



TC05147

Appeal number: TC/2015/07058

Income tax – penalties – late SA Returns for 2011 and 2012 – application to appeal out of time – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN FERGUSON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE KENNETH MURE, QC

Sitting in public at The Eagle Building, Glasgow on Wednesday 11 May 2016

Appellant – Mr J P Crawley, CA

Respondents – Miss Clare Robertson, Presenting Officer, HMRC

DECISION

Introduction

1. This is an application by the appellant to the Tribunal for permission to appeal late against penalties imposed for his failure to lodge timeously Returns for 2011 and 2012. The penalties total £3,200. HMRC have not accepted late notices of appeal as no *reasonable excuse* has been presented.
2. The appellant did not appear to give evidence but his account of the matter was spoken to by his accountant, Mr Crawley, who appeared on his behalf.

10 Submissions

3. Mr Crawley opened the appeal on behalf of the appellant. He indicated that the level of his client's income for both Years was below the personal allowance. Tax deducted, therefore, was repayable. For 2010/11 the appellant, he said, had received Jobseeker's Allowance of £856 and income from CSI self-employment of £2,213 (from which tax of £442.50 had been deducted). For 2011/12 the appellant received Jobseeker's Allowance of £1,408 and income from CIS self-employment of £938 from which £187.50 in tax had been deducted.

4. Mr Crawley understood that HMRC had closed his client's SA record on 8 February 2013. They should have realised that he was a "man of straw". The pragmatic solution in the present case was to cancel the penalties. He submitted that the appeal should be allowed and all penalties cancelled.

5. Miss Robertson then replied on behalf of HMRC. She advised that their records indicated that for 2011/12 the appellant had worked for Smart Construction (UK) Ltd and his earnings had been subject to PAYE. He started work with Smart's on 8 August 2011 and continued until 25 November 2011. He had been paid £7,320 from which tax of £657 had been deducted. His P45 form from an earlier employment indicated earnings of £8,176.

6. Miss Robertson produced a schedule listing the eight penalties which were issued for both years between February 2012 and February 2014. They were all appealed on 16 March 2015. These appeals were all late by delays varying between 1,096 and 354 days. Appeals are, of course, due within 30 days as emphasised by HMRC in their correspondence to the appellant. Although the appeals were admittedly late, no explanation for the delay was offered in the correspondence or the Notice of Appeal. Mr Crawley had responded (tab 2, p6) to the effect that as the appellant was registered as unemployed and in receipt of only Jobseeker's Allowance there was no requirement on him to submit a Return.

7. Miss Robertson then referred me to the relevant legislation. Section 49 TMA 1970 obliges HMRC to accept late Notice of Appeal where the taxpayer has a *reasonable excuse*. This is not defined exhaustively in the legislation (cf Section 118 TMA): in Miss Robertson's submission it denotes something outwith the taxpayer's control, which could not be anticipated. Whether a *reasonable excuse* arose, had to

be considered in respect of each penalty. Miss Robertson acknowledged that this Tribunal has a broader discretion than HMRC. It should consider all factors arising, including the reasons for and length of the delay, any explanation, and the prejudice resulting to each party from the decision.

5 8. In the present case, the appeals were substantially late. There was a need for
finality, Miss Robertson continued. She referred to the relevant case-law of
10 *Ogedegbe v HMRC* [2009] UKFTT 364 (TC), *Data Select Limited v HMRC* [2012]
UKUT 187 (TCC), and *O’Flaherty v HMRC* [2013] UKUT 161 (TCC). Following on
Sir Stephen Oliver’s *dicta* in *Ogedegbe* she invited me to consider the prospects for
15 success of any appeal. HMRC’s records showed that the Returns had been issued.
There had been no change of address. No correspondence had been returned as
“undelivered” to HMRC. Further, several SA statements had been computer-issued in
addition to the Penalty Notices and reminders. There had been no response by the
appellant to any of these. In fact he had only responded in January 2015 by a
20 telephone call to HMRC’s debt management section (tab 3, p18). That phone call was
over 10 months after the most recent penalty. No explanation for the delay was then
offered.

9. In conclusion Miss Robertson urged me to dismiss the application. HMRC’s
records indicated that he had been sent the Returns. Also he had received Penalty
20 Notices, reminders, and SA statements. There had been no response until HMRC’s
debt management had become involved. No good reason or explanation for the delay
had been offered. The burden of proof rested on the appellant and it had not been
discharged.

10. In a brief reply Mr Crawley suggested that the important preliminary point in
25 this appeal was whether the appellant should have submitted a Return. He had
suggested in correspondence that there was no such requirement (tab 1, p1).

Conclusion

11. The delays in appealing each of these penalties is inordinate. The date in
HMRC’s Schedule have not been disputed. No explanation is offered. I agree with
30 Miss Robertson that there was no *reasonable excuse* forthcoming. While I agree with
her that my discretion is somewhat greater, I do not consider that I can take a more
indulgent view. The case-law cited sets out the criteria to be applied and these are
summarised *supra* (para 8). There is a need for finality. The appellant received
repeated items of correspondence from HMRC which, reasonably, should have alerted
35 him to make much earlier enquiry of them.

12. I would query too the prospects of success in any appeal. The appellant,
Mr Ferguson, was not present to give evidence. HMRC insists that the Returns were
issued, and not returned as undelivered. There is a conflict about the amount and
sources of the appellant’s income. The implication of HMRC’s notices and
40 correspondence was never challenged until the phone-call made by the appellant in
January 2015.

13. For all of these reasons leave to appeal out-of-time is refused.

14. 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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**KENNETH MURE
TRIBUNAL JUDGE**

RELEASE DATE: 6 JUNE 2016