



**TC07000**

**Appeal number: TC/2018/06577**

*INCOME TAX – penalties for late delivery of tax return – permission to make late appeals opposed by HMRC – held appeals not late – whether reasonable excuse: no – daily, 6 month and 12 month penalties cancelled on procedural grounds – three late payment penalties – permission to make 2 late appeals – granted – 2 penalties cancelled because review officer legally cancelled third on account of HMRC delay and concessionally cancelled the first two on the same grounds and then reneged on that concession.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL SMITH**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE RICHARD THOMAS**

**The Tribunal determined the appeal on 15 February 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 21 October 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 19 December 2018.**

## DECISION

1. This is an appeal by Mr Michael Smith (“the appellant”) against penalties of assessed on him for his failure to deliver an income tax return for the tax year 2015-16 by the deadline. For reasons which are explained later I have taken his appeal to be also against late payment penalties for the same year.

### **Facts**

#### *The background*

2. The appellant has been in what HMRC call “the Self-Assessment regime” on and off. He was in it between 6 April 1996 and 5 April 2008 and then from 6 April 2014 to 5 April 2016.

3. He registered for Self Assessment online services on 28 October 2005 and activated his account on 28 October 2005.

4. On 29 December 2016 he wrote to HMRC PAYE & Self Assessment saying that he was now fully employed on a permanent basis but was self-employed up to June 2015. In the same letter he said that had enclosed his completed tax return for “2015-2015” (*sic*) and he would “await your processing” and that “I will try to submit a tax return on line for this year if I can, but if I am unable to do so as last year I will contact someone for assistance”.

5. Also on 29 December 2016 he wrote separately to HMRC’s Debt Management section also saying “I have sent off my tax return filled in and await their reply”. He added that “I will attempt to file my latest return for 2015/16 on line if I can, but if I am unable to do so as last year I will contact someone for assistance”.

6. HMRC’s records showed the appellant as “SA Dormant” with effect from 17 December 2016.

7. HMRC also say the references to the tax return that the appellant had just delivered were to his 2014-15 return. They point to the fact that the appellant was assessed with a 12 month late filing penalty for that year.

8. Having regard to the evidence in the file of such a penalty and from the wording used by the appellant in the two letters of 29 December I find that he delivered his return for 2014-15 in December 2016 and no other.

#### *The return*

9. HMRC’s records (Return Summary) indicate that the appellant was issued with a notice to file an income tax return for the tax year 2015-16 and the date given in the records for that having been done was 6 April 2016. That notice would have required the appellant to deliver the return by 31 October 2016 if filed in paper form or by 31 January 2017 if filed electronically (“the due date”). The appellant does not dispute that he received such a notice.

10. On 7 February 2017 HMRC records indicate that they issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

11. HMRC records indicate that they issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date on 11 August 2017

12. HMRC records also indicate that they issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date on 11 August 2017

13. The appellant's return was, say HMRC, filed on paper in a form satisfactory to them on 22 December 2017.

14. HMRC records indicate that they issued a notice on 30 January 2018 informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 12 months after the due date. Because the return when delivered was in paper form, the 12 month period ran from 31 October 2016.

15. HMRC records indicate that they issued a notice on 21 August 2018 informing the appellant that three penalties had been assessed for failure to pay tax outstanding by dates 30 days, 5 months and 30 days and 12 months and 30 days after the due date for payment which would have been 31 January 2017.

#### *The appeal*

16. On 19 July 2017 the appellant wrote to HMRC. In this letter he said that he was amazed to receive a threat of a fine for not returning his tax form as he had sent it in in December 2016 because he could not file it on line, and that he was now fully employed on a permanent basis as explained in his letter (date not mentioned but presumably that of 29 December 2016 – see §4).

17. He said he did not expect any fines to be imposed and wanted confirmation from HMRC that they had got his return, and he enclosed a copy of a Form SA372-60, a reminder letter that daily penalties were accruing.

18. On 9 August 2017 an officer of Revenue and Customs, R E Doignie, replied to what they said was the appellant's appeal against the initial penalty and against daily penalties (even though no daily penalties had at that point been assessed on the appellant). They said that they could not consider his appeal because HMRC had not received his return, and they gave him information about how he could do that. They said that once he had done that he should make a new appeal giving the reason that stopped him from filing on time. Information about what HMRC considered to be a reasonable excuse was given, which said that HMRC's view was that:

“a reasonable excuse will only apply (*sic*) when an unexpected or unusual event, either unforeseeable or beyond your control has prevented you from sending your return on time. We'll consider the facts in each case.”

19. Finally the letter warned that daily penalties were accruing and that they could be reduced by filing online.

20. On 14 August 2017 the appellant wrote to R E Doignie repeating that he had sent all relevant information to HMRC but he had not saved a copy of his return which he believed had been in short form. I think this must be a reference to the short

supplementary pages (SA102S) for reporting trading income where the turnover is below the VAT threshold.

21. He added that he had once again tried to complete his return on Sunday 13 August online but could not “get off the first page”. He thought this might be because he had changed internet provider, and so had changed his email address and this may have upset his home page.

22. He therefore enclosed a paper form for 2015-16 on, he said, “a copy of a previous form”, as had been unable to download a form from the HMRC website. He asked R E Doignie to look into the fines.

23. On 11 September 2017 the appellant wrote, for the attention of the “Team Leader”. In this letter he expressed mild irritation with HMRC saying that he had now delivered his tax return in full on 14 July 2017 and enclosed a certificate of posting dated 14 August showing the recipient’s postcode as BX91AS and a copy of his letter of 14 July. He said he refused to accept any fines and asked for a statement of what he owed.

24. On 6 October 2017 Steven King of HMRC replied to the appellant acknowledging receipt of the return on 18 August 2017. However he could not give a statement of liabilities because the return had not been processed as there was a three month processing time. He said there was £1,632.70 owing on the account, a combination of penalties and interest and the interest would continue to rise until he appealed “the penalties and *interest*” (my emphasis). To appeal “these” the appellant would have to write stating his grounds of appeal, and if HMRC “accepted” the appeal the amounts would be cancelled.

25. On 11 October 2017 the appellant sent HMRC a form SA 370 Appeal listing a £300 “3 months late filing” penalty amount and a £600 “6 months late filing” amount, giving the date of the penalty notices as 17 September 2017. In the section for giving reasons for making an appeal he repeated his previous complaints.

26. On 20 October 2017 the appellant wrote to Mrs C Graham in HMRC’s Debt Management section in response to a letter from her dated 12 October 2017 (not in the bundle) saying he had registered an appeal against the fines on his account.

27. The statement of case says that on 23 October 2017 HMRC returned to the appellant the paper return that they had received on 18 August 2017. No copy of any covering letter in the bundle, nor is there any reference to this action on the SA or Notes or Debt Management Notes included in the file. But a copy of the rejected paper return is, and it shows what HMRC say was the reason for its rejection more than 2 months after receipt: the objection was that the return was printed as one for the year ended 5 April 2015 but the appellant had amended it to show it was for the year ended 5 April 2016 by crossing out 2015 and writing in 2016. It also appears that this was a copy of the return the appellant had filed for 2014-15 as he had written over entries in various boxes with new figures, and crossed out what were sections irrelevant to a 2015-16 return.

28. An SA Note made on 25 October says: “dor 18/8/17 15/16 SA ITR returned as incomplete, SA 604 issued”. I am assuming this is a reference to the matter in §27. No letter dated this day is in the bundle.

29. On 31 October 2017 Sarah Smith of HMRC Debt Management wrote to the appellant saying they had been unable to contact him by phone and they needed to discuss his self-assessment account.

30. On 7 November 2017 it is stated in the statement of case that HMRC looked at the appellant's appeal of 11 October 2017 (§25). It is also stated that the officer doing that misinterpreted the SA Notes and thought the appeal has "been dealt with" on 28 October. From the SA Note of 7 November the officer compiling the statement of case noted that the 28 October note said that the return had been "unlogged" (ie any computer record showing it as received was changed) and the appeal rejected. What the 28 October note actually said was that there was an external communication to the appellant telling him that his appeal could not be accepted "due to returns being late".

31. On 1 November 2017 the appellant resubmitted his 2015-16 tax return. The covering letter in the bundle explained that he had used the 2014-15 return copy in desperation as he was frustrated at not being able to get the information to HMRC online. He noted that the one he was now submitting seemed shorter than the last and asked HMRC to tell him if any information was missing. There is a copy of this return in the bundle.

32. On 30 November 2017 HMRC once again sent the return back with an SA605 letter as they say it was incomplete in that it did not contain the self-employment pages. Again the letter accompanying the rejected return is not in the bundle.

33. On 20 March 2018 the appellant wrote to HMRC following receipt of a summary of his liabilities which he said showed further fines.

34. HMRC seem to have taken this letter of 20 March 2018 as an appeal against late payment penalties, since SA Notes of 1 May 2018 say "LPP appeal for 2015/16. Payments not made so App21 issued with copy of SA statement". LPP is HMRC's abbreviation for Late Payment Penalties, which I use from here (and use LFP to mean the penalties for late delivery of the return). No copy of the actual letter is available.

35. Notwithstanding that the appeal was against LPPs only, the compiler of the Statement of Case says it was an appeal against all LFPs and LPPs.

36. On 10 May 2018 the appellant wrote to HMRC referring to their letter of 2 May. I assume that this is in fact the letter referred to in the SA Note of 1 May as the appellant refers to it as "regarding my appeal". He added that he had now paid the outstanding taxes for 2015-16. Later he referred to a resolution of his issue with 2016-17 fines for, it seems, late filing of that year's returns, which are not in issue so I assume they were either cancelled or accepted as due.

37. Finally the appellant asked HMRC to deal with his appeal against LFPs.

38. On 26 June 2018 HMRC, in the person of M Lahaware, replied to this final paragraph. They informed the appellant that they were sorry to say that the deadline for appealing all the LFPs had passed. The appellant was asked to supply any reasonable excuse he had for not filing on time, and was told that if HMRC did not accept it they could not accept the appeal, but the appellant would be able to ask for the case to be "reviewed" by the Tribunal.

39. On the same day a similar letter was sent in relation to the 30 day and 6 month LPPs.

40. And on the same day another letter was sent about the 12 month LPP. This did not reject the appeal as being out of time. It characterised the appellant's reason for late payment thus:

“You told us that you didn't pay the tax you owe on time because (*sic*) you have made a payment to clear outstanding taxes owed for 2015-15 (*sic* – should be “-16”) as requested.”

In this letter the appellant was told of his review rights.

41. On 8 July 2018 the appellant completed Form SA634 (request for a review).

42. On 22 August 2018 Mrs T Francis, the review officer, gave a conclusion letter about the 12 month LPP. She decided to cancel this penalty “strictly on this occasion only and on a without prejudice basis”. She added that “as a concession” she had cancelled the 30 day and 6 month LPPs, having taken into account the “delay in HMRC processing the 2015-2016 paper tax return you submitted”. The next paragraph of her letter said “the penalties will be cancelled and your appeal is now treated as settled”.

43. On 27 August 2018 the appellant write to Mrs Francis thanking her for her “fair assessment of my case”. He promised to settle his outstanding liabilities as soon as possible.

44. On 6 September 2018 Mrs Francis wrote to the appellant thanking him for his response and enclosing his current SA Statement showing his liabilities. This statement showed only LFPs and no LPPs.

45. On 15 September 2018 the appellant wrote to Mrs Francis saying he could not reconcile the statement against her letter as the Statement showed the LPPs as still outstanding. This is wrong: as mentioned in §44 the statement showed only LFPs for 2015-16 (and one for 2014-15).

46. But on 25 September 2018 Mrs Francis replied saying that her letter of 22 August 2018 was **only** about the 12 month LPP which she had indeed cancelled. Appeals against the 30 day and 6 month LPPs had not been accepted because of lateness and she enclosed copies of the letter of 26 June 2018 (§39).

47. I add here that Mrs Francis cannot have looked properly or at all at her letter of 22 August 2018 (§42) in which she clearly cancelled *all* the LPPs. And as I have said, the SA Statement she sent showed no LPPs for 2015-16 outstanding.

48. On 4 October 2018 the appellant wrote to Mrs Francis saying that in her letter she highlighted the “30 day rule” (in fact this would have been in the caseworker's letter of 26 June). He added that throughout the whole process he had been appealing and been in constant contact with HMRC:

“and at no time have you highlighted this point before.

This I feel is unjust and you have treated me unfairly.

It could be argued that by accepting my appeal in your letter dated 22<sup>nd</sup> August 2018, that you were aware of this as you stated that all charges on this occasion were in fact included to be cancelled.”

49. On 16 October 2018 Mrs Francis replied. She reiterated that her decision was about the 12 month LPP only, as the other letters of 26 June 2018 on LPPs and LFPs rejected the appeals as out of time and she was unable to review them. She referred the appellant back to PAYE & Self Assessment colleagues.

50. On 21 October 2018 the appellant submitted a Notice of Appeal to the Tribunal. He listed penalties of £1,600. Against the question “Is the appeal in time” he said “I am not sure” and against “Reason for late appeal” he referred to an HMRC letter of 10 October 2016. But it was actually a reference to Mrs Francis letter of 16 October 2018.

51. On 20 November 2018 the Tribunal informed the appellant that the case would be a default paper case and that it included an application to make a late appeal. HMRC were also informed that if they objected to the late appeal application they must address it in the Statement of Case.

### **The law**

52. The law imposing LFPs is in Schedule 55 Finance Act 2009 and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC’s decision as to whether there are special circumstances was flawed.

53. Given what has happened in this case I need to set out the law on appeals in more detail.

54. Paragraphs 20 and 21 Schedule 55 FA 2009 say:

#### *“Appeal*

20—(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.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.”

55. The provisions about appeals for income tax are in the Taxes Management Act 1970 (“TMA”) thus:

#### *“31A Appeals: notice of appeal*

(1) Notice of an appeal under section 31 of this Act must be given—

- (a) in writing,
- (b) within 30 days after the specified date,
- (c) to the relevant officer of the Board.

...

(4) In relation to an appeal under section 31(1)(d) of this Act [*against an assessment other than a self-assessment*]—

- (a) the specified date is the date on which the notice of assessment was issued, and
- (b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

...

(5) The notice of appeal must specify the grounds of appeal.”

*49 Late notice of appeal*

(1) This section applies in a case where—

- (a) notice of appeal may be given to HMRC, but
- (b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

- (a) HMRC agree, or
- (b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

56. And also given what has happened in this case I need to set out the law on reviews in TMA in more detail:

*“49A Appeal: HMRC review or determination by tribunal*

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

- (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),



(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

#### *49B Appellant requires review by HMRC*

(1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.

(2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.

(3) HMRC must review the matter in question in accordance with section 49E.

(4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—

(a) the appellant has already given a notification under this section in relation to the matter in question,

(b) HMRC have given a notification under section 49C in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(5) In this section “relevant period” means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or

(b) such longer period as is reasonable.

#### *49E Nature of review etc*

(1) This section applies if HMRC are required by section 49B ... to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

- (a) upheld,
- (b) varied, or
- (c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

- (a) the period of 45 days beginning with the relevant day, or
- (b) such other period as may be agreed.

(7) In subsection (6) “relevant day” means—

- (a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC’s view of the matter in question,
- (b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant’s acceptance of the offer.

...

#### *49F Effect of conclusions of review*

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

#### *49G Notifying appeal to tribunal after review concluded*

(1) This section applies if—

- (a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or
- (b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section “post-review period” means—

- (a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or
- (b) in a case falling within subsection (1)(b), the period that—

- (i) begins with the day following the last day of the period specified in section 49E(6), and
- (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9).

*49I Interpretation of sections 49A to 49H*

(1) In sections 49A to 49H—

- (a) “matter in question” means the matter to which an appeal relates;
- (b) a reference to a notification is a reference to a notification in writing.

...”

57. Finally I add that the law on penalties for late payment of tax follows that, as far as procedure and relevant means of escaping them, for late filing penalties.

### **Late appeals**

58. HMRC say that they do not oppose the appellant’s application to appeal out of time. But nevertheless I must consider the application as it is the job of the Tribunal to determine whether to give permission to force HMRC to accept appeals. But this only applies if of course the appeals were late and were rejected as late by HMRC.

59. The initial penalty was issued on 7 February 2017. The first intimation of an appeal was on 9 July 2017, 4 months late. But R E Doignie did not reject the appeal as out of time – they said it was simply rejected because the return had not been filed. If HMRC do not invoke s 49 TMA when they received an appeal they cannot later say that it was out of time. Therefore permission is not required.

60. The next two penalties were issued on 11 August 2017. On 14 August 2017 the appellant wrote to R E Doignie in response to their letter of 9 August. With this he enclosed as requested his return and asked R E Doignie to “look into his fines”. R E Doignie should have treated this as an appeal against at least the daily and 6 month penalties, and so therefore I accept them as being appeals and in time. I also note that R E Doignie referred to the daily penalty in his letter of 9 August even though it was only issued on 11 August (at least if HMRC’s records are anything to go by).

61. As to the 12 month penalty I can see no appeal against it in time. But HMRC have said that they do not seek to support the penalty, and so coupled with their non objection to late appeals against all LFPs I give permission for the an appeal against the 12 month penalty to be given to HMRC and I waive any formalities necessary to bring it before the Tribunal to enable HMRC not to press for it and thus for me to cancel it.

62. As far as the LPPs are concerned HMRC accepted as in time the appeal against the “12 month” penalty but rejected as out of time the appeals against the 30 day and “six month” penalties.

### **Grounds of appeal**

63. In his grounds of appeal the appellant repeated much of what he had said to HMRC as set out in the section on the facts. He highlighted in particular:

- (1) his difficulties with trying to file online.

- (2) his many attempts to contact HMRC by phone to find out how to file.
- (3) his going to the lengths of copying an old return form and updating it with the new figures to at least get them to HMRC so that he would know what he owed.
- (4) his completion of a paper return which was issued to him with all the details.
- (5) the fact that the letter of 22 August 2018 cancelled penalties which said to him the HMRC had sympathy with his situation and that was treated unfairly.

### **Discussion - LFPs**

64. In my view there is no reasonable excuse for the failure to file the 2015-16 return by 31 October 2016.

65. The appellant said in his letter of 29 December 2016 that he had already filed the return in paper form. This is incorrect. I have found as a fact that he did file a return in that month, but it was his 2014-15 return. In any event even if he had filed a paper return in December 2016 it would have been late, and no reasonable or any excuse for failing to file by 31 October has been offered.

66. But in his letters of 29 December 2016 he did indicate that he had had problems in attempting to file online for 2014-15 at that time. He said he would try to file 2015-16 online but might run into problems so needing assistance. Much later he also put forward online filing problems to say why he had not filed his 2015-16 return, but I can find no evidence in the papers (and HMRC say they could find none) that the appellant had either attempted to file online or had sought assistance from HMRC or anyone else.

67. I am aware that sometimes HMRC accept as a reasonable excuse online problems encountered shortly before the deadline. Here there was no evidence that any difficulties were encountered at that time. If they were encountered earlier then advice should have been sought. If they were encountered later then that was too late to prevent a late filing penalty.

68. As to the daily penalties there is no “SA reminder” or “SA 326D” in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with. (See *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)). I therefore cancel them.

69. As to the 6 month penalty I cancel it as it was issued automatically before the return was received without an officer of HMRC considering to the best of their knowledge and belief what the penalty should be (see *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) (a decision of mine)).

70. As mentioned above HMRC say in their submission that they were withdrawing their case in relation to the 12 month penalty. To avoid any doubt I cancel it. Had I not done so because of HMRC’s withdrawal of their case I would have cancelled it for the reasons given in §69.

71. HMRC in the person of the officer compiling the statement of case, Jamie Harrison, have addressed the question whether there were special circumstances, but have found none. I cannot say that Mr Harrison’s decision in relation to the numerous matters he took into account was flawed – indeed it is the most comprehensive

consideration of special circumstances I have seen. There was however one matter which Mr Harrison did not consider and which is potentially a special circumstance.

72. Given that the appellant says he was issued with a paper return in 2017 and that he did file a paper return eventually, that action of HMRC's might amount to a special circumstance. See in this regard *Morgan & another v HMRC* [2013] UKFTT 317 (TC) at [137]. However the timing of this action was such that it could only have potentially affected the 12 month penalty and HMRC have withdrawn their case in relation to that, so I make no reduction of the penalties on that account.

### **Discussion - LPPs**

73. There were also LPPs raised in this case. One difficulty I have had with these is that I have no clear indication from the statement of case when they were issued. The usual evidence that HMRC point to is the RET015B, the "View/Cancel Penalties" printout from the SA System. This shows a date against the LPPs of 21 August 2018. This cannot be right as the date of issue and because they are shown as nil, and as cancelled for reason 4, it must be the date of cancellation.

74. But although it is not mentioned in the statement of case HMRC have exhibited an SA Statement dated 23 February 2018 which gives some clues. It shows as "becoming due" three late payment penalties of £44 each. The dates shown for when they become due are 8 March 2018 for the first two and 22 March 2018 for the third. By paragraph 11(2) Schedule 56 FA 2009 a penalty must be paid within 30 days from the date on which the notice of assessment is issued. So for the first two the entries on the SA statement suggest that the notices were issued on 6 February 2018 and for the third that it was issued on 20 February 2018.

75. The appeal was made on 20 March 2018. On 20 June 2018 M Lahaware accepted, rightly, that the third penalty was in time for an appeal, but rejected the appeal against the other two as they were out of time, by 12 days on my reckoning. On 8 July the appellant requested a review of the decision letter of 20 June 2018. HMRC have written "15-16 12M LPP" on the SA634. HMRC did not, as they are required to do by 49B TMA, tell the appellant of their "view of the matter". Nonetheless Mrs Francis reviewed the decision to impose the 12 month penalty and decided in her conclusion letter of 22 August 2018 it should be cancelled. Although she had decided, correctly, that the other two penalties could not be reviewed because the appellant had not been permitted to give a notice of appeal against them (by virtue of s 49 TMA) she said that as a concession "I have cancelled" the other two penalties, and "The penalties will be cancelled and your appeal is now treated as settled". She then sent an SA Statement dated 5 September 2018 not showing any LPPs.

76. The subsequent letter of 25 September telling the appellant that only the 12 month penalty was cancelled is baffling. I have considered whether, when she wrote in the 22 August review conclusion letter, she meant to say "The penalty is cancelled", but she had immediately before that clearly said she would, in addition to cancelling the 12 month penalty, cancel the other two. So "The penalties are cancelled" read in the context must refer to all three and is not a slip.

77. What are the legal consequences of what she said? In relation to the 12 month penalty she said in the 22 August letter that the appeal was settled. This follows from s 49F(2) TMA, and so by law the penalty is cancelled under paragraph 15(1) Schedule 56 FA 2009.

78. In relation to the other penalties what she said had no force in law and if she intended to settle the appeals against those two penalties she could not, because there was no appeal given to HMRC so nothing for HMRC to settle under a real s 54 TMA agreement let alone a deemed one under s 49F(2).

79. It follows from this that the appellant has to bring to the Tribunal an application for permission to give a late notice of appeal to HMRC in relation to those two. I have no hesitation in giving that permission. On the basis of my findings of fact the appeals were 12 days late. As HMRC routinely allow seven days for postage, effectively it is 5 days late. That is neither serious nor significant.

80. I then waive any formalities needed to bring the appeals to the Tribunal and I cancel the penalties, thereby doing what Mrs Francis said she would, only to deny it in writing to the appellant and renege on her promise without explanation or apology. I cancel them because Mrs Francis must have thought there was a reasonable excuse for not paying by all three deadlines or she would not have said she was cancelling all of them. In any event I would have found her backtracking to be a special circumstance not considered by her, as I sincerely hope that it is out of the ordinary.

### **Decision**

81. The penalty of £100 for the late filing of the 2015-16 return is confirmed.

82. The penalties of £900 and £300 for the late filing of the 2015-16 return are cancelled.

83. The 30 day and 5 months plus 30 day penalties for late payment of tax are cancelled.

84. 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.

**RICHARD THOMAS  
TRIBUNAL JUDGE**

**RELEASE DATE: 26 FEBRUARY 2019**