



TC06833

Appeal number: TC/2018/04273

INCOME TAX – self assessment – whether the Notice to File issued to the Appellant was issued under Section 8 of Taxes Management Act 1970 – yes – whether the Appellant’s tax return was filed late – yes – whether this late filing rendered the Appellant liable to a penalty imposed under Paragraph 3 of Schedule 55 to Finance Act 2009 – yes – whether the amount of the penalty under Paragraph 3 is fixed or HMRC are required to consider the circumstances of each taxpayer to assess the penalty individually – the amount is specified by Paragraph 3 – whether the Appellant had a reasonable excuse for her delay in filing her return – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SOL COLLADO

Appellant

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 15 October 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 3 July 2018 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 21 August 2018 and the Appellant’s Reply dated 7 September 2018.

DECISION

Introduction

- 5 1. This appeal by Ms Collado is against HMRC's decision to issue her with a penalty of £100 for her failure to file her tax return for the tax year 2016/17 by the statutory filing date. This penalty was raised under Paragraph 3 of Schedule 55 to the Finance Act 2009.

Factual background

- 10 2. On the basis of the documents before me I find the following facts:
- a) On the basis of the printed copy of HMRC's electronic Return Summary I am satisfied that on 6 April 2017, HMRC issued Ms Collado with a Notice to File a tax return for 2016/17. On the basis of HMRC's record of the address they held for Ms Collado from 23 March 2017 onwards, I am satisfied that this Notice to File was issued to Ms Collado at her current address. Ms Collado does not dispute receiving the Notice to File, and I find that it was received by her in the ordinary course of post.
- 15
- b) On the basis of the printed copy from HMRC's electronic records, I am satisfied that on 13 February 2018, HMRC issued Ms Collado with an initial late filing penalty notification in the sum of £100. I am satisfied that this was received as it forms the basis of Ms Collado's appeal.
- 20
- c) On 19 March 2018, Ms Collado's agent, Crown Accountants, filed an appeal on Ms Collado's behalf. In that appeal Crown Accountants stated:
- 25 We refer to the late filing penalty for the 2016/2017 Tax Return in the sum of £100.
- Would you kindly accept this letter as our appeal against same on the grounds that she was employed only and had no tax liability. Copy of P60 attached. The UTR should have been set up for the 2018 tax year where we expect dividends to be paid.
- 30 d) On 21 March 2018, HMRC received Ms Collado's tax return for 2016/17 online.
- e) By letter dated 23 April 2018, HMRC refused to accept this appeal on the basis that Ms Collado became a director in the tax year 2016/17 and that a Notice to File had been issued. HMRC offered Ms Collado an independent review.
- 35 f) On 9 May 2018, HMRC received Ms Collado's request for a review. In this request Crown Accountants stated:

The reason why HMRC's decision is not accepted is that the notice of penalty assessment is unlawful.

1. Schedule 55 to FA 2009 refers, as the heading states, to failure to file returns, not late returns.

5 2. The penalty was not assessed as required by Para 18(1)(a) of Sch 55

3. Sch 55 refers to failure to file returns under Section 8 A (1)(a) of TMA 1970. No such notice was given.

g) By letter dated 25 June 2018, HMRC upheld their earlier decision to reject Ms Collado's appeal, reiterating that a Notice to File had been issued to Ms Collado on 6 April 2017 and that this created a liability to file a tax return. HMRC set out their understanding of Schedule 55 to Finance Act 2009.

h) On 3 July 2018, Ms Collado appealed to this Tribunal. Ms Collado's grounds of appeal were as follows:

The penalty is unlawful.

15 i) HMRC's Statement of Case was filed with the Tribunal on 10 August 2018. A copy was sent to Ms Collado and to Crown Accountants. On behalf of Ms Collado, Crown Accountants filed a Reply to HMRC's Statement of Case, stating:

20 Most people would not agree that fines of £10 per day for late filing of returns are designed to encourage compliance and not to punish defaults.

It only makes sense if the legislation is interpreted as it is written and as parliament intended. ie penalty for failure to make returns etc.

Please see the first page of Schedule 55.

25 Section 1(1) does state "on or before the filing date", but it needed to, as otherwise the legislation would read a penalty is payable whether the filing date has passed or not.

Please see Section 106, the heading of which states "Penalties for failures to make returns etc." The etc relates to other documents.

30 Under Section 7 TMA 1970, anyone who is chargeable to tax shall give notice that he is chargeable. If therefore, the legislation intended Sch 55 to relate to late filing of returns, then it would have referred to Section 7 (1)(a) TMA 1970. Instead it referred to Section 8(1)(a) TMA 1970. The intention of this section is that where HMRC has information that a person has income, he may be required, by notice given by an officer, to make and deliver to the officer, a return of his income. If he does not
35 comply, then he is liable to the penalties described in Schedule 55.

You will also note that this notice must be given by an officer and the return delivered to that officer.

5 HMRC's "Notice" on 6 April 2017, which we do not accept was a notice under section 8, did not state an officer and was issued for the purpose of making the taxpayer liable to penalties under S.55 rather than for the purpose of establishing his tax liabilities.

Para 3 Sch 55 FA 2009 states his liable to a penalty of £100.

10 Please see Para 18(1)(a) – HMRC must assess the penalty. Assess means someone applying his mind to arrive at an appropriate figure. HMRC treats the penalty as a fixed amount of £100.

Please see Para 20(2) – the amount is clearly an appealable matter.

Because of the volume of late returns HMRC have argued that it is not practical to assess the penalties and have decided to fix the amount at £100.

15 It is our contention that the legislators and parliament have not erred and that Section 107 as expanded by Schedule 55 refer, as their headings state, to failure to make returns rather than late filing.

Discussion and decision

20 3. Having set out my findings of fact, I now consider how the relevant legislation should be applied to those facts. In an appeal against the imposition of a penalty, the onus of proof is first upon HMRC to satisfy the Tribunal that the penalty has been imposed in accordance with the legislation. If I am satisfied that has occurred then the onus switches to Ms Collado to demonstrate that she has a reasonable excuse for her delay or that there is another reason why the penalty should not be imposed. The
25 standard of proof in both cases is the civil standard of the balance of probabilities.

Was the penalty properly imposed?

4. The relevant parts of Paragraph 1 of Schedule 55 provide as follows:

30 **1.** (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

5. For the avoidance of doubt, the list of relevant returns in the Table in Schedule 55 includes a personal tax return which has been required after a Notice to File has been issued under Section 8(1)(a) Taxes Management Act 1970 (“TMA 1970”). I am satisfied that Notice to File requiring a tax return for 2016/17 from Ms Collado was issued under the statutory authority of Section 8(1)(a) TMA 1970.

6. The penalty of £100 was imposed on Ms Collado under Paragraph 3 of Schedule 55 to the Finance Act 2009. Paragraph 3 provides:

3. P is liable to a penalty under this paragraph of £100.

7. I interpret Paragraphs 1 and 3 as providing that if a relevant return is not received on or before the filing date, then the taxpayer is liable to pay a penalty. That interpretation accords with the Court of Appeal’s interpretation of Schedule 55 in *Donaldson v HMRC* [2016] EWCA Civ 761 (in which Mr Donaldson filed his tax return after the filing deadline, and HMRC imposed penalties which the Court of Appeal upheld as lawful).

8. I cannot accept Ms Collado’s argument that a penalty is not due where a tax return is late, and that a penalty would be due only if Ms Collado had failed to file a tax return at all. I am afraid that argument makes a nonsense of the words “on or before the filing date”, and fails to accord with the decision of the Court of Appeal in *Donaldson*. The legislation requires HMRC, and subsequently the Tribunal, to consider the situation which existed at the expiry of the filing date. If a person is required to file a return and it is not received by HMRC on or before the filing date, then that person is liable to a penalty. What happens afterwards is irrelevant for the purposes of Paragraph 3 – it cannot matter if the return is subsequently filed after the filing date or not filed at all. What matters for Paragraph 3 is whether or not the return was received on or before the filing date. Ms Collado did not file her return on or before the filing date. Therefore, she is liable to a penalty.

9. The amount of the penalty is clearly stated in Paragraph 3 of Schedule 55 to be £100. I reject Ms Collado’s argument that the amount of the penalty has been fixed by HMRC for administrative convenience; it is has been specified by Parliament. HMRC have no power to increase a Paragraph 3 penalty, and they can decrease it only if they consider that the circumstances of the case are such that Special Reduction under Paragraph 16 would be appropriate. HMRC were not made aware, prior to 13 February 2018, of any special circumstances relating to Ms Collado so there was no basis on which HMRC could reduce the penalty before notification.

10. I also reject Ms Collado’s argument that HMRC failed to assess the penalty correctly because an officer did not specifically consider Ms Collado’s circumstances when issuing the penalty notification. The Court of Appeal in *Donaldson* considered Schedule 55 at great length. The Court of Appeal was satisfied that a policy decision to issue penalties in specified circumstances was sufficient. Paragraph 55 does not require an HMRC officer to consider the individual circumstances of a taxpayer before a penalty notification can be issued.

11. I also reject Ms Collado's argument that HMRC have failed to correctly issue a tax return because, she alleges, it was issued for the purpose of making her liable to penalties. I accept HMRC's explanation that Notice to File was issued to Ms Collado because she became a director in 2016/17. Section 8 TMA 1970 provides that a return may be issued:

...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...

12. Given that HMRC had been informed that Ms Collado had become a director and given that they had no information about what amounts, if any, Ms Collado might receive as a result of being a director in 2016/17, it was clearly permissible for HMRC to issue a Notice to File to Ms Collado for 2016/17 in order to establish the amounts in which she was chargeable to income tax. There is simply no evidence whatsoever that any officer of HMRC individually, or the Commissioners collectively, deliberately abused their powers to artificially create a situation where Ms Collado would be issued with a Notice to File and then would be liable to penalties if she paid no heed to her filing obligations.

13. I also reject the argument that the Notice to File is invalid because there is no officer named on the Notice to File. There is no requirement for an officer to be named. I am satisfied that an officer of HMRC took the decision to add Ms Collado's details to HMRC's Self-Assessment system in the knowledge and expectation that if her details were in Self-Assessment then Ms Collado would be issued with a Notice to File for 2016/17 in due course. In the same way that the Court of Appeal in *Donaldson* were satisfied that the automated system would carry out a policy decision, I am satisfied that the operation of the automated system was the carrying out of an instruction to issue a Notice to File for 2016/17 to Ms Collado.

14. I have found that Ms Collado filed an online tax return for 2016/17 on 21 March 2018. The filing deadline for an individual's tax return is specified by Section 8 TMA 1970, and the deadline for electronic filing of tax returns for 2016/17 was 31 January 2018. I am satisfied that Ms Collado's return for 2016/17 was not filed by the filing deadline. I am satisfied that the penalty of £100 has been imposed in accordance with Paragraph 3 of Schedule 55.

Does Ms Collado have a reasonable excuse for her delay?

15. The onus now shifts to Ms Collado to establish that she had a reasonable excuse for her delay. However, as Ms Collado's case is that the penalty is unlawful, she has not provided any explanation for why her return was filed a month and a half after the electronic filing deadline. Therefore, there are no circumstances suggested for me to consider which might amount to a reasonable excuse.

Special reduction

16. I have considered whether there are flaws in the way in which HMRC have approached the question of whether there are exceptional circumstances which would make it right for the penalty to be reduced. I have concluded that there are no errors

of law in HMRC's approach, and so I have no jurisdiction to interfere with their conclusion that the penalty imposed on Ms Collado should not be reduced.

Conclusion

17. The appeal is dismissed. The late filing penalty of £100 is confirmed.

5 Summary decision

18. A summary decision was issued to the parties on 23 October 2018, in which the parties were advised that any request for full findings of fact and reasons for the decision should be made within 28 days.

10 19. On 13 November 2018, Crown Accountants filed an application to the Tribunal for permission to appeal. In accordance with the Tribunal's usual practice when an application for permission to appeal is made before full findings of fact and reasons have been requested, Crown Accountants' application was treated as being a request for a full decision. This request was received in time.

Full decision

15 20. 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
20 "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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**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 22 NOVEMBER 2018