



**TC05847**

**Appeal numbers: TC/2014/05294  
TC/2014/05519  
TC/2014/05520**

***INCOME TAX – Penalties – Failure to file returns – Whether penalty provisions can apply if returns have been filed – Yes – Appeals dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**(1) JAMES MURPHY  
(2) DENNIS SMITH  
(3) THOMAS KETTLE**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS**

**Sitting in public at the Royal Courts of Justice, Strand, London on 24 April 2017**

**Tony Woon-Sam, of Crown Accountants, for the Appellant**

**Christopher Fleming, of HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr James Murphy, Mr Dennis Smith and Mr Thomas Kettle each appeal against a £100 penalty imposed by HM Revenue and Customs (“HMRC”) under paragraph 3 of schedule 55 to the Finance Act 2009. As their appeals are factually identical, raise the same issue and all three appellants have the same representative, Mr Tony Woon-Sam of Crown Accountants, it was directed that they be heard together.

2. It is not disputed that on 30 December 2013 Mr Murphy, Mr Smith and Mr Kettle each received a notice from HMRC requiring them to file a self-assessment tax return for 2012-13. The filing date for these returns was 6 April 2014 (three months and seven days from the date of the notice). As the returns had not been submitted by the filing date, HMRC, on 8 April 2014, imposed a penalty of £100 (under paragraph 3 schedule 55 to the Finance Act 2009) on each of the appellants whose 2012-13 returns were subsequently filed electronically on 16 May 2014.

3. In a somewhat novel argument Mr Woon-Sam contends that, because s 106 and schedule 55 to the Finance Act 2009 refer to penalties for “failure to make returns” rather than their late submission, no penalty can be payable if a return has been filed. He accepts that this is counter to the prevailing understanding of penalties as advanced by Mr Christopher Fleming of HMRC and accepted by the Courts and Tribunals. Indeed, Lord Dyson MR, giving the judgment of the Court of Appeal in *Donaldson v HMRC* [2016] STC 2511 (“*Donaldson*”), said, at [1]:

“Schedule 55 of the Finance Act 2009 (“the Schedule”) makes provision for the imposition by Her Majesty’s Revenue and Customs (“HMRC”) of penalties on taxpayers **for the late filing of tax returns.**” [emphasis added]

4. To consider Mr Woon-Sam’s argument it is necessary to refer to the relevant legislation and all subsequent references to paragraphs are, unless otherwise stated, to those of schedule 55 to the Finance Act 2009.

5. Under s 8(1D) of the Taxes Management Act 1970 (“TMA”) a person who has been given notice to file a self-assessment tax return for a year of assessment (Year 1) is required to do so, in the case of a non-electronic return, on or before 31st October in Year 2, and in the case of an electronic return, on or before 31st January in Year 2.

6. However, if notice is given in respect of Year 1 after 31st July in Year 2 (but on or before 31st October), a return must be delivered within three months of the notice (for a non-electronic return), or on or before 31st January (for an electronic return) (see s 8(1F) TMA). If, as in the present appeals, a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice (see s 8(1G) TMA) although, in practice, HMRC allow an additional seven days over the three months for the return to be filed.

7. Insofar as applicable to the present case, s 106 of the Finance Act 2009 provides:

**106 Penalties for failure to make returns etc**

(1) Schedule 55 contains provision for imposing penalties on persons in respect of failures to make returns and other documents relating to liabilities for tax.

8. Paragraph 1 of schedule 55 provides:

**Penalty for failure to make returns etc**

1—

(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, ..., specified in the Table below [which includes a self-assessment return – item 1 in the table] on or before the filing date.

(2) Paragraphs 2 to 13 set out—

- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) ...

(4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“penalty date”, in relation to a return or other document [falling within any of items 1 to 3 and 5 to 13 in the Table]<sup>3</sup>, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

9. A penalty of £100 is payable, under paragraph 3, if a person fails to make or deliver a self-assessment tax return on or before the filing date. If, three months after the penalty date the return has not been filed a person is liable to a penalty, under paragraph 4, of £10 for each day it remains outstanding for a period of up to 90 days from the date specified in a notice from HMRC. A penalty of £300 or 5% of any liability to tax (if greater) which would have been shown in the return is payable, under paragraph 5, if the return is not filed within six months after the penalty date. A further penalty of £300 or 5% of any liability to tax (if greater) which would have been shown in the return is payable, under paragraph 6, if the return is not filed within 12 months of the penalty date.

10. Paragraph 23 provides that a person is not liable to a penalty if he or she has a reasonable excuse for the failure to file a return and, if the reasonable excuse has ceased, has remedied the failure without unreasonable delay after it has ended. Additionally, a penalty may be reduced, under paragraph 16, because of “special circumstances” if HMRC’s decision not to apply such a reduction is “flawed” in a judicial review sense.

11. In the present appeals Mr Woon-Sam confirmed that neither reasonable excuse nor special circumstances are relied upon by any of the appellants. Their sole ground of appeal is that the penalty provisions cannot apply as their returns have been filed.

12. Although neither s 106 of the Finance Act 2009 nor the title of schedule 55 to the Act specifically refer to penalties for “late” filing of returns, paragraph 1(1) provides that a person is liable to a penalty if he or she fails to deliver a return on or before the filing date. Mr Woon-Sam contends that the reference to “filing date” in the paragraph is to ensure that the filing date has passed before any liability to a penalty arises. That cannot be controversial. However, Mr Woon-Sam’s argument does not address the language of paragraph 1(1) itself, namely that a penalty **is** payable (emphasis added) in such circumstances.

13. Clearly if a return has not been submitted on or before the filing date a penalty is payable under paragraph 1(1) whether or not a return is subsequently filed. It therefore follows that Mr Woon-Sam’s argument that the penalty provisions cannot apply where a return has been filed cannot succeed.

14. Neither, in my judgment, can the alternative position that Mr Woon-Sam appeared to accept during the course of the hearing, that a penalty can be imposed by HMRC if, and only if, the filing date has passed without a return being delivered. This also relies on the absence of any reference to “late” filing in s 106 and schedule 55 of the Finance Act 2009 without addressing the language of the legislation. However, even if this were not the case as Mr Murphy, Mr Smith and Mr Kettle each filed his 2012-13 self-assessment tax return on 16 May 2014, after the imposition of a £100 penalty under paragraph 3 on 8 April 2014, it would necessarily follow that their appeals must be dismissed.

15. A further argument advanced by Mr Woon-Sam advances relies on paragraph 18(1)(a). This provides:

Where P is liable to a penalty under any paragraph of this Schedule HMRC must—

(a) assesses the penalty.

Mr Woon-Sam contends as the penalties in this case have been computer generated they have not been “assessed” by HMRC as required by the legislation.

16. However, this issue was considered in *Donaldson*, albeit in relation to daily penalties under paragraph 4 but equally applicable to the present case, where HMRC successfully argued that a decision had been taken by programming its computer to automatically issue a penalty in circumstances where a liability arose notice in accordance with a “high policy” decision. Lord Dyson MR said:

“It seems to me that it is inherently unlikely that Parliament intended that HMRC should be required to make a decision by exercising a discretion on an individual taxpayer-by-taxpayer basis. Parliament has addressed the issue of the individual circumstances of P by [the reasonable excuse provisions of] para 23”

17. Mr Woon-Sam contends, relying on his “failure” to file argument, that because the Court of Appeal at [1] in *Donaldson* referred to penalties applying to the “late” filing as opposed to a “failure” to file returns (see above) it was wrongly decided. I do not agree. Having rejected Mr Woon-Sam’s argument in relation to “late” filing it follows that his argument that HMRC have not “assessed” the penalty cannot succeed either.

18. Therefore, for the above reasons, the appeals are dismissed and penalties confirmed.

19. 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.

**JOHN BROOKS  
TRIBUNAL JUDGE**

**RELEASE DATE: 28 APRIL 2017**