



TC05723

Appeal number: TC/2013/88

INCOME TAX – penalties for late filing

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALTAY ERALP

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

The Tribunal determined the appeal on 10 March 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 13 December 2012 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 27 January 2017.

DECISION

5 1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit his 2010/2011 self-assessment return on time. As the return was submitted electronically its due date was 31 January 2012.

2. The penalties that have been charged can be summarised as follows:

10 (1) Daily penalties of £10 per day amounting to £900 imposed on 7 August 2012;

(2) Penalty of £300 imposed on 7 August 2012 when the tax return had been outstanding for more than 6 months after the filing date.

15 3. An initial penalty of £100 had been imposed on the appellant on 14 February 2012 when the return was not filed on the due date but this £100 penalty did not form a part of the appeal.

4. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) The imposition of the penalties was unfair because HMRC (allegedly) failed to give warning of the new late filing penalties;

20 (2) The amount of the penalties was out of proportion because the tax return was a nil return

(3) The amount of the penalties was heavy and inequitable.

History of appeal

25 5. The appellant’s agent, Ms A Reis, filed an appeal on 13 December 2012. In February 2013 the appeal was stayed behind another appeal in this Tribunal (*Morgan and Donaldson*) which raised questions on whether there were technical defects with the imposition of daily penalties. That stay lasted for several years, as this Tribunal’s decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761).

30 6. It became clear that the Court of Appeal’s decision was final when the Supreme Court refused permission for leave to appeal on 21 December 2016. Thereafter, HMRC have been asked to provide statements of case on the many appeals stayed behind Donaldson in order that they could be resolved.

35 7. That history explains why this appeal which was lodged in 2012 has only come on to be determined in early 2017. HMRC’s statement of case in this appeal was lodged on 23 January 2017 and the appellant was given the opportunity (by letter dated 30 January 2017) to reply to it. He did not reply. The appeal is determined on

the papers as it was categorised as a paper case and the appellant has made no request for it to be determined at a hearing.

The facts

5 8. There does not appear to be any dispute on the facts. HMRC's case is that the appellant filed his 2010/11 self-assessment return on 5 September 2011 and the appellant did not suggest otherwise. I find the return was filed on that date. No explanation has been given for why the self-assessment return was filed late.

10 9. HMRC's case in addition is that a flyer stating that daily penalties would be imposed together with other penalties for late filing was sent to the appellant with his notice to file his 2010/11 tax return. I was given a copy of this flyer and I note it refers not only to daily penalties but also to the fact that a penalty would be charged even if there was no tax to pay. HMRC also state the appellant was sent a reminder about the risk of late filing penalties on 16 December 2011, 5 June 2012 and 3 July 2012, although I was not provided with copies of these.

15 10. As the appellant has not disputed HMRC's assertions on this, I find that the appellant was sent these flyers and reminders.

Were the penalties properly imposed?

20 11. Schedule 55 to the Finance Act 2009 sets out the penalties at issue in this appeal. The relevant text of those provisions is set out in the appendix to this decision.

The £300 penalty

25 12. In summary, paragraph 5(1) of Schedule 55 stated that the fixed £300 penalty can be imposed if the tax return is still outstanding on 1 August 2012 (ie 6 months beginning with the day after the filing day). I have found that the appellant's tax return for 2010/11 was not filed until 5 September 2012 and so I find that the £300 penalty was properly imposed.

The daily penalties

30 13. In summary, daily penalties can be imposed at £10 a day if certain conditions are met. Those conditions are (paragraph 4(1)) that (a) the tax return is still outstanding on 1 May 2012 (ie 3 months beginning with the day after the filing date); (b) HMRC have decided that the penalty is due; and (c) HMRC have given the appellant notice of the date from which the penalty is payable.

14. There can be no dispute about whether condition 4(1)(a) was fulfilled as it is clear that the appellant's tax return was outstanding until 5 September 2012.

15. But whether HMRC had fulfilled the other conditions was the issue in the *Donaldson* appeal. There was no appeal from the Court of Appeal's decision on this matter and therefore that decision is binding on this Tribunal.

5 16. The Court of Appeal held at [18] that HMRC's policy decision to charge all taxpayers more than 3 months' late with their tax returns daily penalties was sufficient for paragraph 4(1)(b). So I find that condition was fulfilled in this case too.

10 17. The Court of Appeal held at [21] that the warning given to the taxpayer in that case that he would be charged daily penalties if more than three months late, such as the warning referred to in paragraph §9-10 above, was sufficient to amount to due notice under paragraph 4(1)(c). So I find that condition was fulfilled in this case too.

15 18. Lastly, the Court of Appeal accepted that the notice assessing the penalties in the *Donaldson* case was defective as it failed to specify the period over which the daily penalties were charged, but held at §29 that that defect was cured by s 114 of the Taxes Management Act 1970 which provided that mistakes in assessments which were not misleading would not affect the validity of the assessment. The Court of Appeal considered that the period assessed could be easily calculated. In short, the taxpayer in *Donaldson* lost the appeal as the imposition of the daily penalties was held to be valid.

20 19. I do not have a copy of the notice of assessment of the daily penalties in this case. Even if it suffered from the same defect as in the *Donaldson* appeal, it is clear that I must find that s 114 of the Taxes Management Act 1970 cures that defect. It should have been obvious that the 90 days for which the £10 penalty was charged were within the period from 1 May 2012 to 7 August 2012 (a period of some 99 days).

25 **Conclusion**

20. I therefore find that the penalties were properly imposed. I move on to consider the appellant's grounds of appeal.

Reasonable excuse

30 21. Paragraph 23 of Schedule 55 provides that liability to the penalties does not arise if the appellant is able to satisfy the Tribunal that he has a reasonable excuse for his failure to make a return.

35 22. While Schedule 55 does not define a reasonable excuse it is understood to be something which causes the failure to file and which could have caused a conscientious taxpayer, aware of his obligations to HMRC and intending to fulfil them, to fail to file the return. The appellant put forward three grounds of appeal (see §4) and so I consider whether any of these amount to a reasonable excuse.

Lack of warning?

23. The appellant claims that there was no warning, in particular of the fact that the penalties would apply to those filing nil returns, but gives no further details. I find, see §9-10, that the appellant had plenty of warnings about the new daily penalties regime and that fact penalties could be imposed even if no tax was owing. So as a matter of fact I reject his case that he had no warning.

24. In any event, I reject his case as a matter of law. Ignorance of the law does not amount to a reasonable excuse as to be a reasonable excuse the appellant must have acted as a conscientious taxpayer aware of his obligations to file online: moreover, not only should a conscientious taxpayer be aware of the law, it is not excuse to fail to comply with it simply because one did not expect to be penalised for non-compliance.

Lack of proportionality/excessive penalties?

25. The second and third grounds of appeal related to the size of the penalties: the size of the penalties cannot be a reasonable excuse for failing to file online as clearly they did not *cause* the late filing. I will consider them separately below.

Special circumstances

26. Another statutory defence is one of ‘special circumstances’ (see paragraph 16 of Schedule 55). There are only limited circumstances in which this Tribunal can consider such a defence, and I do not think that they apply here.

27. Nevertheless, even if I could consider the grounds put forward by the appellant as ‘special circumstances’ it is clear that I must reject them. Firstly, the alleged lack of warning of penalties is unproved, and in any event for the reasons already given is not something for which the taxpayer should be excused payment of the penalties. Secondly, the other two grounds amount to saying that the penalties are too much, and impliedly, that the appellant cannot pay them. It is not proved that the appellant cannot afford to pay the penalty, but even if true, paragraph 16(2)(a) makes it clear ability to pay is not relevant.

Proportionality

Penalties out of proportion?

28. There is no statutory defence relating to proportionality. But to the extent that the Tribunal has power to consider proportionality as a matter of general law, it is clear that it can only be where the penalties are ‘not merely harsh, but plainly unfair’ as per the Court of Appeal in the case of *International Transport Roth GmbH* [2002] EWCA civ 158.

29. I do not consider penalties for failing to lodge a nil tax return are, by themselves, harsh and certainly not plainly unfair. HMRC need to be told whether or

not the taxpayer has a tax liability in order to do their job of collecting the right amount of tax. In particular, HMRC can't challenge the taxpayer's self-assessment unless and until it is filed. A penalty encourages filing of all returns and is therefore not by itself even harsh and certainly not plainly unfair.

5 30. In so far as the complaint is that the amount of the penalty was 'plainly unfair', again I am unable to agree. The daily penalties are merely £10 per day: the appellant was warned about them in advance.

10 31. The fixed penalty of £300 could be set at a higher amount if tax was owing: £300 is the minimum but is only payable when the return is already more than 6 months late. I do not consider a £300 penalty, even combined with daily penalties, 'plainly unfair' for a return that was 6 months late.

32. I dismiss this ground of appeal.

Decision

15 33. For the reasons given above, I find that the daily penalties of £900 and penalty of £300 were properly imposed for failure to file the appellant's 2010/11 until September 2012. I find that the penalties did not lack proportionality, the appellant had no reasonable excuse for his late filing, and there were no special circumstances. The appeal against the two penalties is dismissed.

Application for permission to appeal

20 34. 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
25 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30 **Barbara Mosedale**

TRIBUNAL JUDGE

RELEASE DATE: 16 MARCH 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

5 2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

- 10 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
- (b) HMRC decide that such a penalty should be payable, and
- (c) HMRC give notice to P specifying the date from which the penalty is payable.

15 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

- 20 (a) may be earlier than the date on which the notice is given, but
- (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

25 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

4. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

35 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

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

- (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.

5. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

- 16—
 - (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
 - (2) In sub-paragraph (1) “special circumstances” does not include—
 - (a) ability to pay, or
 - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
 - (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
 - (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

6. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

- 22—
 - (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
 - (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
 - (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

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(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.