



TC05965

Appeal number: TC/2014/00848

INCOME TAX – penalty for failure to make returns

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREA TALIADOROS-HICHRI

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

The Tribunal determined the appeal on 15 June 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 7 February 2014 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 23 February 2017, the appellant's reply dated 20 March 2017 and HMRC's further written submissions dated 22 May 2017.

DECISION

1. The appellant, Ms Taliadoros-Hichri, is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the tax year 2011-12 on time.

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

(1) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 3 September 2013

(2) A 6-month late filing penalty of £300 under paragraph 5 of Schedule 55 imposed on 3 September 2013.

3. Ms Taliadoros-Hichri grounds of appeal can be summarised as follows:

(1) At relevant times she was living in Tunisia. She tried on more than one occasions to send her advisers (Howell Wade) information necessary to prepare her tax returns. However, unreliable electronic communications between the UK and Tunisia meant that Howell Wade did not receive the information and, moreover, were not even aware that it had been sent. Ms Taliadoros-Hichri, therefore, had a “reasonable excuse” for the late submission and HMRC applied the wrong test when deciding that there was no reasonable excuse.

(2) The penalties charged are disproportionate given that Ms Taliadoros-Hichri’s tax liability for the year was just £140.75.

Findings of fact

4. I have made the findings of fact set out at [5] to [13] below.

The preconditions for the penalties to be chargeable

5. HMRC have produced evidence in the form of a print-out from their computer systems, that indicates that they sent Ms Taliadoros-Hichri a notice under s8 of the Taxes Management Act 1970 (“TMA 1970”) on 6 April 2012 requiring her to produce a tax return for 2011-12. Ms Taliadoros-Hichri has not denied receiving that notice. Indeed, her grounds of appeal make it clear that she was aware that she was under an obligation to file a return for that tax year. I have concluded that she was aware of this obligation because she received the notice under s8 of TMA 1970.

6. A return for 2011-12 would have been due, in electronic form, on 31 January 2013 (or in paper form on 31 October 2012). HMRC have produced evidence from their computer records that suggests that they received Ms Taliadoros-Hichri’s electronic return for 2011-12 on 21 August 2013. Ms Taliadoros-Hichri is not arguing that HMRC received the return earlier than this date (as the whole essence of her appeal is that there was a reasonable excuse for the delay) and I have therefore concluded that HMRC’s records are accurate.

7. On 3 September 2013, HMRC sent Howell Wade a notice of a penalty of £100 relating to Ms Taliadoros-Hichri's failure to submit her electronic tax return by 31 January 2013¹. That took the form of the "Form SA 326D" that was considered in *Keith Donaldson v The Commissioners of Her Majesty's Revenue & Customs* [2016] EWCA Civ 761. HMRC have made it clear that they rely on this document as establishing that the requirements of paragraph 4(1)(c) of Schedule 55 are met. I am satisfied that this document contained the information necessary to be a notice under paragraph 4(1)(c) of Schedule 55. However, in the Discussion section of this decision, I will consider matters of law that arise because this notice was sent at the same time as the penalty notice relating to the daily penalties.

8. HMRC have satisfied me that the requirements of paragraph 4(1)(b) of Schedule 55 are met. The "high level policy decision" referred to in *Donaldson* would have applied to Ms Taliadoros-Hichri just as much as other taxpayers, and *Donaldson* is authority for the proposition that this policy decision was sufficient to meet the requirements of paragraph 4(1)(b).

9. HMRC have produced computer records that show that the penalties referred to in paragraph 2 were entered on their computer system on 3 September 2013. On 3 September 2013, HMRC sent Ms Taliadoros-Hichri notice of those penalties. In accordance with the decision of the Special Commissioners in *Corbally-Stourton v HMRC* [2008] STC (SCD) 907, I have concluded that the assessments to daily penalties were made on 3 September 2013 (when entered onto HMRC's computer system). However, Ms Taliadoros-Hichri would only have received the Form SA326D referred to at [7] (which constituted the notice of daily penalties under paragraph 4(1)(c) of Schedule 55) some days after 3 September 2013 (when it had been delivered in the post). Therefore, HMRC assessed Ms Taliadoros-Hichri to daily penalties before they gave her notice under paragraph 4(1)(c).

Other relevant facts

10. I have accepted Ms Taliadoros-Hichri's statements made both in her Notice of Appeal and in correspondence with HMRC to the effect that she had difficulty in communicating with Howell Wade electronically from Tunisia. I therefore accept that, on more than one occasion, she sent them information which they did not receive, and did not even know had been sent.

11. However, Ms Taliadoros-Hichri has not given much more information than that outlined at [10]. I have not been given any evidence, and cannot therefore make any findings, on the following issues:

- (1) the date by which Ms Taliadoros-Hichri thought she had sent Howell Wade all the information they needed to prepare her tax return and, in particular, whether that was before or after 31 January 2013;

¹ Ms Taliadoros-Hichri has not sought to appeal against that penalty

(2) what steps, if any, Ms Taliadoros-Hichri took, in the run-up to, and shortly after, the filing deadline of 31 January 2013 to ascertain whether Howell Wade had filed her tax return on time;

5 (3) when Ms Taliadoros-Hichri realised that her return had not been filed by the deadline; and

(4) what steps, if any, she took to make allowances for, or work around the evidently faulty electronic communication between the UK and Tunisia when she re-sent information to Howell Wade after it became clear that this information had not been received first time around.

10 12. Ms Taliadoros-Hichri appealed to HMRC against the penalties imposed on 13 September 2013 which was within the applicable time limit. HMRC rejected that appeal on 4 October 2013. Ms Taliadoros-Hichri requested a review. HMRC reviewed their decision but, by letter dated 11 December 2013, upheld their conclusion on review.

15 13. Ms Taliadoros-Hichri notified her appeal to the Tribunal on 7 February 2014. That notification was just less than a month late. Some explanation has been given as to why the appeal was notified late. Since HMRC have not objected to the late notification of the appeal, I will give Ms Taliadoros-Hichri permission to make a late appeal to this Tribunal.

20 **Discussion**

14. Relevant statutory provisions are included as an Appendix to this decision.

15. I have concluded that Ms Taliadoros-Hichri's tax return for 2011-12 was received in electronic form on 21 August 2013. It should have been received no later than 31 January 2013. Therefore, subject to considerations of "reasonable excuse" and
25 "special circumstances" set out below, the conditions necessary to impose the "six month" penalty of £300 are met.

16. Ms Taliadoros-Hichri did not take any point, in her Notice of Appeal, to the effect that HMRC had purported to assess her to daily penalties before they had sent her notice under paragraph 4(1)(c), although she did make a general complaint that, if
30 she had received notice of penalties earlier, she would have realised much earlier that there had been a problem with the submission of her return. HMRC did not mention the point either in their Statement of Case. In those circumstances, I invited the parties to make additional written submissions as to whether the daily penalties had been validly charged. HMRC made some submissions (although they failed to address the
35 point). Ms Taliadoros-Hichri made no further submissions.

17. My overall conclusion is that Paragraph 4 of Schedule 55 sets out a list of requirements that must be satisfied before a taxpayer can be liable to daily penalties. Those conditions must be satisfied before HMRC can assess the penalty. I do not consider that conclusion to be at odds with the decision in *Donaldson*. Both in the
40 Upper Tribunal and the Court of Appeal, the relevant issue in *Donaldson* was whether HMRC were entitled to issue a notice under paragraph 4(1)(c) before the tax return in

question was over three months late. Neither the Upper Tribunal nor the Court of Appeal considered the completely different question of whether HMRC could give notice under paragraph 4(1)(c) after daily penalties had been assessed.

5 18. My interpretation of paragraph 4 of Schedule 55 is consistent with the plain meaning of the words. Moreover, if the position were otherwise, HMRC could assess a taxpayer to daily penalties and issue a notice under paragraph 4(1)(c) months or years later. That would rob the requirement to serve notice of daily penalties of any force. I do not consider Parliament can have intended this outcome. On the contrary, Parliament must have intended that notice of daily penalties has to be given before
10 daily penalties are assessed. That conclusion, together with the finding at [9] means that the daily penalties charged under paragraph 4 of Schedule 55 are not due.

19. The appellant has argued that the penalties charged are disproportionate. She has referred to the First-tier Tribunal's decision in *HMRC v Anthony Boshier*. However, relevant aspects of the First-tier Tribunal decision were reversed by the
15 Upper Tribunal. The decision of the Upper Tribunal in *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) is binding on me. Following that decision, I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

20. That leaves the question of whether there is a "reasonable excuse" that prevents
20 the six-month penalty of £300 from being due. I do not consider that there is a reasonable excuse. The effect of paragraph 23(2)(c) of Schedule 55 is that a "reasonable excuse" has to exist throughout the period during which a tax return is outstanding. Ms Taliadoros-Hichri has explained some difficulties that she experienced with electronic communication which might have amounted to a
25 "reasonable excuse" for part of the period. However, I am not satisfied that the very brief account of those difficulties amounts to a reasonable excuse for a tax return being over six months late. Moreover, it is not even clear from Ms Taliadoros-Hichri's account when she thought she had given Howell Wade the necessary information. It is a matter of some importance whether that was before or after 31
30 January 2013 but Ms Taliadoros-Hichri's Grounds of Appeal are silent on the matter. The burden is on Ms Taliadoros-Hichri to establish the defence of "reasonable excuse" and she has not done so.

21. Ms Taliadoros-Hichri has not suggested that there were "special circumstances" or explained why HMRC's failure to reduce the penalties on account of "special
35 circumstances" was unreasonable. In those circumstances, I do not consider that HMRC's decision on special circumstances was flawed in the judicial review sense. I will not, therefore, reduce the penalties on account of the presence of "special circumstances".

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Conclusion and application for permission to appeal

22. My conclusion is as follows:

(1) HMRC's decision to charge daily penalties totalling £900 is cancelled.

(2) HMRC's decision to charge a six-month penalty of £300 is upheld.

5 23. 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
10 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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**JONATHAN RICHARDS
TRIBUNAL JUDGE**

RELEASE DATE: 21 JUNE 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

15 (c) HMRC give notice to P specifying the date from which the penalty is payable.

(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).

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

(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).

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

5—

30 (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—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

35 4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

(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 12 months beginning with the penalty date.

5 (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

10 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

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

15 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

20 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

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

25 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

30 (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

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

35 (6) Paragraph 6A explains the 3 categories of information.

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

23—

5 (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,

10 (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

15 (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.

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

16—

20 (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

25 (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

30 (b) agreeing a compromise in relation to proceedings for a penalty.

7. 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:

35 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.

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(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

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(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.

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

15 1.