



**TC06327**

Appeal number: TC/2012/08257

*INCOME TAX – daily penalty for failure to make returns – schedule 55  
Finance Act 2009 – were the conditions for the imposition of the penalty  
satisfied – yes – did the taxpayer have a reasonable excuse for the failure –  
no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTOPHER JOHN AUSTIN**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ROBIN VOS  
DAVID BATTEN**

**Sitting in public at Reading ET on 29 January 2018**

**The Appellant did not attend the hearing and was not represented**

**Mr David Lewis, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **Background**

- 5 1. Schedule 55 to Finance Act 2009 (“schedule 55”) introduced a new penalty regime where tax returns are filed late. Before that, a penalty could not normally exceed the amount of tax due.
2. The appellant, Mr Austin, had filed his tax returns late for the tax years ending 5 April 2005 – 5 April 2010 inclusive but did not have to pay any penalties as he had no tax liability.  
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3. He also filed his self-assessment tax return for the tax year ended 5 April 2011 after the statutory deadline. However, in this case, he was charged a £100 late filing penalty together with further daily penalties totalling £760 under the new penalty regime in schedule 55 even though he had no tax to pay.
- 15 4. Mr Austin has appealed against the daily penalties but not against the initial £100 penalty.

### **Mr Austin’s failure to attend the hearing**

5. Mr Austin did not attend the hearing. It appears that the correspondence from the Tribunal notifying him of the hearing date may not have been received as it was sent to an incorrect email address and had not been sent by post.  
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6. However, the clerk to the Tribunal spoke to Mr Austin immediately before the hearing. Mr Austin confirmed to the clerk that he was aware of the hearing as he had received a bundle of papers from HMRC. He also confirmed that he was happy for the hearing to proceed in his absence.
- 25 7. The Tribunal is satisfied that Mr Austin had been notified of the hearing. Having examined Mr Austin’s notice of appeal, HMRC’s statement of case and the bundle of documents produced by HMRC, the Tribunal was satisfied that it had all the information it needed to conduct the hearing fairly and to make a decision. The Tribunal therefore decided in accordance with rule 33 of the Tribunal rules to proceed  
30 with the hearing in Mr Austin’s absence.

### **Evidence and Facts**

8. The evidence consisted of a bundle of documents and correspondence produced by HMRC. This included a copy of a witness statement made by Martin Delnon, an officer of HMRC working in the Self-Assessment Live Services team which is responsible for the electronic process of issuing reminders to file self-assessment tax returns and charging penalties for the late filing of such tax returns. The witness statement describes HMRC’s process for issuing these reminders and charging the penalties. On the basis of the evidence before us, we find the following relevant facts.  
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9. On 6 April 2011 HMRC issued to Mr Austin a self-assessment tax return for the year ended 5 April 2011 for completion together with a leaflet explaining the new penalty regime.
10. In December 2011, HMRC issued to Mr Austin a form SA309A reminding him that he still needed to complete a self-assessment tax return and to pay any tax due.
11. On 14 February 2012, HMRC issued a penalty assessment notice to Mr Austin for the initial late filing penalty of £100.
12. Mr Austin's self-assessment tax return for the year ended 5 April 2011 was received by HMRC on 16 April 2012.
13. On 17 April 2012, Mr Austin spoke to HMRC to say that he had received the initial penalty letter (presumably the £100 penalty) and to let HMRC know that he had submitted his tax return the previous week. He was told that it could take up to two weeks to log the receipt of the tax return onto HMRC's system.
14. Mr Austin says that, during the conversation, he was told by the HMRC officer that, as long as the tax return was submitted by 1 May 2012 (which it was), he would not be subject to daily penalties. There is no evidence of this in HMRC's notes of the call with Mr Austin although that does not of course mean that this part of the conversation did not take place.
15. However, for the reasons set out below, it does not in our view make any difference to the result of this case whether the HMRC officer did in fact say this.
16. On 24 April 2012, HMRC issued a penalty assessment notice to Mr Austin charging a penalty of £760, being daily penalties of £10 per day for 76 days in accordance with paragraph 4 of schedule 55.
17. Mr Austin appealed to HMRC against the penalty but the appeal was rejected and HMRC's decision was upheld on review.

### **Filing self-assessment tax returns and the penalty regime**

18. In accordance with section 8 Taxes Management Act 1970, an individual is required to file a self-assessment tax return if requested to do so by HMRC. The return must be submitted by 31 October following the end of the relevant tax year if the return is submitted in paper form. If the return is submitted electronically, the taxpayer has until 31 January after the end of the relevant tax year in order to submit the return.
19. Schedule 55 imposes penalties where a self-assessment tax return is filed late. There is a £100 initial penalty if the tax return is filed after the statutory deadline. If the tax return is more than three months late, HMRC may charge a daily penalty of £10 per day for up to 90 days. Once the tax return is more than six months late, a further penalty of a minimum of £300 is due and if the tax return is more than 12 months late, there is another penalty, again of a minimum of £300, which is payable.

20. In this case, as the tax return was submitted in paper form, the statutory deadline was 31 October 2011. The return was received by HMRC on 16 April 2012 and so was less than six months late. The initial penalty and the daily penalties are therefore relevant but the six month penalty and the 12 month penalty are not relevant.

5 21. This case has been stayed pending the decision in *Donaldson v HMRC* [2016] EWCA Civ 761 which was decided by the Court of Appeal in 2016 and which is now final. That case dealt with various arguments in relation to the validity of daily penalties based on HMRC's computerised system for assessing the penalties and also in relation to certain defects in the penalty notices.

10 22. The Court of Appeal decided, in that case, that the penalties had been validly imposed but also made it clear that HMRC had the burden of proving that the requirements of schedule 55 had been satisfied. In particular, paragraph 4(1)(c) of schedule 55 requires that HMRC has given the taxpayer a notice specifying the date from which the daily penalties are payable.

15 23. Paragraph 23 of schedule 55 provides that a taxpayer is not liable to a penalty if the Tribunal is satisfied that there is a reasonable excuse for the failure.

20 24. HMRC is permitted to reduce a penalty if they believe that there are special circumstances making it right to do so. The Tribunal may also reduce a penalty if there are special circumstances but only if HMRC's decision on this aspect is "flawed" in a judicial review sense.

#### **Were the conditions for the imposition of daily penalties satisfied**

25. There is no doubt that Mr Austin filed his self-assessment tax return more than three months late and so HMRC were in principle entitled to charge daily penalties.

25 26. The Court of Appeal in *Donaldson* decided that a generic decision by HMRC to charge daily penalties in all cases where a tax return is more than three months late is a valid decision. In this context, it was made clear on the front page of the self-assessment tax return for the year ended 5 April 2011 which was sent to Mr Austin and in the accompanying leaflet about the new penalty regime that the daily penalty of £10 per day would be charged as soon as the return was more than three months late.

30 27. It is also a requirement of paragraph 4 of schedule 55 that the taxpayer is notified of the date on which the daily penalty starts to become payable. In *Donaldson*, the Court of Appeal relied on two documents, both of which were held to satisfy this requirement. The first was the self-assessment reminder which was sent out by HMRC in December 2011. The second was the notice assessing the initial  
35 £100 penalty which was sent out in February 2012.

28. In this case, based on the witness statement provided by Martin Delnon, we are satisfied that Mr Austin was sent both of these documents. He confirms the computer based process through which these documents are issued and we are satisfied on the

basis of this evidence that Mr Austin would have been sent these documents to his usual address (which had not changed since 2001).

29. The self-assessment reminder is form SA309A. We were provided with a sample of this document which confirms that:

5                                “If we still haven’t received your online tax return by 30 April  
   (31 January if you are filing a paper one) a £10 daily penalty will  
   be charged every day it remains outstanding. Daily penalties can  
   be charged for a maximum of 90 days, starting from 1 February  
   for paper tax returns or 1 May for online tax returns.”

10 30. It is quite clear from this that Mr Austin was given a notice specifying the date  
   (1 February) from which the daily penalties would start to be charged. We do not  
   have a copy of the notice of assessment of the initial £100 penalty (form 326D).  
   However, the requirements of the legislation are satisfied by the self-assessment  
   reminder which was sent to Mr Austin in December 2011.

#### 15 **Mr Austin’s submissions**

31. In his initial appeal to HMRC, Mr Austin referred to the penalty assessment  
   notice dated 24 April 2012 and a subsequent statement of account dated 1 May 2012  
   which confirmed that he did not owe HMRC any money. He says in the letter that he  
   had been told in a telephone conversation with HMRC that no daily penalties would  
20 be charged as long as the return was received by 1 May 2012.

32. He also says in his letter to HMRC that he was aware of other people in the  
   same position as him who have not been charged daily penalties.

33. When requesting a review of HMRC’s rejection of his appeal, Mr Austin makes  
   the point that the income from his business is never more than his annual allowance  
25 and so he does not have any tax to pay. As he had never been charged a penalty in the  
   past, he did not understand why he was charged a penalty for the year ended 5 April  
   2011. He also states that, as far as he knows, his tax return was submitted on time.

34. Mr Austin’s grounds of appeal to the Tribunal refer mainly to the fact that he  
   did not have any tax liability for the relevant tax year. He also refers to a self-  
30 assessment statement issued by HMRC on 1 July 2012 which showed that he did not  
   owe anything to HMRC.

#### **HMRC’s submissions**

35. Mr Lewis accepts that the self-assessment statement sent to Mr Austin on 1 May  
   2012 shows that, as at 1 May 2012, Mr Lewis did not owe anything to HMRC, despite  
35 the £100 initial late filing penalty. This was because Mr Austin was due a tax refund  
   and the £100 was satisfied out of the money due to Mr Austin. The statement does  
   however make it clear that, as a result of the daily penalties, Mr Austin was due to pay  
   HMRC £760 by 31 May 2012.

36. Mr Lewis also accepts that the statement dated 1 July 2012 shows that, as at that date, Mr Austin did not owe anything to HMRC. This was however because the £760 penalty had been suspended pending the resolution of Mr Austin's appeal.

5 37. As to the other points made by Mr Austin, Mr Lewis understands these as an attempt either to show that Mr Austin has a reasonable excuse for the failure or that there were special circumstances which would justify a reduction in the amount of the penalties.

10 38. As far as reasonable excuse is concerned, Mr Lewis submits that this must be considered in the light of all the circumstances and that the test is whether Mr Austin acted in the way that a reasonable person, intending to comply with his obligations, would have acted in those circumstances.

15 39. Mr Lewis argues that the fact that Mr Austin had submitted his tax returns late in previous years and had not been charged a penalty was not a reasonable excuse. The fact is that the law changed for the tax year ended 5 April 2011. Mr Austin was given adequate notice of this change both in the tax return which he was sent to complete together with the accompanying leaflet about the new penalty regime as well as the fact that the new penalty regime was widely publicised by HMRC in the media.

20 40. In Mr Lewis' view, it was up to Mr Austin to ensure that he complied with his obligations.

25 41. As far as Mr Austin's conversation with HMRC on 17 April 2012 is concerned, Mr Lewis pointed out that there is nothing in HMRC's record of that conversation which would indicate that the HMRC officer in question told Mr Austin that he would not have to pay daily penalties as long as the tax return was submitted by 1 May 2012. However, Mr Lewis also submitted that a reasonable excuse will only absolve a taxpayer from liability for penalties if the reasonable excuse has continued throughout the entire period of the failure.

30 42. Finally, Mr Lewis referred to Mr Austin's complaint that he was aware of other individuals in similar circumstances who had not been charged a penalty. In this context, Mr Lewis referred to the case of *Hok Ltd v HMRC* [2013] S.T.C. 225 in which the Upper Tribunal held [at 36] that the only question for the Tribunal is whether the penalty has been properly imposed on the particular taxpayer in question and is of the correct amount provided for by statute. The Tribunal cannot take into account whether the imposition of the penalty is in some way "unfair".

35 43. As far as special circumstances are concerned, Mr Lewis noted that HMRC had considered this in its statement of case which was prepared in October 2012. The statement of case concluded that there were no special circumstances which would justify a reduction in the amount of the penalties.

## Decision

44. We do not think that Mr Austin has a reasonable excuse for the failure to file his tax return on time. The fact that HMRC sent Mr Austin statements which may have made it look as if he did not pay them anything in May 2012 has no bearing on whether his tax return was filed late and, if so, whether he had a reasonable excuse for the late filing.

45. Similarly, a conversation with HMRC on 17 April 2012, after the date when he had sent his tax return to HMRC cannot provide any reason why the tax return was in fact filed late as, by then, the tax return was already late and had already been filed.

46. The fact that Mr Austin had filed his tax returns late in the past and had not been charged a penalty does not provide a reasonable excuse for the failure to file the tax return for the year ended 5 April 2011 on time. As HMRC say, the responsibility to ensure that a tax return is filed on time is that of the taxpayer and the taxpayer must take the consequences if he or she decides to file the tax return late.

47. Mr Austin may not have been aware that the rules had changed and that, under the new penalty regime in schedule 55, he would have to pay a penalty, even though he had no tax to pay. However, he was given plenty of notice of this both when the tax return was sent to him for completion and by way of later reminders. Although Mr Austin may not have read these documents carefully and so may have failed to appreciate that the penalty regime had changed, this does not provide a reasonable excuse for what was, by Mr Austin's own admission, a deliberate decision not to file his tax return by the statutory deadline simply because he thought that it did not matter.

48. For the reasons put forward by Mr Lewis, this Tribunal cannot take into account HMRC's treatment of other taxpayers and has no jurisdiction to reduce or eliminate a penalty based on HMRC's treatment of other taxpayers. Mr Austin's only remedy in relation to this would be an application for judicial review.

49. HMRC have concluded that there are no special circumstances which would justify a reduction in the amount of the penalty. As mentioned above, we can only reconsider this aspect if HMRC's decision is "flawed" in a judicial review sense. HMRC's decision that there are no special circumstances which should be taken into account and that consequently there is no reason to reduce the penalty is a reasonable one and we cannot therefore interfere with it. Even if we could, we agree that there are, in this case, no special circumstances.

## Conclusion

50. We accept that the conditions for the imposition of the daily penalties have been satisfied.

51. In our view, Mr Austin does not have a reasonable excuse for filing his tax return late.

52. HMRC's decision in relation to special circumstances is not flawed and we therefore have no jurisdiction to reconsider this point.

53. Accordingly, Mr Austin's appeal against the daily penalty of £760 is dismissed and the penalty is upheld.

5 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  
10 "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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**ROBIN VOS  
TRIBUNAL JUDGE**

**RELEASE DATE: 8<sup>th</sup> FEBRUARY 2018**