



TC05246

Appeal number: TC/2015/03421

INCOME TAX – self-assessment return – late filing penalties – Schedule 55 to FA 2009 – permission to appeal out of time – reliance on third party – lack of funds and business condition – whether reasonable excuse; no – whether special circumstances; no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MISS GRACE MACDONALD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
MR IAN SHEARER**

**Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow G2 7TS on 29
January 2016**

No representation nor attendance by the Appellant

**Ms Linda McGuigan, presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

1. The appellant, Miss Grace MacDonald, appealed against four penalty notices in respect of the late filing of her Self-Assessment Tax Return ('SA Return') for the year 2012-13 imposed under Schedule 55 to Finance Act 2009 ('Sch 55 FA 2009').
2. The issues for determination as noted in HMRC's Statement of Case are:
 - (1) Whether to allow the application for permission to make or notify a late appeal;
 - (2) Whether the appellant has incurred a penalty under Sch 55 FA 2009 for the late filing of the 2012-13 SA return;
 - (3) Whether the appellant had a reasonable excuse or special circumstances for the successive failures to file the SA return.

Hearing in absence

3. There was no appearance of the appellant at the scheduled time for the hearing at 10am. There had been no message left by the appellant with the Tribunals Service to notify of her likely delay. The Tribunal nevertheless waited till 10.30am as on that morning, there were high winds across Scotland, causing delays and cancellations to a number of regional train services, and some problems on the roads. The Tribunal checked that trains from the appellant's local area to Glasgow were running, and tried contacting the appellant by telephone but received no reply.
4. The Tribunal was satisfied that the appellant had been notified of the hearing by letter dated 9 December 2015. There were numerous email exchanges and correspondence between the appellant and the Tribunals Service preceding the letter of 9 December 2015 to suggest that the appellant was well aware of the listing for the hearing, and that there had been no issue for the delivery of correspondence to the same address as that for the 9 December 2015 letter.
5. We are also satisfied that no postponement application had been made. We considered the position in the light of Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and decided that it would be in the interests of justice to proceed with the hearing in the appellant's absence.

The background

6. Miss Macdonald was appointed a Director of The Bruce Macdonald Ltd (a restaurant business) on 20 July 2009. In consequence of becoming a director, Miss Macdonald had a statutory obligation to notify HMRC by 5 October 2010 of her requirement to complete an SA return under s7 of the Taxes Management Act 1970 ('TMA'), as amended by Sch 41 to the Finance Act 2008.

7. It was not until 12 April 2013 that Miss Macdonald registered with HMRC; hence the time limit for the s7 TMA requirement was breached by over 30 months.

8. Following the notification, a Self-Assessment ('SA') return for 2012-13 was issued on 25 April 2013 for completion, and the filing due date of the return was 31 January 2014. On the failure to do so, the first penalty notice dated 18 February 2014 was issued to impose the fixed penalty of £100 under paras 1 to 3 of Sch 55 FA 2009.

9. Successive failures to file the 2012-13 SA return led to further penalties under paras 4 to 6, Sch 55 FA 2009 as follows:

10 (1) The daily penalty of £10 for failure continuing after 3 months (maximum chargeable of 90 days);

(2) A further penalty if failure continues after 6 months, being the greater of £300 or 5% of the tax liability;

(3) A further penalty if failure continues after 12 months, being the greater of £300 or 5% of the tax liability.

15 10. The daily penalty of £900 and the 6-month penalty of £300 were both imposed on 18 August 2014 by separate notices. The 12-month penalty of £300 was imposed by notice dated 24 February 2015.

20 11. Miss Macdonald appealed to HMRC on 15 December 2014 against the first three notices for the respective penalties of £100, £900 and £300. At the time of her appeal to HMRC in December 2014, her 2012-13 SA return remained outstanding.

25 12. By letter dated 11 February 2015, HMRC refused Miss Macdonald's appeal notified in December 2014 on the ground that the appeal was outwith the statutory time limit of 30 days from the date of the penalty notices as noted on all the notices. The letter continued by stating that HMRC could only accept a late appeal if Miss Macdonald 'had a reasonable excuse for not appealing within the time limit' and 'appealed without unreasonable delay after the excuse had ended'. Miss Macdonald was invited to write again if she thought these circumstances applied to her.

30 13. It would seem that Miss Macdonald wrote some time again near May 2015 to appeal to HMRC against the 12-month penalty notice issued on 24 February 2015. Miss Macdonald's letter of appeal was (inexplicably) not included in the bundle but was referred to as 'your recent letter' in HMRC's reply to her dated 12 May 2015. The reply reiterated the reasons for refusing Miss Macdonald's December 2014 appeal, and the officer continued by stating:

35 'I still cannot accept your appeal. If you do not agree that you made your appeal too late for us to consider, you can ask HM Courts & Tribunals Service to review our decision. You should write to them by 11 June 2015.'

14. The SA return for 2012-13 was eventually filed on 10 July 2015.

The Notice of Appeal

15. The Notice of Appeal to the Tribunal was dated 25 May 2015. The appealable decision noted in the Notice of Appeal is HMRC's letter dated 12 May 2015. Accordingly, Miss Macdonald has stated 11 June 2015 as 'the latest time by which
5 appeal ought to have been made or notified' under section 6 of the Notice, which requests also the reasons in respect of a request for permission to make or notify the appeal late. While Miss Macdonald has marked the box for 'Yes' for notifying the appeal late, she has not stated any reasons why the appeal was made out of time.

16. For the grounds of appeal, Miss Macdonald states: '... if I could pay the penalties I would but I have no funds or income to do this so do not know what to do'. Under section 8 of the Notice for 'Result', she states: 'I just think the accountants that were employed and paid to do the job had done it as it was plain to see that the business was in dire trouble and I was trying everything possible to keep it going.'
10 (The statements are all in block capital in the Notice, which is not replicated here.)

17. Miss Macdonald has given extensive reasons for 'Hardship Application' under section 5, which is not being related here, as a hardship application applies only to an appeal where the disputed tax is an indirect tax (such as VAT). It is not applicable in an appeal against penalties.
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HMRC's submissions

18. There are two aspects to HMRC's submissions. The first pertains to the procedural issue as regards the admission of a late appeal, and the second concerns the merits of the substantive appeal.
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19. HMRC can confirm that all the penalty assessments, which were issued to the correspondence address provided and that there had been no return by the Post Office of any undelivered mail. The appellant has therefore been properly served the penalty notices, in accordance with s7 of Interpretation Act 1978, which states:
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'Where an Act authorises or requires any document to be served by post (...) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'
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20. Under s49(2) of TMA, notice of appeal may be given after the relevant time limit if—
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(a) HMRC agree, or

(b) Where HMRC do not agree, the tribunal gives permission.'

The conditions that need to be met for HMRC to agree to a notice of appeal out of time are set out in s49(4) to s49(6); namely, that HMRC are satisfied that there was reasonable excuse for not giving notice before the relevant time limit, or where the appellant has made a request in writing to HMRC to give the notice of appeal, the request was made without unreasonable delay after the reasonable excuse ceased.
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21. The Tribunal is also referred to s118(2) of TMA, under the heading of ‘Interpretation’, which states:

5 ‘... where a person has 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...’.

22. HMRC contend that Miss MacDonald was aware of the time limits to notify her appeal to HMRC and chose to do nothing; that the range of delay from 61 to 299¹ days was not minimal; that no evidence has been provided to show there had been a reasonable excuse for making her appeal to HMRC late.

23. As regards Miss Macdonald’s application for permission to make a late appeal to the Tribunal, Ms McGuigan referred the Tribunal to *Obhloise Benjamin Ogedegbe v HMRC* [2009] UKFTT 364 (TC) in which Sir Stephen Oliver QC states at [7]:
15 ‘While this Tribunal has got power to extend the time limit for making an appeal, this will only be granted exceptionally.’

24. The decision by the Upper Tribunal in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) was also referred to, and in particular at [34], where Morgan J states:

20 ‘Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will
25 be the consequences for the parties of a refusal to extend time? The court or tribunal then must make its decision in the light of the answers to those questions.’

25. On the merits of the substantive appeal, Ms McGuigan submitted that the
30 appellant notified her requirement to complete an SA return under s7 TMA over 30 months after the prescribed time limit; that the appellant had from 25 April 2013 when the SA return was issued, until 31 January 2014 to file her SA return; that the return was not filed until 10 July 2015, and so all the penalties have been correctly imposed in the terms of Sch 55 FA 2009.

35 26. Furthermore, Ms McGuigan submitted that taxpayers are expected to act with reasonable prudence and diligence in dealing with their tax affairs; that the

¹ HMRC’s calculation of days late may not be entirely accurate. For example, if the first notice was issued on 18 February 2014, the time limit for making an appeal was 20 March 2014; Miss Macdonald did so on 15 December 2014, which makes it 269, not 299, days late. We agree the appeal against the second and third notices was 90 days late. The fourth penalty notice was issued on 24 February 2015, and the 30-day appeal time limit expired on 26 March 2015; we infer that Miss Macdonald wrote to HMRC some time before 12 May (when HMRC replied to her ‘recent letter’), and if she wrote before, say, the end of April she would only have been up to 35 (not 61) days late.

appointment of an agent does not absolve the appellant from the responsibility in ensuring that her tax obligations are met; that reliance on a third party is specifically excluded as a reasonable excuse under para 23 of Sch 55 FA 2009.

27. From case law, Ms McGuigan directed the Tribunal to *Siobhan Heaney-Irvine v HMRC* [2011] UKFTT 785 (TC) in which Judge Brooks states at [11] that ‘the responsibility for filing a self-assessment tax return remains that of the individual taxpayer even where, as in this case, an accountant has [been] instructed to prepare and submit the self-assessment return to HMRC on his client’s behalf’.

28. In *Jeffers v HMRC* [2010] UKFTT 22 (TC) Sir Stephen Oliver QC (the then President of the Tribunal) states at [17]:

‘The obligation to make the tax return on time is nonetheless the taxpayer’s. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer’s failure, through his agent, to comply with, eg the obligation to make the return on time can amount to a “reasonable excuse”. To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional.’

29. It is HMRC’s contention that the appellant had been made aware of the implications of further penalties on the continual failure to file the SA return as early as 18 February 2014 when the fixed £100 penalty notice was issued. Despite the issue of six statements of account and three further penalty notices, the appellant took no remedial action until 10 July 2015 when the SA return was filed.

30. Furthermore, HMRC contend that ‘Miss Macdonald has not explained why in the face of explicit letters from HMRC she still apparently believed that matters were being dealt with by her agent’; that Miss Macdonald has failed to provide evidence that she took reasonable care to comply with her tax obligations. On the information held, HMRC do not consider that Miss Macdonald had a reasonable excuse for the failure to file the SA return, nor were there any special circumstances that would allow HMRC to exercise their discretion to reduce the penalties.

The applicable law

31. The key authorities for consideration in determining whether to admit Miss Macdonald’s late appeal have been helpfully related in HMRC’s submissions. The general rule as set out by the five questions in *Data Select* is similar to the approach adopted in *A G for Scotland v Gen Comms for Aberdeen City* [2006] STC 1218 (*‘Aberdeen City’*) by the Court of Session, and is set out below in our discussion.

32. The Tribunal’s discretion to exercise its case management powers by extending the time limit to admit a late appeal comes under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (*‘Tribunal Rules’*). Rule 20(4) clearly states that unless the Tribunal gives such permission, the Tribunal must not admit a late appeal.

33. In applying the two specific rules in relation to the admission of a late appeal, the Tribunal should give due regard to the overriding objective stated under Rule 2, which is ‘to deal with cases fairly and justly’, ‘in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties’.

The provisions of reasonable excuse

34. Under para 23 of Sch 55 FA 2009, it is provided 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 [the taxpayer] 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) –

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside [the taxpayer’s] control,

(b) where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure.

(c) where [the taxpayer] had a reasonable excuse for the failure but the excuse has ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.’

35. There is no statutory definition for *reasonable excuse*. The term is to be given its normal everyday meaning as referring to an unexpected or unusual event, either unforeseeable or beyond a person’s control, which prevents one from complying with an obligation.

36. In *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 (*The Clean Car Company*), Judge Medd QC remarks:

‘... 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 in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.’

The provisions for special circumstances

37. Para 16 of Sch 55 FA 2009 provides that if HMRC think it right because of special circumstances, they may reduce a penalty. Under para 22 of Sch 55 FA 2009, the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

38. The legislation does not define ‘special circumstances’. From case law, it is accepted that for circumstances to be special they must be ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152).

5 *The onus of proof*

39. On the procedural issue, the onus is on Miss Macdonald to prove to the Tribunal that she had a reasonable excuse for making an appeal late. On the substantive appeal, HMRC have to prove that there is a *prima facie* case that a penalty is due, by virtue of the return not having been submitted by the due date. The burden is then on the
10 appellant to prove that she had a reasonable excuse for failing to submit the return on time. The standard of proof is the civil standard of the balance of probabilities.

Discussion

40. The procedural issue concerns whether Miss Macdonald’s appeal should be admitted as it was made late to HMRC. The Tribunal notes that Miss Macdonald, for
15 once in this episode, has acted timeously in notifying her appeal to the Tribunal before 11 June 2015 as advised by HMRC’s letter dated 12 May 2015.

41. HMRC’s letter of 12 May 2015 confirmed a decision to refuse permission to Miss Macdonald to make a late appeal to HMRC against the penalties. There is no
20 question that the making of appeal to HMRC against the penalties was out of time, even though the notifying of her appeal following the refusal decision was made within time to the Tribunal.

42. Under para 20 of Sch 55 FA 2009, the appealable decisions to the Tribunal are the penalty notices as follows:

- (a) Fixed £100 penalty notice issued on 18 February 2014;
- 25 (b) Daily penalty of £900 issued on 18 August 2014;
- (c) 6-month penalty of £300 issued on 18 August 2014;
- (d) 12-month penalty of £300 issued on 24 February 2015.

The first three penalty notices were appealed to HMRC on 15 December 2014, and the fourth penalty notice was appealed to HMRC some time before 12 May 2015, and
30 the range of delay was not minimal, as noted by HMRC. On that reckoning, Miss Macdonald’s appeal to HMRC against the penalties has been made consistently late after the 30-day time limit stipulated on the penalty notices.

43. However, it would seem that as far as Miss Macdonald is concerned, she has notified her appeal to this Tribunal against the substantive matter of the penalties
35 within time. From the Notice of Appeal, it would seem that Miss Macdonald considered she had made her appeal to this Tribunal on time by lodging a Notice of Appeal before 11 June 2015. Due to her absence in the hearing, the Tribunal did not have the opportunity to explain to Miss Macdonald the technicalities concerning the distinction between making the appeal out of time to HMRC and notifying her appeal

within time to the Tribunal, and of the preliminary matter of whether the Tribunal would admit her appeal out of time before considering her substantive appeal.

5 44. In determining the procedural issue, the Tribunal adopts the approach in *Aberdeen City*, for the reason that the criteria set out focus on the existence of ‘reasonable excuse’ and apply more directly to the issues for consideration in this case than *Data Select*. The three criteria in *Aberdeen City* are: (i) whether there was a reasonable excuse for failing to observe the time limit; (ii) whether matters have proceeded with reasonable diligence once the excuse has ceased; and (iii) whether there is prejudice to one or the other party if the appeal proceeds or is refused.

10 45. The Tribunal is mindful that our decision on the procedural matter will involve a consideration of the ‘prejudice’ to Miss Macdonald, which in turn means assessing the prospects of success for the substantive appeal based on ‘reasonable excuse’. The Tribunal recognises that in this current case, the consideration of ‘reasonable excuse’ to address the procedural issue, is practically the same as the consideration for
15 ‘reasonable excuse’ in addressing the substantive appeal. The Tribunal also has regard to the overriding objective, which is ‘to deal with a case fairly and justly’, ‘in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties’, and that includes ‘avoiding delay, so far as compatible with proper consideration of the issues’. Weighing all the factors
20 in the balance, and primarily in the interests of justice to Miss Macdonald who was not present at the hearing, the Tribunal decides not only to admit the appeal as already set out above, but also to determine the case on the substantive matter.

25 46. In respect of the substantive appeal, under the relevant legislation the only ground for discharging the penalties is that Miss Macdonald had a ‘reasonable excuse’ for her repeated failure in filing her 2012-13 SA return.

30 47. Miss Macdonald’s main ground for having a reasonable excuse would seem to be her reliance on her accountant to meet the time limit on her behalf. Reliance on a third party is specifically excluded from being a reasonable excuse under para 23 of Sch 55 FA 2009, *unless* the taxpayer has taken ‘*reasonable care to avoid the failure*’. The onus is on Miss Macdonald to prove that she has taken reasonable care to avoid the repeated failure in filing her SA return.

35 48. The test of what amounts to ‘reasonable care’ should be judged in accordance with the standards of reasonableness set out in *Clean Car*, as those ‘which one would expect to be exhibited by a taxpayer who *had a responsible attitude to his duties as a taxpayer*, but in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered’ (emphasis added).

40 49. Delegation to the accountant does not remove the ultimate responsibility that remains with Miss Macdonald as the taxpayer. From the due date for the SA return filing on 31 January 2014 to its eventual filing nearly 18 months later on 10 July 2015, there was no evidence of any attempts to check on the progress of the accountant in order to avoid the continual failure. A taxpayer with a responsible attitude to her duties as a taxpayer would have enquired about the progress; would

5 have taken action to expedite the completion of the return by answering any queries that have held up the filing of the return; would have engaged the service of a different accountant if the failure had originated with the accountant's dilatoriness. In the absence of any evidence that Miss Macdonald had taken any reasonable care to avoid the failure, and in view of the inordinate delay from the repeated failure to submit the SA return despite the penalty warnings, Miss Macdonald's substantive appeal has to be dismissed.

10 50. Over the whole episode from notifying a requirement to file, to filing her SA return, to the making of her appeal to HMRC, Miss Macdonald unfortunately seems for whatever reason to have ignored the purposes of time limits, and not to have shown awareness of the legal and statutory obligations placed on her as a taxpayer and an appointed Director of a company, of which the timely notification of her requirement to file and submission of the requisite return were only examples. It is a long-established principle that ignorance of the law can never be a reasonable excuse; otherwise the law would be favouring those who choose to stay in ignorance over those who take due diligence in finding out what the law requires of them.

15 51. Finally, Miss Macdonald has also pleaded the lack of funds and that the business being in 'dire trouble' as grounds of her appeal. The penalties have been imposed for the successive failures in submitting the 2012-13 SA return. As stated earlier, the only ground on which these penalties can be discharged is if Miss Macdonald had a reasonable excuse for the repeated failure in its submission. Insufficiency of funds is also specifically precluded from being a reasonable excuse by virtue of para 23(2)(a) of Sch 55 to FA 2009, unless attributable to events outside the taxpayer's control, on which Miss Macdonald has presented little or no evidence to discharge the burden of proof. We therefore dismiss her appeal on the ground of reasonable excuse.

20 52. As to whether the lack of funds or the business being in dire trouble can amount to special circumstances for the penalties to be reduced, the law is clear that special circumstances had to be '*exceptional, abnormal or unusual*', and to bear directly upon the failure to file the related return. Reasons such as the sudden illness of the accountant, or destruction of accounting records due to floods, may amount to special circumstances as they can have a direct impact on a return not being completed within the time limit for submission. The lack of funds and the business being in dire trouble concern Miss Macdonald's ability to pay the penalties, and do not bear directly on why the return was submitted on 10 July 2015, some 18 months after the due date. The inability to pay the penalties is not a valid ground, in any manner of construction, to reduce the penalties that have been correctly imposed in accordance with the legislation.

Decision

40 53. For the reasons stated above, the appeal is dismissed. The penalties in relation to the failure to file the Self-Assessment Return for 2012-13, namely the fixed penalty of £100, the daily penalties of £900, the 6-month penalty of £300, and the 12-month penalty of £300, are all confirmed.

54. 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 HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 13 JULY 2016

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