



**TC06785**

**Appeal number: TC/2014/06180**

*INCOME TAX –penalties for late filing – whether return had been submitted by the due date – held, no – Donaldson and Sudall considered – whether reasonable excuse – whether proportionate – appeal against daily penalties allowed, appeal against other penalties refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS N BIBI**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE REDSTON**

**The Tribunal determined the appeal on 20 April 2018 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 13 November 2014 (with enclosures) and HMRC's Statement of Case received by the Tribunal on 5 January 2015 (with enclosures).**

## DECISION

1. Mrs Bibi appealed against penalties totalling £1,600 imposed by HM Revenue & Customs (“HMRC”) for a failure to submit her 2011-12 self-assessment (“SA”) return on time.

2. The appeal was decided on 20 April 2018, and a summary decision was issued to the parties on 30 April 2018. By that decision, Mrs Bibi was informed that penalties of £900 had been cancelled, and penalties of £700 had been upheld.

3. On 30 May 2018, Mrs Bibi sought to appeal the Tribunal’s decision. However, it is not possible to seek permission to appeal against a summary decision but only against a full decision. Mrs Bibi’s application for permission to appeal was therefore treated as an application for a full decision.

4. On 25 June 2018, the Tribunals Service informed Mrs Bibi that her application for a full decision had been made after the 28 day deadline specified in Rule 35(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”). Mrs Bibi had been informed of that deadline at the end of the summary decision.

5. Because Mrs Bibi’s application for a full decision had been made slightly late, on 17 July 2018 the Tribunal asked HMRC if they had any comments on her application, and they repeated that request on 19 September 2018. No reply was received to either request. On 16 October 2018, I was informed of Mrs Bibi’s application, and was also informed that on 26 June 2018 Mrs Bibi had written to the Tribunal, explaining her slight delay on the basis that she had thought the reference to 28 days was to 28 working days.

6. Mrs Bibi, on behalf of the Tribunal I apologise for the delay in dealing with your application. I allow you to make that application after the 28 day deadline because your delay was short, and because you had a good reason for your lateness.

7. I have now drafted this full decision explaining why I decided that £900 of the penalties are cancelled, but that penalties of £700 remain due. If you wish to ask for permission to appeal against this decision, see §§48-49 on page 8.

8. The Tribunal has no power to reduce the penalties below the £700. However, HMRC’s attention is drawn to the paragraphs on mitigation at §§44-45 see page 7.

### **Late appeal?**

9. Mrs Bibi was required to appeal against the penalties within 30 days of receiving each penalty notice, but her appeals were not made until 12 July 2014, over four months after the last of the penalties had been issued.

10. HMRC refused to consider her appeals because they were made after the statutory deadline of 30 days, and also because she had not provided a “reasonable

excuse” for the lateness. That letter was sent to her with a standard form allowing a person to ask for a statutory review.

11. Mrs Bibi completed that form, and an HMRC Review Officer carried out a statutory review. However, he did not realise that HMRC had refused to consider Mrs Bibi’s appeals at all. Instead, he proceeded on the basis that Mrs Bibi was seeking statutory review of a decision to uphold the penalties, and he concluded that “the decision to charge penalties was correct”.

12. It may therefore be that HMRC have in terms allowed Mrs Bibi to make a late appeal. But it seemed more likely that no such permission had been given, and that the Review decision was erroneous. In particular, I note that HMRC have no power to admit a late appeal if there is no reasonable excuse, see Taxes Management Act 1970, s 49(5). I therefore considered whether the Tribunal should give Mrs Bibi permission to make her appeal late.

13. In accordance with the guidance given in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 and the three-stage test in *Denton v White* [2014] EWCA Civ 906, I considered first the length of the delay, which was significant. No reason had been given for the delay. However, Mrs Bibi had not been advised, either by HMRC or by the Tribunal, that she needed permission to make her appeal. It had instead been delayed behind that of Mr Donaldson for over three years, again on the basis that the issue to be decided was whether the penalties should be upheld; there was no mention of any need to obtain permission to make a late appeal. Taking into account all the circumstances, I decided that Mrs Bibi should be given permission to make her appeal late.

#### **The penalties under appeal, and the late notification of the appeal**

14. The penalties under appeal were charged under Finance Act 2009, Schedule 55 (“Sch 55”), as follows:

- (1) a £100 late filing penalty, under para 3 of Sch 55;
- (2) a £300 six month penalty, under para 5 of Sch 55;
- (3) daily penalties totalling £900, under para 4 of Sch 55
- (4) a £300 twelve month penalty of £300, under para 6 of Sch 55.

15. The legislation relating to the penalties is set out in the Appendix to this decision.

#### **Findings of fact**

16. In 2011-12, Mrs Bibi ran a business called the Watan Food Store. On 6 April 2012, HMRC issued her with a Notice to File her tax return for 2011-12.

17. The filing date was 31 October 2012 for a paper return, and 31 January 2013 for an electronic return. HMRC did not receive the return by 31 January 2013, and on or around 12 February 2013 they issued Mrs Bibi with a £100 penalty.

18. There was no response from Mrs Bibi, and on or around 14 August 2013, HMRC issued the six month penalty of £300 and the daily penalties of £900. There was again no response from Mrs Bibi. On or around 25 February 2013, HMRC issued her with the twelve month penalty of £300.

5 19. On 2 April 2013, Mrs Bibi closed her business and became a housewife. At some point before 12 July 2014, HMRC sought to collect the outstanding penalties, plus interest and a small amount of tax. This triggered Mrs Bibi to complete an HMRC Notice of Appeal form, which she did on 12 July 2014. She said that she was appealing on the grounds that:

- 10 (1) her turnover for 2011-12 was only £7,587 and that for 2012-13 was only £8,310;
- (2) she had subsequently closed her business; and
- (3) her tax returns had been filed on time.

15 20. HMRC responded on 22 August 2014, saying that her 2011-12 return had not yet been received and warned that they might issue an estimated assessment. As already noted at §§10-11:

- (1) HMRC's letter also said that Mrs Bibi's appeals were out of time and she had not given any "reasonable excuse" for her failure to file the return by the due date;
- 20 (2) on 1 September 2014 Mrs Bibi asked for a statutory review of that decision, saying she had filed her return on time and had no savings to pay the penalties; and
- (3) on 29 October 2014, the HMRC Review Officer confirmed the penalties.

25 21. On 18 November 2014, Mrs Bibi completed a Tribunal Notice of Appeal form, seeking to notify her appeals against the penalties to the Tribunal.

### **Whether the return had been submitted on time**

22. Mrs Bibi's evidence is that she sent in her SA return on time. However, HMRC did not receive that return by the statutory deadline; they had also not received it by the time they drafted the Statement of Case for this appeal, on 5 January 2015.

30 23. The Interpretation Act 1978, s 7, reads:

35 "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) 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 at which the letter would be delivered in the ordinary course of post".

40 24. Thus, it is for Mrs Bibi to prove that she properly addressed, stamped, and posted the SA return. If she had done that, it would then be for HMRC to show that they had not received it. However, Mrs Bibi has simply stated that she posted the

return. She has not provided any details as to what was in the return, when she posted it, where she posted it, and how she knows she posted it at that time and in that place. She has not provided a copy of the return which she said she had posted, which might for example show the date on which it was signed.

5 25. If Mrs Bibi *had* submitted her return on time, it is surprising that she did not call or write to HMRC when she received the first £100 penalty, to ask why it had been charged and to say that the return had been sent in, with details as to how she knew this was the position. HMRC keeps records of calls made in relation to SA returns, and there is no record of a call from Mrs Bibi, asking why she had been issued with a  
10 penalty given that she submitted her return, and giving the date on which she sent it in. HMRC also keep copies of letters, and neither Mrs Bibi nor HMRC have provided any copy of a letter written by Mrs Bibi about the £100 penalty.

15 26. Mrs Bibi was also sent further penalties – the six month penalty and the daily penalties – but there is again no record of Mrs Bibi making contact. A final twelve month penalty also produced no reaction or explanation from Mrs Bibi. The first contact from Mrs Bibi about the SA return was the appeal dated 12 July 2014, which was triggered by HMRC’s attempt to collect the accumulated penalties. This is well over a year after the final £300 penalty was issued.

20 27. Finally, I note that when Mrs Bibi completed her Notice of Appeal to the Tribunal, she attached the first page of her 2012-13 return, not her 2011-12 return.

28. I therefore do not accept Mrs Bibi’s evidence that she posted her 2011-12 return before the statutory deadline. Instead, I find as a fact that the 2011-12 return was not submitted on time.

### **The Donaldson case**

25 29. As already noted, Mrs Bibi’s appeal has been delayed, because her case was stayed behind the appeal of another taxpayer, Mr Donaldson. Mr Donaldson’s appeal against the daily penalties rested on technical grounds. Had Mr Donaldson won his appeal, the appeals of other taxpayers (such as Mrs Bibi) who had also appealed against the daily penalties, might have been allowed automatically.

30 30. Mr Donaldson’s case was heard by the First-tier Tribunal, the Upper Tribunal and finally by the Court of Appeal, which gave judgment in favour of HMRC on 18 July 2016, see *Donaldson v HMRC* [2016] EWCA Civ 761 (“*Donaldson*”). Mr Donaldson sought permission to appeal that decision to the Supreme Court, but permission was refused on 21 December 2016. It follows that the Court of Appeal’s  
35 decision is now final, and Mr Donaldson did not succeed.

### **The daily penalty**

40 31. Mr Donaldson’s appeal considered whether HMRC had followed the requirements in the legislation for a valid daily penalty notice. One of those requirements was that HMRC must “give notice to [the taxpayer] specifying the date from which the penalty is payable”, see Sch 55, para 4(1)(c).

32. In *Donaldson* HMRC provided evidence that Mr Donaldson had received:

(1) an “SA Reminder” after the deadline for submitting a paper return had expired, which informed him that daily penalties would be charged if his return was not filed by 31 January 2012; and

5 (2) an “SA 326D notice” informing him of the first £100 fixed penalty and warning that if the return was more than 3 months late, daily penalties would be charged.

33. The Court of Appeal held that those documents were sufficient to constitute Notices to Mr Donaldson that complied with Sch 55, para 4(1)(c).

10 34. However, in this case HMRC have provided no evidence that Mrs Bibi was issued with an SA Reminder. Although I have found as a fact that the £100 penalty was issued, HMRC has also provided no evidence as to whether that penalty Notice had the same wording as the SA 326D issued to Mr Donaldson.

35. As Judge Richards said in *Sudall v HMRC* [2017] UKFTT 0404 (TC):

15 “HMRC have the burden of proving the daily penalties are chargeable. Mr Sudall has not, in his Notice of Appeal or other correspondence, taken any point to the effect that the requirement of paragraph 4(1)(c) of Schedule 55 is not met. However, HMRC have the burden of proof on this point. It is clear from *Burgess and Brimheath Limited v HMRC*  
20 [2015] UKUT 0578 (TCC) that HMRC must prove their case even if Mr Sudall has not taken the point.”

36. The position is the same in Mrs Bibi’s case. HMRC have not proved that she received a notice “specifying the date from which the penalty is payable”. As a result, her appeal against the daily penalties of £900 is allowed.

25 **Reasonable excuse**

37. The £100 and two £300 six month penalties can be cancelled if Mrs Bibi had a reasonable excuse for her delay in filing the return. The test for reasonable excuse was set out by Judge Medd QC in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 in the context of VAT, but accepted as equally applicable to direct taxes:

30 “was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with her 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?”

35 38. Mrs Bibi has said she cannot afford to pay the penalties, as she has closed her business and is now a housewife. But that information has been put forward, not as a reason why she did not file her return on time, but as a reason why she should not have to pay the penalties. Mrs Bibi therefore does not have a reasonable excuse for her failure to file the 2011-12 SA return by the due date.

## **Proportionality**

39. Mrs Bibi also appealed on the basis that the penalties were too large when compared to her annual income from the business, in other words, they were “disproportionate”

5 40. However, this Tribunal can only exercise the powers given by Parliament, and no statutory provision gives it the power to change the penalties which have been levied in this case on the basis that they are too high, see *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC).

10 41. Moreover, the penalties were imposed as the result of an Act of Parliament. In *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin), Green J first considered the relevant case law on proportionality and then summarised the position:

15 “All of the case law underscores the point that an Act of Parliament is at the apex of the exercise of the democratic decision making process. A court should only interfere with the [the Act in question] if there are fundamental errors or where the policy choices adopted are wholly unsupported by evidence or unconnected with any lawful policy objective and cannot on any logical or sensible basis be said to be consistent with the various limbs of the proportionality test.”

20 42. There is no fundamental error or other basis on which this Tribunal could interfere with the fixed penalties on the basis that they are disproportionate.

25 43. Moreover, the penalty regime is phased, so higher penalties are only charged after there has been very considerable delay, and that phasing is relevant to proportionality. Mrs Bibi received four penalties. Had she filed her return after the first penalty, the amount of the penalty would have been very much lower. In summary, the Tribunal cannot reduce the penalties on the basis that they are disproportionate.

## **HMRC’s power of mitigation**

30 44. The remaining penalties of £700 are very high in the context of Mrs Bibi’s business – her annual turnover was only £7,587. Some five years have now elapsed since the penalties were issued, largely because of the delays caused by the *Donaldson* case, so there will also be significant interest charges.

35 45. As already noted, the Tribunal has no power to reduce (“mitigate”) the penalties because they were high in the context of Mrs Bibi’s business; it also has no jurisdiction over the charging of interest. However HMRC does have that power. It is a matter for HMRC whether they decide to reduce the penalties charged on Mrs Bibi, taking all relevant factors into account.

## **Decision and appeal rights**

40 46. For the reasons summarised above, Mrs Bibi’s appeal against the £900 of daily penalties is allowed, and her appeals against the other penalties (totalling £700) are dismissed.

47. This document contains full findings of fact and reasons for the decision. If either HMRC or Mrs Bibi is dissatisfied with this decision has a right to apply for permission to appeal against it under Rule 39 of the Tribunal Rules.

5 48. Mrs Bibi is reminded that the permission to appeal form she completed on 30 May 2018 was not accepted, but was instead treated as a request for a full decision (see the beginning of this judgment). If she now wishes to seek permission to appeal against this decision, she must complete another form.

10 49. If either party wishes to appeal, their 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.

15 **ANNE REDSTON**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 24 October 2018**



## APPENDIX

### RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Finance Act 2009, Sch 55. The starting point is para 3 of Sch 55 which imposes a fixed £100 penalty if an SA return is submitted late.

2. Para 4 of Sch 55 provides for daily penalties to accrue where a return is more than three months late:

(1) P is liable to a penalty under this 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

(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).

(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).

3. Para 5 of Sch 55 provides for further penalties to accrue when a return is more than 6 months late:

(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.

4. Para 6 of Sch 55 provides for further penalties to accrue when a return is more than 12 months late:

(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.

(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).

(3)-(4) ...

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

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

5. Para 18(1) of Sch 55 states:

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

- 10 (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.

6. Para 20 of Sch 55 gives a taxpayer a right of appeal to the Tribunal:

- 15 (1) P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

7. Para 22 sets out the Tribunal’s jurisdiction:

- 20 (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
  - 25 (b) substitute for HMRC's decision another decision that HMRC had power to make...

8. Para 23 of Sch 55 contains a defence of “reasonable excuse”:

- 30 (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,
  - 35 (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.

5