



TC06971

Appeal number: TC/2018/02690

INCOME TAX – late filing penalties – reasonable excuse – reliance on another – reasonable care to avoid the failure – Schedule 55, Finance Act 2009 – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN COLL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
IAN ABRAMS**

Sitting in public at Taylor House, London EC1 on 24 January 2019

The Appellant in person

Melissa Kumbula, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Coll against late filing and late payment penalties imposed by HMRC under paragraphs 3 and 4, Schedule 55, Finance Act 2009 in respect
5 of the late filing of his 2011/12 tax return.

2. Mr Coll appeared in person. HMRC were represented by Ms Kumbala. We heard evidence from Mr Coll. In addition, a bundle of documents was submitted in evidence.

Procedural Issues

3. Mr Coll's notice of appeal is dated 2 April 2018. The review decision letter,
10 against which he appeals, is dated 24 January 2018. His appeal was therefore out of time. However, HMRC did not object to the late filing, and the Tribunal has granted permission for a late appeal.

4. On 4 May 2018, the Tribunal wrote to Mr Coll acknowledging receipt of his
15 notice of appeal, and assigning the appeal to the standard category – which would normally be decided following an "in person" hearing.

5. For reasons that are not clear, in addition to this appeal proceeding on the standard
category track (under tribunal reference TC/2018/02690), a default paper category track
for this same appeal proceeded in parallel (under tribunal reference TC/2018/05113).
That parallel appeal appears to have been based on the statement of case filed in this
20 appeal under reference TC/2018/02690. This was, not surprisingly, confusing to the
Appellant, who had received conflicting correspondence from the Tribunal. A decision
was released by the Tribunal based "on the papers" under reference TC/2018/05113,
but without the benefit of the Appellant's submissions (other than the grounds of appeal
as set out in their notice of appeal). Ms Kumbala told us that HMRC have no record of
25 receiving this decision notice. We find that a procedural irregularity has occurred in
relation to the decision reached under reference TC/2018/05113 and that it is in the
interests of justice that it be set aside. We (with the consent of both parties) direct that
it be set aside pursuant to Rule 38, and re-make the decision as set out in this Decision
Notice.

Background facts

6. On the basis of the evidence before us, we find the background facts to be as
follows.

7. Mr Coll is a director and shareholder of a company that is in the restaurant
business. The company was incorporated, and the business started, in 2010. For the
35 periods that are the subject of this appeal, the company had a turnover of around
£500,000 and employed about 15 members of staff. Mr Coll engaged a firm of
accountants – Alton & Co – to undertake book-keeping for the company and the
preparation of the company's accounts and various tax returns. Mr Coll provided
invoices and other accounting information to Alton & Co on a monthly basis, and he
40 had regular progress meetings with them. In addition to dealing with the tax affairs of

the company, Alton & Co also prepared Mr Coll's personal income tax return. In addition to his income as a director and shareholder of the company, Mr Coll also received income from an investment property.

5 8. Alton & Co maintained the company's books and prepared the various tax returns (including Mr Coll's personal tax return) for two years without any serious problems.

9. In December 2012 or January 2013 (Mr Coll could not remember the precise date – but it was shortly before the filing date for his 2011/2012 personal tax return), Mr Coll had a meeting with his account manager at Alton & Co. It transpired during the course of the meeting that there were material problems with the quality of Alton & Co's book-keeping, and that there were material errors in the accounting records that they had prepared. The account manager informed Mr Coll that additional work would need to be done to correct accounting records, and that it was unlikely that Alton & Co would be able to prepare Mr Coll's personal tax return by the 31 January 2013 filing deadline (for electronic returns). The account manager explained to Mr Coll that the company's accounts had to be finalised first, and only once the final figures were available for the company was it then possible to prepare Mr Coll's personal tax return. It subsequently transpired that Alton & Co did not use double entry bookkeeping, and this may have been one of the reasons why the accounting records contained errors.

10. Soon after this meeting, Mr Coll asked friends and colleagues for recommendations for an alternative firm of accountants. In early February 2013, he terminated the contract with Alton & Co, and appointed Elisabeth Sims (a sole practitioner) in their place. Alton & Co would not transfer their files to Ms Sims. It took many calls to Alton & Co and many months before they would transfer their files to Ms Sims. Once Ms Sims had received the files from Alton & Co, it then took her about a month to reconstruct the company's accounts, and prepare Mr Coll's tax return. His return was eventually filed electronically on 31 July 2013.

11. Mr Coll told us that he telephoned the HMRC helpline in early February to inform HMRC that his personal tax return would be filed late, and explaining why. Although there is no record of this call on HMRC's electronic log (which was included in the document bundle), his oral evidence was not challenged by Ms Kumbala, and we believe that he made the call. We note that there is correspondence with HMRC included in the bundle that has not been recorded in the electronic log, and we therefore consider that it is entirely credible that the log is not necessarily a complete record of all interaction between Mr Coll and HMRC.

35 12. Mr Coll said (and we believe him) that he made other calls to the HMRC helpdesk to keep them informed of progress on the finalisation of his tax return.

13. As the return had not been filed by the due filing date of 31 January 2013, a penalty assessment of £100 was issued on 12 February 2013. A notice of daily penalty assessment was issued on 14 August 2013 for £900 (calculated at £10 per day for 90 days). An appeal against the penalties was filed on 13 September 2013.

The Law

14. The filing date for self-assessment income tax returns that are filed electronically is 31 January following the end of the relevant tax year. In the case of the 2014/15 tax year, the filing date was 31 January 2016.

5 15. Penalties are payable for tax returns that are filed late. Paragraph 3, Schedule 55, Finance Act 2009 provides for a £100 fixed penalty for a late return. Paragraph 4 of Schedule 55 imposes daily penalties of £10 per day (for a maximum of 90 days) if the return is filed more than three months late. Therefore, the maximum penalty chargeable under paragraph 4 is £900.

10 16. Paragraph 23 of Schedule 55 provides as follows:

Reasonable excuse

23(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.

15

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

20

(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

25

(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.

17. Thus, reliance on another person to do something can only be a reasonable excuse if the taxpayer took reasonable care to avoid the failure that gave rise to the penalty. Once the excuse has ceased, the taxpayer must remedy the failure without unreasonable delay.

30 Submissions

18. Mr Coll submits that he had a reasonable excuse for the failure to file his tax return on time as he appointed a firm of professional accountants to keep the relevant accounting books, and to prepare tax returns for his company and himself. The firm had undertaken this role to his satisfaction for prior years. It was only at a very late stage that he became aware that Alton & Co would not be able to meet the filing deadline. At that point, he submits he did "all that was humanely possible in the circumstances" to address the failure: he instructed new accountants and telephoned HMRC's helpline to inform them that the return would be late, and he proceeded with reasonable diligence to have Alton & Co release their files to Ms Sims. As soon as they had done so, Ms Sims prepared the relevant accounts and returns, and these were then filed. Mr Coll submits that he took reasonable care to avoid the failure to file the return on time, and

40

that the return was filed without unreasonable delay once the relevant files had been transferred from Alton & Co to Ms Sims.

19. Ms Kumbala submits that Mr Coll does not have a reasonable excuse for the failure to file his income tax return on time. She submits that Mr Coll's reliance on Alton & Co to prepare his tax return cannot be a reasonable excuse by virtue of paragraph 23(2)(b). She submits that he did not take reasonable care to ensure that Alton & Co filed his tax return on time, because the corrective action that he took occurred after the failure to file.

Conclusion

20. We find that Mr Coll had a reasonable excuse for the failure to file his tax return by the due date, and therefore allow his appeal.

21. It is not in dispute that Mr Coll relied on Alton & Co to prepare his tax return. In consequence of paragraph 23(2)(b), that reliance can only amount to a reasonable excuse if Mr Coll had taken reasonable care to avoid the failure to file on time.

22. We find that Mr Coll had taken reasonable care to avoid the failure, and that the failure was corrected without unreasonable delay. Alton & Co had acted as his tax accountants for the previous two years without any problems. Until the meeting shortly before the filing date, Mr Coll had no reason to believe that they would not meet the filing deadline.

23. As soon as he realised that the filing deadline would be missed he took appropriate steps. He asked friends and colleagues for recommendations for a new accountant. He notified HMRC that his return would be late. He appointed the new accountant in early February. He chased Alton & Co to release their files to the new accountant – this took time. But once the files were in the hands of Ms Sims, the tax returns were prepared and filed within a month.

24. This appeal is therefore allowed.

25. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 08 FEBRUARY 2019