[2015] UKFTT 0571 (TC)

TC04719

Appeal number: TC/2014/02718

INCOME TAX – penalty for late filing – penalties and surcharges for late payment of tax – whether HMRC bound to allocate payments in a particular way where appellant makes no allocation – no – whether late filing penalties due - yes– whether reasonable excuse – no – appeal allowed in part as some penalties calculated wrongly

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR AMANDA JANE BROWN **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JULIAN SIMS, FCA, CTA

Sitting in public at The Royal Courts of Justice, Strand, London on 10 September 2015

Philip Deane, of Philip Deane Accountancy Limited, and David Smith, husband of the Appellant, for the Appellant

Hellie Lai and Jeremy Taylor, Officers of HM Revenue & Customs, for the Respondents

DECISION

1. In this appeal, the appellant appeals against "late filing" penalties and "late payment" surcharges and penalties. The penalties that are the subject of this appeal are summarised in the following table:

Tax year	Penalties charged	Applicable statutory provision(s)
2006/07	Late payment surcharge £130.69	s59C of the Taxes Management Act 1970 ("TMA 1970")
2007/08	Late payment surcharge (30 days) £99.30 Late payment surcharge (6 months) £99.30 Late filing penalty (30 days) £100 Late filing penalty (6 months) £100	s59C TMA 1970 s93 TMA 1970
2008/09	Late payment surcharge (30 days) £406.22 Late payment surcharge (6 months) £406.22 Late filing penalty (30 days) £100 Late filing penalty (6 months) £100	s59C TMA 1970 s93 TMA 1970
2009/10	Late payment surcharge (30 days) £304.63 Late payment surcharge (6 months) £304.63 Late filing penalty (30 days) £100 Late filing penalty (6 months) £100	s59C TMA 1970 s93 TMA 1970
2010/11	Late payment penalty (30 days) £304 Late payment penalty (6 months) £304 Late payment penalty (12 months) £180	Sch 56 Finance Act 2009 ("FA 2009")
2011/12	Late payment penalty (30 days) £331 Late payment penalty (6 months) £331	Sch 56 FA 2009

2. The appellant did not suggest that HMRC had failed to notify her of the above penalties. She makes the following arguments in support of her appeals:

(1) She submits that the "late filing" penalties for 2007/08 to 2009/10 are not due because the returns in question were submitted by the due date.

(2) She requires HMRC to demonstrate that her tax liabilities were not paid by the relevant dates so as to trigger a liability to pay the late payment penalties and surcharges. More specifically, she submits that HMRC have not allocated payments of tax that she made appropriately and the result has been to increase the amount of late payment penalty and surcharge to which she is liable.

(3) She submits that she has, over the years, been subjected to a bewildering barrage of demands for payment of tax which have been confusing and contradictory. She therefore submitted that there was a "reasonable excuse" for any failure to pay her tax by the relevant dates.

Evidence

3. The appellant gave oral evidence as did her accountant, Mr Philip Deane, and Officer Taylor cross-examined them both. We were satisfied that both of these witnesses were honest. However, there were some respects in which the evidence of Mr Deane was not consistent with that of the appellant (and vice versa). There were also some respects in which Mr Deane's evidence was contradicted by evidence submitted on HMRC's behalf. We have, therefore, not been able to accept the entirety of either witness's evidence without qualification. [1]

4. HMRC did not put forward any witness evidence. Rather, Officer Lai and Officer Taylor referred us to documents in a bundle they had prepared. The authenticity of these documents was not in dispute.

Facts

General and background facts

5. The appellant is a doctor. The income relevant to this appeal comes from her work as a self-employed doctor with HM Prisons Service.

6. For each of the years in question, the appellant was sent a notice under s8 of TMA 1970. The appellant's liability to income tax, net of tax deducted at source, in each of the tax years at issue in this appeal is set out in the following table:

Tax year	Amount of tax liability
2006/07	£11,028.88
2007/08	£1,986.05
2008/09	£8,124.53
2009/10	£6,092.73
2010/11	£10,465.40
2011/12	£6,636.10

7. HMRC produced a print-out from their computer system indicating that the appellant made the following payments of tax on the dates set out below. The appellant suggested that some of the payments that she had made were, wrongly, credited to the corporation tax account of a company she controlled and we make findings on that issue at [22] below. However, she did not otherwise suggest that HMRC's table of payments ignored any payments that she had made and the figures set out in HMRC's schedule largely accorded with a schedule of payments that Mr Deane had prepared on Dr Brown's behalf. We have therefore concluded that the

[1] 1. Prior to the hearing, the appellant had also sent the Tribunal a "witness statement" of her husband, Mr David Smith. It was not clear to the Tribunal that this had been sent to HMRC, and it did not appear in the bundle of documents that HMRC produced at the hearing. We have not, therefore, treated that document as evidence. However, Mr Smith, with the Tribunal's permission, helped the appellant to make her case and made a number of the points contained in the witness statement when making submissions on the appellant's behalf.

table set out below is an accurate list of the dates, and amounts, of relevant payments of tax that the appellant made before the final relevant penalty date in issue in this appeal.

Date of payment	**Amount**	**Type of payment**
26/01/2007	£23,355.12[2]/ £8,364.60	From Dr Brown
31/01/2007	£0.78	Repayment supplement
31/01/2007	£49.54	Repayment supplement
31/07/2008	£1,904.85	From Dr Brown
09/02/2010	£3,327.00	From Dr Brown
31/01/2011	£3,647.00	From Dr Brown
19/07/2011	£1,633.15	"Credit transfer in"[3]
27/01/2012	£8,509.46	From Dr Brown
31/01/2012	£0.25	Repayment supplement
13/02/2012	£8,000[4]	From Dr Brown
15/02/2012	£0.03	Repayment supplement
27/02/2012	£0.02	Repayment supplement
23/03/2012	£0.12	Repayment supplement
17/05/2012	£3.45	Repayment supplement
15/06/2012	£1,184.57	From Dr Brown
11/10/2012	£3.97	Repayment supplement
26/01/2013	£6,636.10	From Dr Brown

8. The payment of £23,355.12 made on 26 January 2007 needs some explanation.

(1) Firstly, it was made by three separate cheques, two of which were drawn on the bank account of Dr A J Brown Limited, rather than the appellant's personal bank account. It is these cheques that the appellant says were misallocated to the corporation tax account of that company.

(2) By 31 January 2007, the appellant was obliged to pay £14,990.52 as the balancing payment relating to her tax liability for the tax year 2005/06. The tax year 2005/06 is not in issue in this appeal as HMRC allocated £14,990.52 of the

[2] For reasons set out at [8(2)] only £8,364.60 of that payment was available for allocation against the tax liabilities for the tax years at issue in this appeal.

[3] No explanation was given at the hearing of what this phrase meant.

[4] We suspect, from our own review of HMRC's computer records of the appellant's self-assessment account that this payment was made by cheque but that the appellant may subsequently have cancelled that cheque. In evidence, the appellant referred to writing a cheque for £8,000 to HMRC's field officer who visited her at home in 2012 but telling him that the cheque would be cancelled. It is, therefore, possible that this sum should not count as a payment. However, since HMRC included it in the schedule of payments which they prepared (and did not make any submissions to the effect that it should not count as a payment), and since it also appeared in Mr Deane's schedule, we have found as a fact that this amount does count as a payment.

payment made on 26 January 2007 to her liability for 2005/06 with the result that this liability was regarded as discharged on time. Since there was no dispute that the sum of £14,990.52 was properly allocated to the 2005/06 liability we have concluded that only the remainder of the payment made on 26 January 2007 (being £8,364.60) was available to be allocated against her tax liabilities for the tax year 2006/07 and subsequent years.

9. The circumstances surrounding the submission of the appellant's tax returns for the tax years 2007/08 to 2009/10 are disputed and we make findings on the matters in dispute at [14] to [21] below. However, it was not disputed that HMRC's computer records did not record tax returns for those years as being received until 14 February 2012, considerably later than the due date for submission. A further complication was that HMRC's computer records showed these tax returns as being received after the tax return for 2010/11. The following consequences flowed from this:

(1) The first payment that the appellant made that was allocated to her tax liability for any of the tax years 2007/08 to 2009/10 was that made on 27 January 2012. That was because, at the time earlier payments were made, HMRC's computer system did not record the appellant as having an income tax liability for those tax years (as no tax return setting out the amount of her liability was recorded as having been received).

(2) Notices were sent to the taxpayer informing her of HMRC's view that returns had not been submitted by the due date and imposing penalties for failure to deliver those returns. On 17 March 2011 the appellant wrote to HMRC to appeal against at least one of the penalties imposed.

(3) Since HMRC did not consider that they had any information supplied by the appellant as to her tax liability for the years in question, HMRC made estimated assessments and issued demand notices accordingly. For example, HMRC estimated the appellant's tax liability at £50,350 for the tax year 2007/08, an amount considerably higher than her actual liability. Those assessments were cancelled when, on 14 February 2012, HMRC recorded tax returns for those years as received. However, the appellant was visited by an HMRC field officer who was demanding payment of an alleged debt of £109,708.83 and we accept that the appellant felt pressured into making a payment of £8,000 by cheque (although she told the field officer that she would cancel that cheque).

The appellant's system for preparing and submitting tax returns

10. Since one of the appellant's grounds of appeal is that she has a "reasonable excuse" for any failures to pay tax that took place, we have made some findings of fact as to the system that she adopted for preparing her tax returns.

11. The appellant said in her evidence that she relied on her accountant, Mr Deane, who had been advising her for eight years, on all matters relating to her tax compliance. She also said that she obtained help from her husband. She said that, whenever she received any communication from HMRC, she would send it to Mr Deane who would tell her what needed to be done and how much she should pay. She

was asked specifically about instances in which an application had been made to reduce her payments on account of income tax. She said that she had no recollection of herself suggesting that payments on account could be reduced and she believed that she would have followed Mr Deane's advice on that matter.

12. However, other evidence indicated that the appellant's reliance on Mr Deane was not as total as she had suggested. For example, in March 2011, the appellant herself submitted appeals against the penalties imposed for late filing of the 2008/09 and 2009/10 tax returns (rather than asking Mr Deane to do this on her behalf). Mr Deane accepted he had not seen HMRC's letter of 24 June 2011 refusing that appeal. This was significant as, even though HMRC clearly stated in their decision letter that the tax returns remained outstanding, HMRC were not provided with tax returns for those years (or, as the appellant would say, further copies of those returns) until 14 February 2012, nearly eight months later.

13. Overall, therefore, we concluded that the appellant genuinely wished to ensure that her tax compliance was in order. However, we concluded that the system she adopted to do this was, in some respects, unreliable as, despite having engaged Mr Deane to provide professional assistance, she took some steps herself and did not always keep Mr Deane fully informed of the contents of relevant communications with HMRC.

Whether tax returns for 2007/08 to 2009/10 were submitted by the applicable due date

(a) The competing evidence and submissions

14. Mr Deane said in evidence that, for each of the years in question, he prepared the appellant's tax return, met with her to go through the tax return and obtained a signed tax return from her at that meeting. He then took the signed returns back to his office to be sent to HMRC. That evidence was not challenged in cross-examination.

15. He also said that the appellant's tax returns were actually sent to HMRC by members of staff at his firm who were familiar with the process for submitting tax returns. He produced print-outs (the "Print-outs") from his computer system of the text of the three covering letters used to submit those returns. However, we were not shown copies of the signed covering letters on his firm's letterhead, nor were we shown copies of the paper returns as submitted.

16. The Print-outs referred to the appellant's return for 2007/08 being submitted on 27 July 2008, that for 2008/09 being submitted on 20 July 2009 and that for 2009/10 being submitted on 18 June 2010.

17. The appellant also referred us to the fact that the national insurance number that appeared on a number of the letters notifying her of penalties was not the same as hers. She invited us to conclude, therefore, that the penalties had been addressed to the wrong person and that there was perhaps another "Dr Brown" whose tax returns had been filed late.

18. Officer Taylor submitted that the returns had not been sent on the dates that Mr Deane mentioned. He pointed us to the evidence of HMRC's computer system and said that, if returns had been submitted, they would have been logged on that system. He submitted that while it was conceivable that the tax return for one year could be lost in the post, it was highly unlikely that this would happen for three consecutive years. Officer Taylor also referred to the undisputed fact that HMRC did not receive the appellant's tax return for 2006/07 initially but that the appellant's agent (which may, or may not have been Mr Deane) called HMRC to check whether it had been received. On being told that it had not been received, a further copy of that return was submitted.

19. Officer Taylor did not suggest that the Print-outs were anything other than print-outs of covering letters that Mr Deane had prepared at the time. For example, he did not suggest that they had been prepared after the event. Therefore, we have taken Officer Taylor to be submitting that something happened after those letters were prepared which resulted in the returns either (i) not being posted at all or (ii) being posted, but being misaddressed.

20. Officer Taylor also submitted that there was a known problem with HMRC's letter templates which required, in some situations, a national insurance number to be included within a particular field even if that was not necessary to identify the taxpayer. That had led to a practice under which, in order to enable a letter to be sent, officers of HMRC would produce a "random" national insurance number. The bundle prepared for the hearing contained a letter dated 5 September 2011 from HMRC to the appellant that made the same point and stood as evidence (albeit hearsay evidence) in support of that submission. Therefore, he submitted that the existence of a "wrong" national insurance number did not suggest that the penalty notice had been sent to the wrong person. He also pointed out that the notices in question did contain the correct "unique taxpayer reference" ("UTR") applicable to the appellant.

(b) Our conclusion

21. On balance, we have concluded that the appellant's tax returns were not sent by post in a properly addressed envelope on or around the dates set out in the Print-outs. We have reached this conclusion for the following reasons:

(1) Mr Deane did not say in evidence that he was himself the person who placed the tax returns in an envelope. Therefore, the evidence that he gave (that returns were prepared and signed, and that covering letters prepared) is not inconsistent with some administrative oversight taking place at his firm or some change of plan after the covering letters were prepared. The appellant did not put forward any evidence of the actual posting of the returns or the address shown on the envelope to which they were sent. Therefore, we considered that there was a gap in the evidence on which the appellant relied.

(2) 27 July 2008, the date that appears on one of the Print-outs, is a Sunday. This point was not put to Mr Deane in cross-examination and we have been careful not to draw inferences as to the authenticity of the Print-outs since

Officer Taylor was not challenging their authenticity. However, since Mr Deane did not mention in his evidence that he submitted this return on a Sunday, and since the postal service does not generally operate on a Sunday, we consider this fact suggests that the date that appeared on this particular Print-out is not necessarily a reliable guide as to the date on which it was posted. That in turn has caused us to question whether any of the Print-outs satisfy us that the returns were posted on the dates referred to, or indeed posted at all.

(3) On 1 July 2011, the appellant herself requested a review of HMRC's decision to charge a "late filing" penalty for the tax year for the 2008/09 and the 2009/10 tax years. The first ground that she gave in that request was that "the return was made 4 days before the deadline in the same envelope my husband's return was also sent [sic]. He has not received a penalty for a late return indicating the return was made in good time." That statement raises the question of how the appellant could know that her return was in the same envelope as that of her husband if Mr Deane's firm had submitted the return. Moreover, the dates appearing on the Print-outs were all much more than 4 days before the deadline for submission of paper returns (which would have been 31 October in each of 2009, 2010 and 2011). These inconsistencies suggest that there may have been a change of plan, for example one under which the appellant herself was to submit the returns, which has further undermined the weight that should be attached to the Print-outs as evidence that the returns were sent on the dates specified.

(4) We are not satisfied that the fact that certain penalty notices contain the wrong national insurance number indicates that the appellant's tax returns were received and that she has been issued with penalty notices that should have been sent to someone else given that the UTR on those letters was correct.

(5) We considered whether there was an alternative explanation, namely that the returns had been posted in a properly addressed envelope, but had been lost in the post. We rejected that as implausible: it seemed to us to be unlikely that three consecutive tax returns (or four if account is taken of that for 2006/07) would be lost in the post in this way.

Whether any payments that the appellant made were allocated to the corporation tax account of Dr A J Brown Limited

22. We found no evidence that such a misallocation had taken place so as to affect the amount of penalty that the appellant is being charged. We are prepared to accept that there may have been an initial misallocation. However, none of the documents we saw showed the payment of £23,355.12 being allocated against the corporation tax liability of the appellant's company and we concluded, therefore, that even if there had been an initial misallocation, it was reallocated to the appellant's income tax account with effect from the date on which it was made and therefore had no effect on the penalty being charged.

Whether the appellant paid tax liabilities for the relevant years prior to the date or dates on which penalties or surcharges for late payment fell due.

23. We have found as a fact that, when she made the various payments referred to at [7] above, the appellant did not request any of those payments to be allocated to her tax liability for any particular tax year.

24. In the absence of any such allocation, it is necessary to determine which payments that the appellant made should be allocated to which tax years' liabilities. We set out our view on the law in this area at [42] and [43] below.

25. We find as a fact that the position with the appellant's account with HMRC can be summarised in the table (the "Table") set out below:

Tax year	Penalty Date	Tax liability for relevant tax year	Cumulative tax liability total	Cumulative payment total	(Deficit)/Surplus
2006/07	29/2/2008	£11,028.88	£11,028.88	£8,414.92	(£2,613.96)
2007/08	1/3/2009	£1,986.05	£13,014.93	£10,319.77	(£2,695.16)
	1/8/2009	£1,986.05	£13,014.93	£10,319.77	(£2,695.16)
2008/09	1/3/2010	£8,124.53	£21,139.46	£13,646.77	(£7,492.69)
	1/8/2010	£8,124.53	£21,139.46	£13,646.77	(£7,492.69)
2009/10	1/3/2011	£6,092.73	£27,232.19	£17,293.77	(£9,938.42)
	1/8/2011	£6,092.73	£27,232.19	£18,926.92	(£8,405.27)
2010/11	1/3/2012	£10,465.40	£37,697.59	£35,436.68[5]	(£2,260.91)
	2/8/2012	£10,465.40	£37,697.59	£36,624.82	(£1,072.77)
	2/2/2013	£10,465.40	£37,697.59[6]	£43,264.89	£5,567.30
2011/12	2/3/2013	£6,636.10	£44,333.69	£43,264.89	(£1,068.80)
	3/8/2013	£6,636.10	£44,333.69	£43,264.89	(£1,068.80)

[5] This sum takes into account the payment of £8,000 made on 13 February 2012 for the reasons set out in footnote 4.

[6] This figure does not include the tax liability for 2011/12 of £6,636.10 which fell due for payment on 31 January 2013 because a late payment penalty could not be charged for non-payment of that liability until 2 March 2013.

26. Some notes are needed to explain the findings in the Table:

(1) The date in column 2 is each date on which HMRC are seeking a late payment penalty or surcharge in relation to the tax years set out in column 1.

(2) The cumulative total in column 4 is found by adding together the total of all of the appellant's income tax liabilities (for the relevant tax year specified in column 1 and prior disputed tax years) that fell due on or prior to the date in column 2 and which could be the subjected to a late payment penalty or surcharge by that date. Penalties that the appellant was charged have not been included in the total in column 4.

(3) The cumulative total in column 5 is found by adding together the total of payments made on or prior to the corresponding penalty date from the table set out at [7]. For these purposes, given what we say at [8], we have treated the first relevant payment of being of £8,364.60 since that was the balance of the payment of £23,355.12 made on 26 January 2007 that remained after the tax liability for 2005/06 had been settled in full.

(4) Column 6 is derived by subtracting the total in Column 4 from that in Column 5 with negative numbers being shown in brackets.

27. It will be seen from the Table that, on each relevant date (other than 2 February 2013) for the purposes of "late payment" surcharges and penalties, the payments that the appellant had made on or prior to that date were not sufficient to discharge all of her final tax liabilities that had arisen on or prior to that date. On the penalty date falling on 2 February 2013, Column 6 of the Table shows a surplus as the cumulative total of payments that the appellant had made was more than the amount of her tax liabilities that had fallen due for payment and on which a late payment penalty or surcharge could be levied.

28. For those penalty dates on which a deficit is recorded in Column 6 of the Table, if HMRC had both (i) allocated all payments that the appellant made against her tax liabilities (rather than against interest or penalties) and (ii) had allocated payments against earlier liabilities in preference to later liabilities then the amount of penalty that became chargeable on the date specified in the table would be 5% of the lower of the tax liability for that year and the amount of the appellant's "deficit". However, it is not possible to calculate the penalties charged from the amounts specified in the table since, for the reasons set out at [9(3)], HMRC have not always allocated payments against earlier liabilities in preference to later liabilities. In addition, some payments have been allocated against penalties and interest and such payments are thus not available to be allocated against tax liabilities.

29. Up until the tax years 2010/11, we have concluded that any difference between the penalties charged and 5% of the appellant's deficit is attributable to the effect set out at [28]. However, for the tax years 2010/11 and 2011/12, the differences seemed too significant to be explained by that effect. In particular:

(1) HMRC calculate the first late payment penalty for 2010/11 (which arose on 1 March 2012) as £304. However, 5% of the appellant's "deficit" on that date would be only £113.05

(2) HMRC calculate the second late payment penalty for 2010/11 (which arose on 2 August 2012) as £304. However, 5% of the appellant's "deficit" on that date would be only £53.64

(3) HMRC have charged a third late payment penalty for 2010/11 (with the relevant penalty date being 2 February 2013) of £180, but column 6 of the Table indicates the appellant had a surplus on that date.

(4) HMRC have charged late payment penalties for 2011/12 of £331 (with the relevant penalty dates being 2 March 2013 and 3 August 2013). However, 5% of the appellant's deficit on those dates was only £53.44.

Our suspicion, although we heard no argument on the point during the hearing, is that the differences referred to above can be explained by the £8,000 payment made on 13 February 2012 being treated as a payment in HMRC's schedules prepared for the hearing, but not treated as a payment for the purposes of the underlying penalty calculations. Given that we have concluded that the payment of £8,000 was made, we have concluded that HMRC's calculations were incorrect in the respects set out at [29] above.

Statutory provisions relevant to the penalties charged

"Late payment" surcharges for tax years up to 2009/10

30. As set out in the table summarised at [1] above, HMRC are charging "late payment" surcharges in relation to the tax years 2006/07, 2007/08, 2008/09 and 2009/10. In relation to those tax years, the law applicable to late payment surcharges was as set out in s59C TMA 1970.

31. Section 59C(2) provided for a 5% surcharge where tax remains unpaid on the day following 28 days from the due date. The "due date" for these purposes is that set out in s59B(4) of TMA 1970, namely the 31 January next following the end of the year of assessment in question. Section 59C(3) provided for a further 5% surcharge where the tax remains unpaid on the day following the expiry of 6 months from the due date. These dates, therefore, determine the entries in Column 2 of the Table for tax years up to, and including, 2009/10.

32. Section 59C(9) permits the Tribunal to set aside a surcharge if it considers that a taxpayer has a "reasonable excuse" for not paying the tax and the concept of a "reasonable excuse" is set out in s118(2) of the TMA 1970 in the following terms:

> (2) For 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

"Late payment" penalties for the tax years 2010/11 and 2011/12

33. For these tax years, HMRC seek "late payment" penalties under successor legislation set out in Schedule 56 of the Finance Act 2009 ("FA 2009"). Schedule 56 relevantly provides as follows:

> (1) A person is liable to a penalty equal to 5% of the unpaid tax where that person does not pay tax due under s59B(3) or (4) of TMA 1970 by the date falling 30 days after the due date specified for payment. In the context of this appeal, the due date was that specified in s59B(4) of TMA 1970 being the 31 January next following the end of the tax year in question.
>
> (2) Therefore, under Schedule 56, an initial penalty becomes payable if income tax is not paid in full by 30 days after the 31 January next following the end of the year of assessment (i.e. by the relevant 1 March or 2 March) depending on whether the relevant February is in a leap year or not. The day following this deadline (i.e. the relevant 2 March or 3 March) is referred to in the legislation as the "penalty date".
>
> (3) Paragraph 3(3) of Schedule 56 FA 2009 imposes a further penalty of 5% of the unpaid tax if any amount is unpaid after the end of the period of 5 months beginning with the "penalty date". Therefore, a second penalty is due if the tax is not paid by either the relevant 2 August or 3 August (depending on whether February is in a leap year).
>
> (4) Paragraph 3(4) imposes a further penalty of 5% of the unpaid tax if any amount is unpaid after the end of the period of 11 months beginning with the "penalty date" (i.e. where tax is not paid in full by the relevant 2 February or 3 February).

34. Paragraph 16 of Schedule 56 of FA 2009 permits the Tribunal to set aside a penalty if it is satisfied that the taxpayer has a "reasonable excuse" for the failure in question. Paragraph 16 also circumscribes what can, and cannot, amount to a reasonable excuse in the following terms:

> 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,
>
> (*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
>
> (*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.

35. Paragraph 9 of Schedule 56 permits HMRC to reduce a penalty because of "special circumstances". Under paragraph 14 of Schedule 56, the Tribunal's

jurisdiction in relation to the question of "special circumstances" is limited and we can only substitute a different decision on "special circumstances" from that which HMRC adopted where we consider that HMRC's decision was "flawed" in the light of principles applicable in proceedings for judicial review.

"Late filing" penalties

36. HMRC is pursuing "late filing" penalties for the years 2007/08, 2008/09 and 2009/10. The relevant legislation is that set out in s93 of TMA 1970.

37. Section 93(1) TMA 1970 sets out the fixed £100 penalty which is to apply if a person fails to comply with a notice to provide a return under s8 of TMA 1970. Therefore, in order for a penalty to be chargeable under s93, a taxpayer needs to have been issued with a notice under s8 and to have failed to "make and deliver" the return required by s8 TMA 1970 by the due date. (It was common ground that the due date for filing a paper return was the 31 October following the end of the tax year in question).

38. During the hearing, we were not referred to any authority on precisely what a taxpayer needs to do in order to "make and deliver" a tax return. However, in the course of writing up this decision, we have concluded that there is some statutory authority on this issue in the Interpretation Act 1978. Since s115(2) TMA 1970 permits a taxpayer to submit a tax return by post, s7 of the Interpretation Act 1978 applies and provides as follows:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) 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.

39. Section 93(3) of TMA 1970 permits HMRC to charge daily penalties for a continuing failure to deliver a return. However, daily penalties are not in issue in this appeal.

40. Section 93(5) of TMA 1970 permits a further £100 fixed penalty to be charged if the taxpayer has still not delivered a return by six months after the "filing date". It was common ground that, in the context of this appeal, the relevant "filing date" was the 31 January next following the end of the tax year in question.

41. Section 93(8) of TMA 1970 permits the Tribunal to set aside a penalty if it considers that there is a "reasonable excuse" for the failure to comply. The concept of "reasonable excuse" is that set out in s118(2) of TMA quoted at [32] above.

Common law authorities relating to the allocation of payments

42. As we have noted at [23], the appellant did not specify that any of the payments she made to HMRC should be allocated to her tax liability for any particular tax year. As will be seen from the discussion at [48] to [50] below, the question of how payments are allocated is of at least potential relevance to the calculation of "late payment" penalties and surcharges. However, neither party made any submissions as to what, if any, legal principles apply to determine how payments that the appellant made are to be allocated. We have gratefully adopted the summary of the law that Judge Redston (then sitting as a presiding member of the Tribunal) gave in *AJM Mansell Ltd v Commissioners for Her Majesty's Revenue & Customs* [2012] UK FTT 602 (TC) where she said:

> 47. In *The Mecca* [1897] AC 286, Lord Macnaghten said (at pages 293–294)
>
> "When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor…it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment', and he is not bound to declare his intention in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain."
>
> 48. That this remains the position has been confirmed in more recent cases, see for example *Abbey National v Commrs* [2005] EWHC 1187 at [28] and *Sycamore plc and Maple Limited v Fir (Inspector of Taxes)* [1997] STC (SCD) 1 at [77].
>
> 49. A different rule applies when the debtor has a "running account" with the creditor, such as a bank account. In that situation a payment is allocated to the earliest debt, see *Clayton's case* [1816] 1 Mer 572 at 608.

43. In the absence of any submissions from the parties on this issue, we have concluded that the rule in *Clayton's case* is not applicable. While taxpayers and HMRC alike refer to "payments on account" of income tax, we consider that the appellant's tax liability for each tax year resulted in a separate debt becoming due to HMRC and that she had no "running account" with HMRC. We therefore concluded that, in the absence of any allocation by the appellant, HMRC could allocate the payments as they saw fit although their public law duties would preclude them from making an unreasonable allocation.

Discussion of "late filing" penalties

44. As noted at [6], we are satisfied that the appellant received a notice under s8 TMA 1970 to submit tax returns for all of the relevant years of assessment. Given the findings we make at [21], the presumption of delivery set out in s7 of the Interpretation Act 1978 is not engaged. We have therefore concluded that the basic

conditions necessary for a "late filing" penalty to be chargeable under s93 TMA 1970 are satisfied.

45. The appellant's arguments on the "late filing" penalties relied almost exclusively on her assertion that the tax returns had been delivered or, at very least, posted in good time. In those circumstances, she did not put forward any excuse to explain why the returns were not delivered. However, for completeness we record our view that there was no "reasonable excuse" for the failure to "make or deliver" the returns. As noted at [12], the appellant certainly knew in March 2011 that HMRC were saying that her tax returns for the years in question had not been received (as evidenced by the fact that she appealed against the imposition of that penalty). Yet it was not until 14 February 2012 that tax returns for those years were finally submitted. Therefore, even if there were a "reasonable excuse", it ceased in March 2011, if not earlier, and the failure to submit returns until 14 February 2012 prevents the appellant from relying on any such excuse given the provisions of s118(2) TMA 1970 referred to at [32] above.

Discussion of "late payment" penalties and surcharges

Whether tax was paid late

46. The appellant submitted there is currently a surplus on her self-assessment account and that, accordingly, all of the "late payment" penalties and surcharges should be discharged. We do not accept that as late payment penalties are triggered by the failure to pay tax by a particular time. It is not relevant whether or not that failure has been cured by the time the appeal against the penalties is heard.

47. We consider that the Table demonstrates that, on all of the dates relevant to the "late payment" penalties and surcharges (except 2 February 2013), the appellant had not made sufficient payments to discharge all of her final tax liabilities that were due and payable by those dates. Therefore, no allocation of payments is possible, in relation to those penalties, that results in a conclusion that all of the liabilities were discharged by the due date.

Whether HMRC have applied an appropriate allocation of payments

48. Conceptually, the way that payments that the appellant made were allocated against her liabilities to tax (and interest and penalties) for the respective years could have a bearing on the amount of penalty due. For example, in the earlier tax years, a maximum of two "late payment" surcharges could be levied. Therefore, conceptually once the appellant had reached the maximum late payment surcharge for a particular year, it might be efficient for payments made subsequently to be allocated to later years (thereby preventing a surcharge arising for those years) even if it meant that the earlier years' liabilities remained unpaid. Any such efficiency would need to be weighed against the additional interest cost that would arise, but we can accept that there would be an "optimal" allocation of payments that would minimise the aggregate of penalties and interest chargeable.

49. A similar point arises in relation to the late filing penalties that were charged. HMRC treated some of the payments that the appellant made as being applied to discharge penalties that she had been charged. The sums allocated to penalties could not, therefore, be applied in discharge of tax liabilities so as to reduce the amount of further late payment surcharges and penalties. Therefore, an "optimal" allocation of payments would also need to take into account whether payments made should be allocated against penalties or against substantive tax liabilities.

50. The appellant submitted, in general terms, that a different allocation of payments may have resulted in a lower penalty. However, except in relation to that penalty that became chargeable on 2 February 2013, there was no possible allocation of payments that could have resulted in no "late payment" surcharge or penalty becoming due. If the appellant wished to allocate her (partial) payments of her outstanding tax liabilities in a particular way, she should have made an allocation when submitting her payment. Since she did not do so, in line with the decision in the *Mecca* referred to at [42], above, we consider that HMRC were entitled to make a reasonable allocation themselves and that the allocation they in fact adopted was reasonable.

51. We have, however, concluded that since the Table indicates a surplus on the penalty date of 2 February 2013, and that this surplus would not be eliminated by allocating payments that the appellant had made to penalties and interest charged (as described at [28] above), the penalty that HMRC assert arose on that date (the third late payment penalty for 2010/11) did not arise.

Whether the appellant had a "reasonable excuse" or whether there were special circumstances

52. The appellant essentially put forward two arguments as to why she had a "reasonable excuse" for making her payments late. Firstly she argued that she relied on Mr Deane. Secondly she argued that the confusing communications she received made it difficult for her to know how much she had to pay at any given point.

53. We do not accept that either of those explanations amounts to a "reasonable excuse". Firstly, as we find at [13], we do not consider that the appellant's reliance on Mr Deane was as complete as she suggested in her evidence. While we agree that she has certainly received a plethora of correspondence from HMRC over the years, a large part of any resulting confusion was exacerbated by the fact that she continued to operate a deficit in her dealings with HMRC and by the fact that tax returns for 2007/08 to 2009/10 were not received by HMRC until 2012.

54. In order to avoid incurring a late payment penalty or surcharge, a self-employed taxpayer simply needs to ensure that, by the 31 January following the end of a tax year, he or she has paid HMRC a sum equal to the tax liability shown on his or her self assessment return for that tax year. We do not consider that to be as complicated as the appellant suggests.

55. We did not consider that there were "special circumstances" that could justify a reduction in the penalties charged.

Calculation of penalties

56. During the course of her oral submissions, Officer Lai took us through the detail of the penalty calculations. Those calculations inevitably relied on the allocation of payments that HMRC have made, but since we are satisfied that this was a reasonable allocation, and one that was open to HMRC, we had no reservations with the calculations on those grounds.

57. However, as noted at [29] above, HMRC's calculations of penalties arising on and after 1 March 2012 were higher than we would have expected. Moreover, as noted at [51], our own calculations indicated that no late payment penalty became due on 2 February 2013. We did not consider that these differences could be explained solely by the fact that HMRC had applied a different allocation of payments from that implicit in the Table. We considered inviting the parties to make further representations on those penalties. However, this dispute has been long-running and has clearly caused the appellant a high degree of anxiety and stress. We therefore consider it is in accordance with the Tribunal's overriding objective for us to make a determination of this issue based on the evidence we have. We therefore determine that, from 1 March 2012 onwards, late payment penalties and surcharges should be calculated at 5% of the lower of (i) the appellant's tax liability of the relevant tax year and (ii) the amount of the "deficit" (if any) shown in the Table. Accordingly, we conclude that the penalties should be reduced as set out in the table set out below:

Tax year	Description	Original penalty amount	Revised penalty amount
2010/11	Late payment penalty (30 days) Late payment penalty (6 months) Late payment penalty (12 months)	£304 £304 £180	£113.05 £53.64 nil
2011/12	Late payment penalty (30 days) Late payment penalty (6 months)	£331 £331	£53.44 £53.44

Conclusion

58. The appeals are dismissed except that "late payment" penalties for 2010/11 and 2011/12 shall be reduced as set out at [57] above.

59. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 4 NOVEMBER 2015