



**TC06987**

**Appeal number: TC/2015/05726**

*Income tax - fixed and daily penalties for late filing of self-assessment return - Donaldson considered - Appellant asserted that it was not necessarily correct to say he was self-employed and that a number of factors in his relationship with his employer/principal indicated that he was employed - until that issue was resolved he was under no obligation to file a self-assessment return - had previously filed self-assessment returns for 35 years - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**MALCOLM TOMLINSON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 25 January 2019 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 15 September 2015, and HMRC's Statement of Case received by the Tribunal on 15 August 2017 with enclosures. The Tribunal wrote to the Appellant on 16 August 2017 stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. The Appellant's agent responded that the Appellant wished to proceed with the appeal, with further representation**

## DECISION

1. This is an appeal by Malcolm Tomlinson ('the appellant') against penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 2, 3, 4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2014.
2. The penalties for late filing of a return can be summarised as follows:
  - i. 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.
  - ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
  - iii. 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.
  - iv. 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.
3. Penalties of £100, £900, £300 and £300 were imposed under (i), (ii) and (iii) and (iv) above.
4. The appellant's appeal is against all the penalties.
5. Daily penalties have 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.
6. On 22 September 2015, because the outcome of the *Donaldson* appeal was relevant to the appellant's appeal against daily penalties, the First-tier Tribunal directed that the appeal should be stood over until the *Donaldson* appeal was determined.
7. The three issues before the Court of Appeal in respect of daily penalties were:
  - a) whether HMRC had made a decision required by paragraph 4(1)(b) of Schedule 55 FA 2009 to charge daily penalties;
  - b) whether HMRC had given notice required under paragraph 4(1)(c) of Schedule 55 FA 2009, specifying the date from which the daily penalties were payable;

- c) whether HMRC had specified the period in respect of which the daily penalties were assessed in the notice of assessment, required under paragraph 18 of Schedule 55 FA 2009.

8. Although only issue (b) was before the Upper Tribunal, Mr Donaldson was given permission to raise the two further points (a) and (c).

9. The Court of Appeal decided that:

- a. Parliament had not intended that HMRC should only be able to exercise discretion under para 4(1)(b) on an individual taxpayer-by-taxpayer basis. The policy decision taken by HMRC in June 2010 that all taxpayers who were at least three months late in filing their returns would be liable to a daily penalty, satisfied the requirements of para 4(1)(b).
- b. HMRC had given notice under paragraph 4(1)(c) specifying the date from which the penalty was payable in the SA reminder and SA326 Notice. Both notices stated in terms that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three months late and specified the date from which they were payable depending on whether the person filed an electronic or paper return. The notice could be given in advance of any default.
- c. HMRC's notice of assessment under paragraph 18 did not specify the period for which the daily penalties had been assessed. The notice should have specified the period over which the penalty had been incurred and should also have specified the three month period for which the penalty had been charged, or at least state the date when the penalties started. However, the court decided the omission fell within the scope of s 114(1) TMA 1970 and thus did not affect the validity of the notice of assessment. The court's view was that Mr Donaldson was not misled or confused by the omission and the period of assessment could be worked out without difficulty.

*How the Court of Appeal decision affects this appeal*

10. HMRC submit that following the Court of Appeal decision, the Tribunal should find that in the present appeal, HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice.

*Filing date and Penalty date*

11. Under s 8(1D) TMA 1970 et seq. which states that a non-electronic return must be filed by 31 October following the end of the relevant tax year or an electronic return by 31 January of the following year. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

12. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

*Reasonable excuse*

13. Paragraph 23 of Schedule 55 FA 2009, provides 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 failure without unreasonable delay after the excuse ceased.

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

- (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and
- (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

15. There is no statutory definition of "reasonable excuse". Whether or not a person 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).

16. HMRC's view is that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper 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 the conduct of the taxpayer can be regarded as conforming to that standard.

17. If there is a reasonable excuse it must exist throughout the failure period.

*The background facts*

18. The notice to file for the year ending 5 April 2014 was issued to the appellant on 6 April 2014.

19. The filing date was 31 October 2014 for a non-electronic return or 31 January 2015 for an electronic return.

20. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 18 February 2015 in the amount of £100.

21. On 10 June 2015 the appellant appealed against the penalty (via his agent) on the grounds that:

“Mr Tomlinson has received a £100 penalty for not submitting his 2014 return. We appeal against the imposition of that penalty on the basis that until his status issue is resolved he cannot be reasonably asked to file a return that may be fundamentally incorrect.

Similarly we appeal against any continuing penalties for non-submission of this return again on the basis that until the status point is resolved he does not know on what basis to complete his return.

We ask that any collection is stayed.

On the subject of status we have just received Mr Hiron's decision. We do not agree with it and will be meeting Mr Tomlinson to take instructions as to how we will proceed on that matter.”

22. On 26 June 2015 HMRC replied that the appellant did not have a reasonable excuse for not filing his SA return. He was able to provide provisional figures and then submit corrected figures, if necessary as an amendment, if he did not have all the information he needed.

23. On 3 July 2015 the appellant requested a review of HMRC’s decision.

24. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 14 August 2015 in the amount of £900, calculated at £10 per day for 90 days.

25. As the return had still not been received 6 months after the penalty date, HMRC also issued a notice of penalty assessment on or around 14 August 2015 in the amount of £300.

26. The appellant says that on 17 August 2015 he filed his 2013-14 return in paper form.

27. On 20 August 2015 HMRC upheld their original decision, saying that the appellant was required under s 8 TMA 1970 to deliver a return and that accordingly the penalties would stand.

28. On 15 September 2015 the appellant lodged an appeal with the Tribunal. The grounds of appeal (as stated by his agent) were:

“Mr Tomlinson’s tax affairs have been under review for some considerable time. On 4 June 2013 a meeting was held with HMRC when, for the first time, we expressed doubt that Mr Tomlinson was self-employed; information arising indicated that he may actually have been an employee.

A ‘status review’ was initiated. At the present time we are still awaiting HMRC’s formal decision regarding Mr Tomlinson’s status, well over two years after this review began. HMRC have expressed an ‘informal’ view that Mr Tomlinson remains self-employed but this has not been encompassed in a formal decision that can be appealed against and so the point is not yet

resolved. We disagree with HMRC's view and fully intend to appeal against their decision if it mirrors their informal views

In the meantime Mr Tomlinson's obligation to submit a return each year continues. HMRC insist that he should submit a return on a self-employed basis, because they believe him to be self-employed...

Mr Tomlinson felt unable to submit a return for 2013/14 (which gave rise to the penalty in question) because he could not honestly sign the declaration on the return, if it was submitted on a self-employed basis, as he genuinely believes himself to be an employee. In addition because his status has not been settled and his potential 'employer' appropriately notified there are no PAYE documents upon which to base a return submitted on an 'employed' basis either.

Mr Tomlinson has fully co-operated with HMRC throughout but we believe any return submitted under self-assessment is the taxpayer's return, not HMRC's, and it is not correct for HMRC to impose the basis or the entries that may be entered upon that return.....

Before any penalties were ever due we corresponded with HMRC and asked them to agree a way forward on this point pending settlement on the status point. HMRC's reaction was to 'tell' Mr Tomlinson to submit a return on a self-employed basis.....

Due to the very unusual circumstances in this matter we believe Mr Tomlinson had a reasonable excuse for delaying submission of his return and so penalties should not have been charged. HMRC's delay in arriving at a formal decision has also significantly contributed to the issue at hand and we still await HMRC's formal decision regarding his status at today's date."

29. On 22 September 2015 the First-tier Tribunal directed that the appeal should be stood over until the *Donaldson* case was finalised.

30. On 25 February 2016, HMRC issued a 12 month penalty in the amount of £300. HMRC say that the appellant's 2013-14 return had not been received.

31. The stay behind *Donaldson* lasted for several years, as the *Donaldson* decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761).

32. The Court of Appeal's decision became final when the Supreme Court refused permission for leave to appeal on 21 December 2016. Thereafter, HMRC have been asked to provide statements of case on the many appeals stayed behind *Donaldson* in order that they could be resolved.

33. HMRC's Statement of Case was received by the Tribunal and copied to the appellant on 16 August 2017

*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 this section is given after the 31st October next following the year, the last j 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
- (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.]

(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 this 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.

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

(1D) A return under this 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.

(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

(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-

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

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

(2) Every return under this 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.

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

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

(4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this 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.

(5) In this section and sections 8A, 9 and 12AA of this 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.

#### **Schedule 55 Finance Act 2009:**

34. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

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

36. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.



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

- (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).

38. 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 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.

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

- (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,
  - (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

40. 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 para-graph of this 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.

41. 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.

#### *The appellant's case*

42. On 29 August 2017, in response to HMRC's Statement of Case, the appellant's agent put forward further submissions, as below:.

"The appeal is against the late filing penalties charged by HMRC in connection with our clients 2013-14 tax return as detailed in HMRC's statement of case.

Our client is not arguing that HMRC are somehow inhibited from charging such penalties (as per Donaldson) but that, in his unique circumstances, it was unreasonable to do so. We have also noted that HMRC have exaggerated the penalties levied by failing to register the submission of the relevant return on 17 August 2015 in any event.

This appeal is very closely linked to another appeal in which the Tribunal ruled on 12 June 2017 following a two-day hearing in May 2017. HMRC have provided a copy of that decision, TC05943.

The background to this matter started during a meeting with HMRC on 7 June 2013. During that meeting a number of facts emerged that, in our view, cast doubt upon Mr Tomlinson's status, was he employed or self-employed? The matter was immediately raised with HMRC and followed up with a letter dated 23 August 2013 setting out, in detail, the position from Mr Tomlinson's perspective. HMRC replied on 3 October 2013.

That status enquiry became complex and protracted with both sides taking alternative views. The status enquiry was not concluded until a decision letter was issued on 11 November 2015, the decision was appealed and a review requested. The review was not concluded until 28 April 2016 and an appeal was made to the Tribunal which in turn was finally concluded on 12 June 2017.

So, throughout a period of some 4 years and certainly during the material period of Mr Tomlinson's failure to submit the return on time there was a very complex status dispute raging in which HMRC insisted Mr Tomlinson was self-employed and Mr Tomlinson believed he was an employee.

It is very clear that the matter was a very difficult one to resolve. This was not a matter where Mr Tomlinson adopted a frivolous position to frustrate his obligation to submit a return but it was one where he held a genuine belief (as set out in the Tribunal decision regarding his status). Indeed, at paragraph 165, the Tribunal confirm that this was a matter in the balance where the case had merits for both positions but, as set out in paragraph 169 and despite the case being capable of being decided either way the intention of the parties tipped the balance towards self-employment.

It is our view that Mr Tomlinson, at the filing date of the relevant return (31 January 2015) and thereafter held a legitimate and genuine view that he was employed. HMRC insisted that he should submit a return on the basis that he was self-employed but he felt that, in the prevailing circumstances, he could not submit returns he believed were wrong. The declaration on the return prohibited him from filing a return on a self-employed basis as such a return would not be 'to the best of his knowledge and belief'. Similarly, he had no documentation regarding his earnings, if he was an employee, upon which to base a return either.

Mr Tomlinson delayed submitting the 2013-14 return because he did not want to submit an incorrect return and he believed HMRC's status enquiry would soon be resolved in time to permit him to submit an accurate return with real certainty. Unfortunately, the delays in the status point being pressed to the point of a formal decision being made by HMRC persisted and Mr Tomlinson remained completely in the dark about his status and the basis on which a return should be made for a long time to come.....

Eventually, realising that the status point would not be resolved in good time to submit an accurate 2013-14 return it was decided to submit a return on an employed basis, heavily caveated to explain the ongoing issue. This could not be readily done electronically; Mr Tomlinson's regular accountants were advised (by their governing body) they could not submit such a return without employment related documents such as P60's etc. It was therefore decided to submit a paper return to HMRC on 17 August 2015 (We submitted the 2014/15 return at the same time).

We are therefore at a complete loss as to why HMRC say in their statement that the 2013-14 has never been submitted. That is simply not the case at all. The return was submitted on 17 August 2015 and therefore HMRC's computation of penalties is plainly incorrect and excessive in any event, notwithstanding our view that to impose any penalty is unreasonable.

HMRC also suggest that they had provided 'advice' to Mr Tomlinson to submit his returns. This advice consisted entirely of insisting that he submitted returns on a self-employed basis, even though they knew Mr Tomlinson did not agree with their position. We believe, under self-assessment it is Mr Tomlinson who must decide what to put on his return and he found himself in a position of great difficulty in submitting a return as detailed above.

### Reasonable Excuse

It is our view that Mr Tomlinson was prohibited from making an accurate return on time due to genuine doubt regarding his status, exasperated by HMRC's delays in resolving the status point, at least to the point of a formal decision being made....

Mr Tomlinson was aware that if he submitted a return on a self-employed basis then he would not be honestly declaring it to the best of his knowledge and belief. He also did not want to submit an incorrect return on an employed basis if he was subsequently found to be self-employed. He waited to see if the point could be resolved before filing...

### Special Reduction

We consider that the circumstances surrounding Mr Tomlinson's delay in submitting his return are rather unusual, would not apply to all taxpayers and seem to be unique to him. Thus, we suggest that Special Reduction is a matter that HMRC should have considered more fully, there is no indication that this was properly considered in HMRC's review or decision.

HMRC are clearly complicit in the delays experienced to resolve the status point yet ignore this matter for the purposes of these penalties.

### Penalty Quantum

The return was submitted to HMRC on 17 August 2015 and so the imposition of a 12-month penalty of £300 is not applicable under any circumstances.

The initial £100 penalty, 90-day penalty of £900 and the six-month late filing penalty of £300, should be reduced to nil as Mr Tomlinson had a reasonable excuse and/or a Special Reduction is applicable in the circumstances.

### *HMRC's Case*

43. Late filing penalties for the year ended 5 April 2014 are due in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund.

44. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the notice to file issued to the appellant on 6 April 2014.

45. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the appellant to ensure his 2013-14 tax return was filed by the legislative date and payment made on time.

46. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment

deadlines. It is the customer's responsibility to make sure they meet the deadlines.

47. The appellant has been making SA tax returns for many years. Therefore, HMRC consider him to be experienced with the SA system including the due dates for paper and online returns.

48. HMRC consider that having been continuously within the SA regime since the 1992-93 tax year, the appellant would know that once a notice to complete a tax return was issued to him, this placed a legal obligation on him to complete the tax return and file it on time. The appellant would also be aware of the consequences of failing to meet his legal obligations.

49. In their appeal to the Tribunal the appellant's agent states his client and HMRC are in dispute regarding the appellant's employment status. A letter dated 20 November 2013 confirms HMRC's view that the appellant is self-employed and states:

“Mr Tomlinson himself has always considered himself to be a self-employed individual. This has been the accepted position of both HMRC and Mr Tomlinson across the span of his working life as somebody who has registered for self-assessment of tax. An alternative view of the status quo is being presented and HMRC is considering this. HMRC regard Mr Tomlinson as self-employed and he must continue to account for his tax liabilities on this basis.”

50. A further letter dated 10 December 2013 advised the appellant to continue to complete SA returns and was advised of the note to make on a return regarding his situation.

51. HMRC sent the appellant a further letter on 30 January 2015 confirming previous advice regarding the completion of SA returns.

52. As agreement could not be reached the First-tier Tribunal Tax Chamber heard the case regarding employment status on 2 and 3 May 2017 and decided that the appellant was self-employed for the period 6 April 2004 to 5 April 2015.

53. HMRC contends that the penalty notices were correctly issued to the appellant at the address notified on their computer system for him.

54. The appellant was repeatedly advised he should continue to complete SA returns, whilst the issue of his employment status, which the appellant contested, was ongoing. The appellant chose not to complete his 2013-14 return: the result of this was that the appellant was charged late filing penalties.

55. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation

56. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

### *Special Reduction*

57. 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.

58. 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 general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

59. HMRC have considered the appellant’s arguments and submit that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

60. 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 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’.

61. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, if the Tribunal disagrees, HMRC further submit that there are no special circumstances which would require the tribunal to reduce the penalties.

### *Conclusion*

62. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

63. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise would have been complied with.

64. The appellant had previously filed tax returns since 1993 and should have been aware of the filing procedures and the penalties payable in the event of default.

65. HMRC sent a late filing penalty to the appellant on 18 February 2015 for £100. Prior to this HMRC had expressed clearly their view that he was self-employed and should be regarded as such until determined otherwise (by the Tribunal in the related appeal).

66. There was no reason why the appellant could not have filed a provisional return and amended the figures later if HMRC or on appeal the Tribunal determined that in fact he was employed.

67. The appellant has not shown a reasonable excuse for the late filing of his 2013-14 return. The late filing penalties of £100, £300 (90 day) and £600 (6 month) have been charged in accordance with legislation. There is no reasonable excuse for the appellant's failure to file his tax return on time, nor by the date the penalties arose.

68. The penalties are therefore confirmed save for the 12 month £300 penalty. That penalty is not payable, the appellant having filed his return in paper form on 17 August 2015 and therefore within 12 months of the due date. I accept that he filed his return in paper form on 17 August 2015.

69. I find that there are no special circumstances which would allow the penalties which have been correctly imposed to be reduced under Special Reduction regulations.

70. 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: 16 FEBRUARY 2019**