



TC06496

**Appeal numbers: TC/2014/01060
TC/2014/01425
TC/2014/01426
TC/2014/01427**

Income tax - s 93 TMA 1970 and Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file partnership and individual self-assessment returns on time - appeals out of time for years before 2009-10 – application for permission to appeal refused - appeals for 2010-11 and 2011-12 not opposed by HMRC - grounds of appeal that HMRC advice misled Appellants to understand that s 93(7) TMA capped penalties where no tax liability - whether reasonable excuse - yes - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

G E HAYHURST and J HAYHURST PARTNERSHIP Appellants

GRAHAM HAYHURST

JAMES HAYHURST

JUDITH HAYHURST

- and -

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

**TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: DEREK ROBERTSON**

**Sitting in public at Tax Appeals Tribunal, Alexandra House, The Parsonage,
Manchester on 26 January 2018**

Mrs Judith Hayhurst for the Appellants

Ms L McLaughlin, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal by G E & J Hayhurst Partnership and also the partners, Graham Hayhurst, Judith Hayhurst and James Hayhurst ('the Appellants') against penalties imposed by the Respondents ('HMRC') under s 93 Taxes Management Act 1970 for the tax years, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10; and under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009, for the failure to file partnership returns and individual self-assessment returns on time, for the tax years ending 2010-11 and 2011-12..

2. The appeals in respect of the years 2005-6 to 2009-10, were made outside the statutory time limits and therefore the Appellants apply for leave to appeal out of time.

3. HMRC oppose the Appellants' application to appeal against penalties for 2005-06 to 2009-10, because the appeals range from over six years to over one year late. HMRC do not oppose the Appellants' application to appeal against the late filing penalties for the years 2010-11 and 2011-12, although these were also made outside the statutory time limit.

Background

4. Graham, Judith and James Hayhurst trade together in a farming partnership, at Brunstow Farm, Ellel, Lancaster, Lancashire, their business being dairy farming and more recently animal and livestock farming.

5. The Appellants' 2005-06 to 2011-12 self-assessment, individual and partnership returns were issued on 6 April in each year of assessment. If filed in paper form, each return was due by 31 October in that tax year. If filed electronically, the return was due no later than 31 January in the following year.

6. A late filing penalty is chargeable where a taxpayer is late in filing their tax return. The penalties for late filing of returns can be summarised as follows:

For 2009-10 and earlier years - under s 93 TMA 1970

- A £100 fixed penalty is imposed if a return is not delivered by the filing date and a further £100 fixed penalty is imposed if the failure continues more than six months from the filing date.
- The above fixed penalties of £100 cannot exceed the tax liability which would be shown in the return, or the amount of tax outstanding at the due date, if the return had been delivered on the filing date.
- A £100 fixed penalty per relevant partner (i.e. each person who was a partner at any time during the period covered by the return) is imposed if a return is

not delivered by the filing date and a further £100 fixed penalty is imposed if the failure continues more than six months from the filing date.

- 5 • The fixed £100 partnership penalty is not subject to the potential penalty cap that applies to individual returns.

For the years 2010-11 onwards - under Schedule 55 Finance Act ('FA') 2009:

- A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
- 10 • If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- 15 • If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
- 20 • There is no penalty cap where the penalty exceeds the tax liability which would be shown in the return or the amount of tax outstanding at the due date, if the return had been delivered on the filing date.

7. The 'penalty date' is the date after the filing date.

Penalties under Section 93 Taxes Management Act 1970

8. The Appellants' partnership and individual returns for the years between 6 April 2006 and 2009-10 were all delivered late.
- 25 9. The 2006-07 returns for both Mr and Mrs Hayhurst were filed on 3 November 2009, almost two years late; their 2007-08 returns were filed on 24 March 2010, over one year late; their 2008-09 returns were not captured by HMRC, and the 2009-10 returns were filed on 25 April 2013, over two years late.
- 30 10. A total of 16 x £100 penalties were issued to Mrs Hayhurst, being 1 x fixed £100 penalty for 2005-06, 2 x £100 fixed penalties in each of the next four years for the late delivery of her individual returns and 2 x £100 penalties in each of those four years for the late delivery of the partnership returns. A £100 penalty for 2008-09 in respect of the late filing of the partnership return was issued but later cancelled.
- 35 11. A total of 15 x £100 penalties were issued to Mr Hayhurst, being 1x fixed £100 penalty for 2005-06, 2 x £100 fixed penalties in each of the next four years for the late delivery of his individual returns and 2 x £100 penalties in each of those four years for

the late delivery of the partnership returns. Two x £100 penalties for 2008-09 in respect of the late filing of his return were issued but later cancelled.

12. A total of 2 x £100 penalties were issued to Mr James Hayhurst being two fixed penalties for his late 2009-10 return.

5 *Penalties under Schedule 55*

13. A total of £3,200 penalties were issued to Mrs Hayhurst, being £100, £300, £900 and £300 in the tax year 2010-11 for the late delivery of her individual return and the late delivery of the partnership returns.

10 14. For the tax year 2011-12, penalties of £420 were issued being £100 and £320 daily penalties for the late filing of the partnership return.

15. Similar penalties, that is, a total of £3,200 for 2010-11 and £420 for 2011-12, were issued to Mr Graham Hayhurst and Mr James Hayhurst.

15 16. The first record in HMRC's SA notes of telephone conversations with the Appellants regarding the penalties, is on 25 June 2009, when Mr Hayhurst telephoned HMRC regarding the outstanding 2006-07 and 2007-08 returns. He said that the partnership accounts were with their accountant and promised the returns for 23 July 2009. He said that his accountants had told him that no tax was due. HMRC said that any penalties imposed for the late delivery of the partnership returns would nonetheless have to stand. In the event the 2006-07 returns were delivered to HMRC
20 on 3 November 2009 and the 2007-08 returns on 24 March 2010.

25 17. On 7 March 2012 Mrs Hayhurst telephoned HMRC to discuss 2 x £100 penalties she had received in respect of the late filing of her individual and the partnership return for 2010-11. Prior to that there had been conversations with the Appellants' agent regarding tax due, but nothing of substance specifically regarding penalties. In the telephone conversation with HMRC, Mrs Hayhurst was informed that her individual and partnership returns were in fact outstanding for the years 2008-09 to
30 2010-11 and that penalties had been issued. HMRC's note records Mrs Hayhurst saying that she would send in £200 in settlement of the penalties. Mrs Hayhurst's account of this conversation was that she would pay the £200 penalties "to show willing" but that any penalties paid would be refunded if no tax was due.

18. Penalties continued to accrue, (under Schedule 55) in respect of each partner throughout 2012 and early 2013.

19. On 5 June 2013, a 30 days, daily penalty reminder letter was sent to Mrs Hayhurst.

35 20. On 14 June 2013, Mrs Judith Hayhurst, spoke to HMRC's help desk. Following this conversation she wrote to HMRC saying:

"We have today received a bill for James for £1728.21, and a letter saying that mine and Graham's had been sent via our accountant. Unfortunately this letter was never

5 received. We do appear over the last few years to have had considerable trouble with our post and much of it appears to be lost. After my conversation, I am now aware that in total we owe £7475.06. This has accrued solely due to late filings and interest. I did receive a bill in August or September last year, rang and spoke to a lady who said if we knew we would have no income tax to pay, due to our non-existent income, all costs would be refunded, so to ignore the bill as it would make the department's life easier as they would not have to send it back.

10 As you can see from the accounts filed we have made no profit for several years and have survived on my earnings alone. We also understood that a refund was owed to my husband, and therefore the figures do not appear to make sense.

15 I did know that penalties were accruing from news reports etc. but had no understanding that they would be so high, or that they would apply to us after my conversation with the officer last year. The main reason the accounts got so far behind was that we knew we would struggle to pay the accountant's bills, and we did not wish to get into a debt spiral. Our logic has certainly backfired.”

21. HMRC treated Mrs Hayhurst's letter as an appeal against the penalties.
22. Section 31A of the TMA 1970 provides that an appeal to HMRC must be made within thirty days of an assessment/penalty.
- 20 23. Section 49(2)(b) of the TMA 1970 provides that a notice of appeal may be given outside the usual time limit if HMRC does not agree but where the Tribunal gives permission.
24. Under Rule 5(3)(a) of the Tribunal Rules, the Tribunal has discretion to extend the time within which a person is required to comply with the time limit to bring an appeal.
- 25 25. The Tribunal must also consider Rule 2 of the Tribunal Rules, being the overriding objective to deal with cases fairly and justly, which includes avoiding delay, so far as compatible with proper consideration of the issues.
- 30 26. On 9 August 2013, HMRC replied to Mrs Hayhurst and advised she did not have a reasonable excuse for the late filing of her appeal against the penalties for the 2011-12 tax year. HMRC said that these were the only penalties considered as the other penalties imposed for years 2005-06 to 2010-11, had been appealed well outside the statutory thirty day time limit.
27. On 12 August 2013, HMRC wrote to Mrs Judith Hayhurst and advised that her husband and son needed to lodge their own appeals.
- 35 28. On 17 October 2013, HMRC concluded the findings of their statutory review, and upheld Mrs Hayhurst's penalties for 2011-12.
29. On 11 December 2013, Messrs Graham and James Hayhurst formally appealed their partnership and self-assessment penalties.

30. In or around February 2014, the Appellants appealed to the Tribunal. The Tribunal subsequently directed that the appeals be consolidated.

31. Daily penalties had been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "Donaldson" case). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties and at the date of the Appellants' Notice of Appeal, *Donaldson* was due to be heard by the Court of Appeal.

32. Because the outcome of the *Donaldson* appeal was relevant to the Appellants' appeal against daily penalties, the Tribunal directed that the appeal should be stood over until the *Donaldson* appeal was determined.

33. The Court of Appeal decision in *Donaldson* was that HMRC had satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission, in the notice of assessment, of the correct period for which daily penalties had been assessed, the omission did not affect the validity of the notice.

34. On 20 December 2017, the Appellant was advised that the Court of Appeal's decision in the *Donaldson* case had been released and that accordingly the Appellants' case was to be listed.

Relevant statutory provisions

Taxes Management Act 1970

Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

5 (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

10 (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

15 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

20 (1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

25 (b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if 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.

(1H) The Commissioners-

30 (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

35 (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

5 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

10 (5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Section 12AA TMA 1970 – partnership returns - provides:

15 (1) Where a trade or profession or business is carried on by two or more persons in a partnership, for the purpose facilitating the establishment of following amounts, namely - (a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each partner,...

(2) An officer of HMRC may by a notice given to partners require such person as identified in accordance with rules given in the notice....

20 (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before' such day as may be so reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may so reasonably be required"

Section 93 TMA 1970

25 Failure to make return for income tax or capital gains tax

30 (1) If any person has been required by a notice served under or for the purposes of section 8 or 9 of this Act (or either of those sections as extended by section 12 of this Act or section 39(3) of the principal Act (husband and wife)) to deliver any return, and he fails to comply with the notice he shall be liable, subject to the provisions of this section-

(a) to a penalty not exceeding, except in the case mentioned in subsection (2) below, [£100],

Schedule 55 Finance Act 2009:

35. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

35 36. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

37. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

- 5 (1) P is liable to a penalty under the paragraph if (and only if)-
- (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
 - 10 (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (2) The penalty under the 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).
- 15 (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).
- 20

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

- (1) P is liable to a penalty under the paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
- 25 (2) The penalty under the 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.
- 30

40. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

- (1) Liability to a penalty under any paragraph of the 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.
- 35 (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,
 - 40 (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.
- 45

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

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.

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:

(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.

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

Paragraph 25(2) provides:

A penalty in respect of the failure is payable by every relevant partner.

Paragraph 25 (4) states:

An appeal made under paragraph 20 in connection with a penalty payable by virtue of this paragraph may be brought only by - (a) the representative partner:

The Appellants’ case

42. The Appellants’ grounds of appeal are as set out in their correspondence with HMRC. Mrs Hayhurst gave oral evidence to the Tribunal which assisted in clarifying the grounds of appeal. These can be briefly summarised as follows:

- i. Mrs Hayhurst’s mother-in-law had always prepared their accounts. This stopped when her husband died. Their accounts were neglected and not prepared when due, as the Appellants could not afford to pay a bookkeeper or pay the fees of the firm of accountants they normally used. They had in any

event earned little if any profit and not sufficient income to be taxed. Mrs Hayhurst had a separate full time job with Lancashire County Council and used her earnings to subsidise the farming partnership.

- ii. Due to local postal difficulties, receiving post was an ongoing concern.
- 5 iii. They were aware that penalties were being imposed but not of their magnitude. They were not aware of the new penalty regime introduced from 2010-11 onwards, but the scale of penalties imposed and how much they had accumulated came as a total shock when they were informed in March 2012. They were not aware that there was a time limit on appealing penalties.
- 10 iv. Mrs Hayhurst had been advised in March 2012 and again in June 2012 that penalties would not exceed the tax owed.
- v. They decided to change their accountants shortly after receiving the first Schedule 55 party notices in early 2012. Thereafter they made every effort to correct matters and to bring their accounts and returns up to date. The new
15 accountants were very understanding and had agreed to accept payment by instalments. The Appellants collated and delivered all their paperwork to the accountants in September 2012. Their accountants advised them that neither Graham nor James owed any tax and in fact a refund was due to Graham in respect of PAYE paid on earnings from a seasonal part-time job. They thought
20 their accountant had filed all their tax returns in early February 2013. In the event some were filed in April 2013 and the remainder on 1 June 2013.
- vi. Mr Hayhurst had suffered stress and depression over a prolonged period. This added to the strain on Mrs Hayhurst, as the partner responsible for maintaining accounts.

25 **HMRC's Case**

The late appeals

- 43. HMRC object to the late appeal in respect of years 2006-07 to 2009-10
- 44. HMRC do not object to the late appeal in respect of years 2010-11 and 2011-12.
- 45. Mr Justice Morgan in *Data Select Limited and the Commissioners for Her
30 Majesty's Revenue and Customs* [2012] UKUT 187 (TCC) said [at paragraph 34]:
 - 35 “As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? (5) what will be the consequences for the parties of a refusal to extend time?”
- 46. What is the purpose of the time limit? The purpose is to ensure that both the taxpayer and HMRC have finality and certainty.

47. How long was the delay? The length of the delay varies between over six years and over one year. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UK I JT 254 (TCC), the Upper Tribunal refused permission for a late VAT appeal to proceed. At paragraph 96 the Tribunal noted:

5 “The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right, which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

10 HMRC therefore submit that the Appellants’ delay cannot be considered anything but serious and significant.

48. Is there a good reason for the delay? The Appellants would have received a number of penalty assessments between February 2007 and August 2011, notifying them of the penalties they had incurred. In addition, they would have received periodic statements showing each penalty as and when it was issued. Mrs Hayhurst in her letter dated 14 June 2013 said:

 “The main reason the accounts got so far behind was that we knew we would struggle to pay the accountant’s bills, and we did not wish to get into a debt spiral.”

20 Whilst HMRC sympathises with the Appellants’ circumstances, they simply do not amount to a good reason for the delay; the penalty assessment letters would have clearly stated the amount of each penalty and the appeal time limit.

49. What will be the consequences for the parties of an extension of time? Given the passage of time, HMRC will be severely disadvantaged if they have to defend these stale appeals. In addition, HMRC would have to allocate further time and resources do so, the cost of which is borne by the public purse. Furthermore, it would be unfair and unjust for HMRC to defend an appeal in which the Appellants have admitted they were aware of the penalties accruing and also failed to provide a reasonable excuse.

50. What will be the consequences for the parties of a refusal to extend time? Mrs Hayhurst’s balance stands at nil, Mr Graham Hayhurst’s balance stands at £1,623.78, and Mr James Hayhurst’s balance is in credit. The only penalties due for payment are in respect of Mr Graham Hayhurst. All other penalties have been paid.

Substantive issues – the appeals relating to the 2010-11 and 2011-12 late returns

51. There is no dispute that the Appellants’ individual tax returns and the partnership tax returns were issued to the Appellants in each year under appeal and that the Appellants failed to submit their returns on time.

52. The partnership return for 2010-11 was filed on 25 April 2013. The filing date was 31 January 2012. The partnership return for 2011-12 was filed on 1 June 2013. The filing date was 31 January 2013. Both returns were therefore filed late.

53. The Appellants' self-assessment returns for 2010-11 were all filed on 25 April 2013, after the filing date of 31 January 2012. The partners' self-assessment returns for 2011-12 were filed on 1 June 2013, after the filing date of 31 January 2013.

54. All returns were sent to the correct address: Brunstow, Ellel, Lancaster,
5 Lancashire LA2 0PY.

55. Section 93 (8) TMA 1970 (2009-10 returns and earlier) and Paragraph 23 of Schedule 55 FA 2009 (2010-11 returns and later) provide that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the
10 failure without unreasonable delay after the excuse ceased.

56. The evidential burden is therefore on the Appellants to show that they have a reasonable excuse for the failures to file on time and that any reasonable excuse lasted for the entire period of the failures.

57. There is no statutory definition of "reasonable excuse". Whether or not a person
15 had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC (2006) STC (SCD) 536* at paragraph 18).

58. The law specifies two situations that are not reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the
20 Appellant's control and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

59. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper
25 regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test, to determine whether
30 the conduct of the taxpayer can be regarded as conforming to that standard.

60. Reasonable excuse was considered in the case *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by the Tribunal Chairman Judge Medd:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an
35 objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?" [Page 128 3rd line et seq.].

61. A Review Officer listened to Mrs Hayhurst's call to HMRC on 12 September 2012. From her understanding, the adviser was discussing the earlier tax returns that were outstanding (2005-06 – 2009-10). The penalty system changed from the 2010-11 tax year, and penalties are no longer reduced to nil if the tax liability is also nil.

5 62. Under Schedule 55, paragraph 23, reliance on another person is not a reasonable excuse, unless the person (taxpayer) took reasonable care to avoid the failure. The Appellants' returns would still have been late if they were filed in February 2013. Indeed, the 2010-11 returns would have been over a year late at that point. The Appellants did not take reasonable care to prevent the late filing of the returns, despite
10 the penalty assessments, reminders and statements advising them that penalties had been incurred, and would continue to be incurred, unless the returns were filed.

63. Whilst HMRC sympathise with the Appellants' financial circumstances, under the legislation, a lack of funds is not a reasonable excuse.

15 64. HMRC have not received any undelivered post from the Appellants' address. Under s 115 (1) of the TMA 1970:

A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

To help interpret this provision, s 7 of the Interpretation Act 1978, states:

20 Where an Act authorises or requires any document to be served by post 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 in which the letter would be delivered in the ordinary course of post.

25 The Appellants were served with the penalty assessments for 2010-11 and 2011-12, which were posted to their usual or last known place of residence. Mrs Hayhurst contacted HMRC on 7 March 2012 and 17 September regarding the penalties she had received. At that point, the late filing, daily, and 6 month penalties had been imposed on the Appellants for the 2010-11 tax year.

30 65. The Appellants have not provided a reasonable excuse for their failure to file their individual partnership tax returns for 2011-12 and the partnership tax return for the year 2012-13 on time and that the penalties have been correctly charged in accordance with the legislation.

Special Reduction

35 66. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

67. In other contexts “special” has been held to mean “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be
5 general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

68. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may
10 rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was “flawed when considered in the light of the principles applicable in proceedings for judicial review”.

69. HMRC have considered the Appellants’ grounds of appeal but these do not amount to special circumstances which would merit a reduction of the penalties.

15 70. Accordingly, HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed and there are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

71. The appeals against the penalties imposed for the years 2005-06 to 2009-10 are
20 inordinately out of time. Mr and Mrs Hayhurst may have been having postal problems but they were clearly aware of the penalties. A total of 31 penalties were imposed over a period of four years between February 2007 and August 2011. They each telephoned HMRC to discuss the returns but did nothing, primarily because they could not afford a bookkeeper or an accountant. Instead they simply paid the penalties
25 amounting to £400 each per year. Eventually they must have settled the accountant’s fees because the returns were filed, albeit late. At that stage it would appear that they had no real intention of appealing the penalties, although they now do so.

72. For the reasons argued by HMRC the Appellants have not shown a reasonable
30 excuse for the delay in appealing the 2005-06 to 2009-10 penalties. The applications for permission to appeal out of time in respect of those years are accordingly refused and the penalties confirmed.

73. The fixed penalties imposed in respect of the returns for 2009-10 and earlier years
35 are subject to the provisions of TMA 1970 s 93(7) which provides that with regard to individual returns, the penalties cannot exceed the tax liability which would have been shown in the return. The returns for 2005-06 to 2009-10 were filed on the dates referred to in paragraph 9 above. Consequently it is for HMRC to determine from those returns whether s 93(7) applies and the penalties which have already been paid
(and which we have confirmed) should be refunded, save insofar as they may have
40 already been cancelled. Section 93(7) does not apply to partnership returns and therefore those penalties stand.

74. The appeals against the penalties imposed for the years 2010-11 and 2011-12 were also out of time, but HMRC do not object to the late appeal.

75. We accept Mrs Hayhurst's evidence that when she spoke to HMRC in March and June 2012, she genuinely misunderstood, possibly because the guidance given to her was not as clear as it should have been, that no penalties would be payable insofar as they exceeded the tax liability shown on the returns, and that as no tax was payable, any penalties imposed would be withdrawn. At that stage, 2 x £100 penalties had been imposed in February 2012, (which she paid "to show willing"), and although 30 day daily penalty reminder letters and 60 day daily penalty reminder letters were issued to each of Mr and Mrs Hayhurst, they appear to have relied upon HMRC's advice and not treated the situation as diligently as they may have done otherwise. However, added to Mrs Hayhurst's problems were that her husband was ill with depression and she had to work full time elsewhere, in order to support the family.

76. When they received the £900 daily penalties in August 2012, Mrs Hayhurst contacted HMRC again and it was only at that stage that she correctly understood that much higher penalties under a new penalty regime had been introduced and there was no penalty cap when no tax was payable. She informed HMRC that they were in the process of appointing new accountants. From that point on, the Appellants did everything they could to remedy matters, collating and providing accounts and information to the new accountants, who eventually filed the 2010-11 return on 25 April 2013 and the 2011-12 return on 1 June 2013.

77. We find on the facts that the Appellants have shown a reasonable excuse for the late filing of their 2010-11 and 2011-12 individual and partnership returns.

78. The appeal is therefore allowed and the late filing penalties for 2011-12 and 2011-12 are discharged.

79. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 11 May 2018