing date. That responsibility cannot be transferred to another person. If an Appellant entrusted that task to another person, the Appellant remained responsible for ensuring that the other person carried out the task. Delegation to a third party is not a reasonable excuse. Reliance is placed on *Stewarton Polo Club Ltd v Revenue & Customs* [2011] UKFTT 668 (TC). If an Appellant feels that the agent failed in his or her professional capacity or that the agent did not follow the Appellant's instructions, then the Appellant should seek redress directly from the agent.

20 18. The quantity of the agent's workload at the time of the filing date does not constitute a reasonable excuse. Notice to file a return was given in sufficient time to enable each Appellant to file a return by the due date. Approving a tax calculation prior to the filing date does not amount to ensuring that the return is filed on time.

19. The information in the HMRC Self-Assessment Manual is guidance only. It is not tax law and cannot be viewed as such.

30 20. HMRC are of the view that in each of these cases there are no special circumstances within the meaning of paragraph 16 of Schedule 55.

The Tribunal's findings

35 21. The computer printout referred to at paragraph 13 above does not indicate the precise time of filing of each return. The HMRC statements of case and accompanying computer records show that the returns to which this appeal relates were filed on 1 February 2013 at 22:20, 23:15, 23:31, 23:36, 23:39, 23:42, 23:47, 23:54. Be that as it may, the Tribunal accepts that the returns of all of the Appellants were filed less than 24 hours after the deadline.

22. However, as a matter of law, if a return is filed even an hour after the deadline, the taxpayer becomes liable to a £100 penalty, unless there is a reasonable excuse or special circumstances.

23. In *Stewarton Polo Club*, it was said at [9]-[18] that:

5 9. ... The Appellant says that he entrusted his accountant with the responsibility for filing [the return]. HMRC’s position is, however, that reliance on a third party such as a bookkeeper does not amount to a reasonable excuse.

10 10. The Tribunal notes that in *RW Westworth Ltd v HMRC* [2010] UKFTT 477 (TC) (which concerned an appeal against cancellation of gross payment status under the Construction Industry Scheme), the Tribunal said at [13] that “In view of Mr and Mrs Westworth’s lack of experience and expertise in accounting, administration and tax matters we consider that it was reasonable for the Company to retain the services of a consultant”, and at [14] that “the Company had a reasonable excuse for the late PAYE payments”.

15 11. The Tribunal has also considered *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199. That case similarly concerned an appeal against cancellation of gross payment status rather than an appeal against a penalty for late filing of P35 returns, although the “reasonable excuse” test in both contexts may be materially similar. In that case, the appellant company which had no knowledge of tax or VAT matters had relied on a company secretary to ensure compliance with tax obligations. However, various tax obligations were not complied with. The Tribunal found in that case at [20] that it had been “reasonable for the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations”. That decision concluded at [23], referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that “reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context”.

20 12. It is noted that this case concluded that reliance on a third party “can” be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.

25 13. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had “relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists”. It was further found in that case (at [8(q)]) that as the appellant “did not have the specialist knowledge and expertise herself she employed and relied upon persons

whom she reasonably believed to have such specialist knowledge and expertise”.

5 14. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

10 15. The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

15 16. In *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC), the Tribunal said at [7] that mistakes by an agent did not amount to a reasonable excuse, in circumstances where “The mistake could have been avoided if the agent had exercised proper care” and where “The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts”.

20 17. 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 such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her 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
25
30 appellant to a third party of itself amounts to a reasonable excuse.

18. As each case turns on its own particular circumstances, the Tribunal does not consider it necessary to draw detailed comparisons with the cases referred to above.

35 24. Further cases were cited in *SR Derivatives Ltd v Revenue & Customs* [2013] UKFTT 301 (TC) at [23]-[28], in which it was concluded at [28] that “the absence of any satisfactory explanation for the failure by [the agent] to file the Company’s return on time, we find that the reliance on [the agent] by the Company cannot amount to a reasonable excuse”.

40 25. In the present case, the Tribunal is not satisfied that the agent’s workload on the night of 31 January 2013 of itself provides a reasonable excuse for failure to file on time each of the returns to which the present appeal relates. The period immediately prior to the deadline is typically a busy period for tax agents. It is for taxpayers to ensure that they get the necessary information to their agents in sufficient time to enable the return to be prepared and filed on time. It is for the agent to advise its
45 clients of the timeframe within which information needs to be provided to the agent to ensure that this is possible. The evidence before the Tribunal in these cases does not demonstrate the existence of any out of the ordinary circumstances that could amount

to a reasonable excuse or special circumstances for purposes of paragraphs 16 and 23 of Schedule 55.

26. The Tribunal does not consider that the Appellants are assisted by CH61640. This states as follows:

5 Where a person has asked somebody else to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to a third party and that third party failed to complete it.

10 We expect the person to take reasonable care to explain to the third party what they require them to do, to set deadlines for the work and to make regular checks on progress, reminding where appropriate. We expect the person

- 15 • to be able to tell us what action they took to ensure that the obligation to file the return or other document was met, and
- normally, but not always, to know the reason why the failure occurred.

 If the person does this and still fails to file the return or other document because the third party failed, they may have a reasonable excuse ...

20 27. In the circumstances of the present case, the first paragraph of CH61640 does not support the Appellants' case. As to the second paragraph, evidence has not been provided in this case that the Appellants set deadlines for the work or made regular checks on progress, reminding where appropriate. CH61640 does not suggest that a taxpayer, merely by approving his or her agent's tax calculation, can be taken to have

25 set deadlines for the work and made regular checks on progress, reminding where appropriate. Furthermore, no reason has been given for the agent's failure other than that 31 January 2013 was an exceptionally busy day. For the reasons above, the Tribunal does not consider that of itself to be sufficient to establish a reasonable excuse, and the Tribunal does not consider that CH61640 suggests otherwise.

30 CH61640 does not suggest that *any* reason for a failure will be sufficient.

28. For purposes of paragraph 23(2)(b) of Schedule 55, the Tribunal is therefore not persuaded that the Appellants have established that they "took reasonable care to avoid the failure" by the agent.

29. For similar reasons to those above, the Tribunal is not persuaded that the

35 Appellants have established the existence of special circumstances for purposes of paragraph 16 of Schedule 55.

30. As to the Appellants' alternative argument, the Tribunal considers it to be untenable. The Appellants' argument is, in effect, that because the returns were filed on 1 February 2013, they do not need to establish a reasonable excuse for 1 February

40 2013. Nothing in either the legislation or in SAM10090 suggests that this is the case. The Appellants were required to file the returns on or before 31 January 2013. Their failure to do so meant that a penalty arose on 1 February 2013. They remain liable to

5 that penalty unless on 1 February 2013 they had a reasonable excuse for not having filed on or before 31 January 2013 that continued until 1 February 2012. If there is no reasonable excuse, the taxpayer becomes liable to a penalty on 1 February, even if the tax return is filed on 1 February. SAM10090 is not in any way inconsistent with the legislation in this respect.

31. It follows that this appeal is dismissed.

10 32. 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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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

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RELEASE DATE: 22 January 2014