



TC06746

Appeal number: TC/2018/02121

INCOME TAX – Notice under paragraph 1 Schedule 36 FA 2008 – penalties – daily penalties for continuing failure to comply – penalties increased.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL WHEELER

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE RICHARD THOMAS
DEREK ROBERTSON**

Sitting in public at County Court, York on 10 July 2018

The Appellant was neither present nor represented

Mrs Chris Cowan, litigator Solicitor's Office and Legal Services, for the Respondents

DECISION

1. This was an appeal by Mr Paul Wheeler (“the appellant”) against a daily penalty of £1,600 (160 days at £10 a day) for his continuing failure to comply with a notice issued to him under paragraph 1 Schedule 36 Finance Act 2008 (“Schedule 36 notice”) on 18 September 2017.
2. In a summary decision issued on 20 August 2018 the Tribunal decided that the penalty of £1,600 imposed by HMRC was increased to £4,800.
3. By an application dated 17 September 2018 HMRC asked for a full findings and reasons decision, as any party is entitled to. This is that decision, which differs little from the summary decision.

Non-attendance

4. The appellant had not appeared at the hearing venue by 10 am, the time listed for the start of the hearing. We had in our papers no phone number or email address for the appellant, and neither did HMRC. We were unable therefore to try to contact the appellant to find out if he intended to appear.
5. We were however satisfied that he knew of the hearing. HMRC had served documents on him by registered post and no notice of non-delivery had been received. As this was the hearing of the second appeal by the appellant against penalties imposed on him for failure to comply with the notice in question, and as he did not attend the first appeal hearing, we are satisfied that he was deliberately absenting himself. We had his grounds of appeal and we therefore decided that it was in the interests of justice to proceed.

Facts

6. The appellant was assessed to a penalty of £300 for his initial failure to comply, with the Schedule 36 notice and his appeal against that failure was heard by this tribunal (Judge Christopher Staker) sitting in Hull on 3 October 2017. The decision of Judge Staker upholding the penalty was published as *Paul Wheeler v HMRC* with neutral citation [2017] UKFTT 743 (TC).
7. We set out below those paragraphs of Judge Staker’s decision dealing with the facts.

“4. Evidence under oath was given at the hearing by HMRC Officer Steven Burns, who adopted his witness statement dated 18 September 2017.

5. Officer Burns issued the information notice to the Appellant, which is dated 30 November 2016. The information notice stated that ‘This notice means that by law you must let me have the information and documents I have asked for by 9 January 2017’. The notice stated that if the Appellant failed to comply with the notice, he may be required to pay a £300 penalty without further warning, and that if inaccurate information was provided carelessly or deliberately in response to the notice a penalty of up to £3,000 may be charged in respect of each inaccuracy. The information notice also advised the Appellant that he had the right to appeal against the information notice within 30 days from the date that he received it.

6. The Appellant did not appeal against the information notice.

7. On 20 January 2017, Officer Burns issued the £300 penalty notice to the Appellant for failing to comply with the information notice. The penalty notice advised the Appellant that if he did not comply with the information notice by 19 February 2017, further penalties of up to £60 per day could be charged.

8. In a letter dated 7 March 2017, the Appellant requested an independent review of the £300 penalty. In a review decision dated 27 April 2017, HMRC upheld the penalty. The Appellant now appeals to the Tribunal against that penalty.

9. Subsequently, on 29 June 2017, HMRC imposed daily penalties under paragraphs 40 and 46 of Schedule 36 to the Finance Act 2008. However, the daily penalties are not part of the subject of the present Tribunal appeal proceedings. The Tribunal understands that they are still the subject of an internal HMRC review.

10. In his oral evidence, Officer Burns stated that after the information notice was issued, no communication at all was received from the Appellant until the £300 penalty was issued.”

8. We had a witness statement from Mr Burns which updated his witness statement given to the Tribunal in the 2017 appeal, and we also had that 2017 witness statement with its exhibits. Mr Burns was present at the hearing and answered questions from us.

9. The penalty referred to in [9] of Judge Staker’s decision is the penalty appealed against by the appellant in these proceedings.

10. On 10 July 2017 the appellant appealed against the assessment of daily penalties of £1,600.

11. On 3 October 2017 the Tribunal heard the appeal against the £300 penalty.

12. On 23 November 2017 Mr Burns released the £300 penalty for collection. As of 24 July 2018 it had not been paid.

13. On 4 December 2017 Mr Burns wrote to the appellant giving his “view of the matter” in relation to the daily penalty.

14. On 12 December 2017 Judge Staker refused leave to appeal against his decision to the Upper Tribunal.

15. On 31 December 2017 the appellant accepted HMRC’s offer of a review.

16. On 5 January 2018 he applied to the Upper Tribunal for leave to appeal Judge Staker’s decision. On 11 January 2018 Upper Tribunal Judge Roger Berner refused leave to appeal on the papers, and when the appellant requested an oral hearing it was arranged but he did not attend. Judge Berner therefore confirmed the refusal. We have seen the two paper decisions and Judge Berner’s note of the oral hearing.

17. On 13 February the conclusions of the review were given that the penalty of £1,600 was upheld.

18. On 11 March 2018 the appeal was notified to the Tribunal.

19. The notice had not been complied with at the date of this hearing.

Grounds of appeal

20. They were:

(1) The appellant had no taxable income, and any income he did have came from the sale of his main home.

(2) If HMRC think he owes any income tax they should assess him.

(3) He is entitled to a private life, and if he has no declarable income HMRC are invading his private life.

21. In his application to the Upper Tribunal he had argued that he had a right to remain silent under the European Convention on Human Rights (“ECHR”).

Reasons for decision

22. On an appeal against a penalty for failure to comply with a notice under paragraph 1 Schedule 36, the Tribunal is not entitled to go behind the notice to see if it was imposed in accordance with the law. In this regard we follow, as we are bound to do, *PML Accounting Ltd v HMRC* [2017] EWHC 733 (Admin) (Sir Ross Cranston).

23. The appellant’s grounds as expressed to the Tribunal seek to go behind the notice. Those arguments can only be adjudicated on in judicial review proceedings.

24. As to the argument on the ECHR Judge Berner dismissed this as of no merit.

25. We were satisfied that the penalty had been properly imposed and validly served. We noted that it was charged at £10 per day when the maximum was £60. Mrs Cowan mentioned that we had full discretion to vary the penalty and we asked her if she was asking for an increase. Mr Burns said he considered that we might increase the penalty to £20 per day.

26. We consider that the appellant’s behaviour towards HMRC given the information that HMRC possess about his personal and business affairs (and which we saw in the bundle) is to simply “cock a snook”¹ at HMRC and to an extent the Tribunal.

27. As a result we decided to increase the penalty to £30 per day, making it £4,800.

28. We suggested to HMRC that the time seemed to be coming when they should take the appellant at his word (see §20(2)). That should not however prevent them issuing further daily penalties at up to £60 a day.

29. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons.

¹ This is the polite version of our actual characterisation.

When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 3 OCTOBER 2018

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