



[2021] UKFTT 120 (TC)

TC08101

LATE FILING PENALTIES – whether properly imposed – appeal against daily penalties allowed – whether reasonable excuse – no – whether special circumstances – yes - penalties disproportionate due to taxpayer’s low income and in one year because HMRC advice contributed to late filing- appeal allowed IN PART

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/5820V

BETWEEN

OLIVER HAMPEL

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE Barbara Mosedale
BY VIDEO LINK**

This was a remote hearing by video. A face to face hearing was not held because the parties agreed to have a video hearing and all issues could be determined in a remote hearing.

The appellant in person appeared by video link

Mr Paul Hunter, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents, appeared by video link

DECISION

VIDEO HEARING

1. This hearing was originally arranged to take place using video technology; by the time the hearing took place, special measures were in place to deal with the Covid-19 pandemic and the technology was adapted so that all parties, including myself and the HMRC presenting officer, as well as the appellant, were able to, and did, attend the hearing from their respective homes. The fully video hearing platform which was used to support the hearing remained stable throughout the hearing with no loss of signal; all three participants were able to be seen and heard throughout the hearing which lasted approximately two and half hours.

VERY LATE DECISION

2. Another result of the pandemic was that, shortly after the hearing I became ill for many months. Reviewing the evidence in September 2020 on return to part-time work led me to conclude that I needed more information; so the parties were asked in October 2020 for further evidence and representations. Before the replies were received, I was back on long term sick leave again. This is the explanation for the extreme delay with the issue of this decision.

THE SUBJECT MATTER OF THE HEARING

3. The parties were agreed that the subject matter of the appeal were 6 penalties charged on the appellant, which totalled £2,600.

Tax year	Date imposed	Type of penalty	Amount of penalty
15/16	7/2/17	Late filing penalty	£100
15/16	11/8/17	Late filing daily penalties	£900
15/16	11/8/17	6 month late filing penalties	£300
16/17	13/2/18	Late filing penalty	£100
16/17	31/7/18	Late filing daily penalties	£900
16/17	10/8/18	6 month late filing penalty	£300

LATE APPEAL?

4. It appeared that at least the appeal against the 2015/16 late filing penalties may have been lodged late with the Tribunal but Mr Hunter stated that HMRC took no issue with the lateness of the appeal. I admitted the appeal without forming a firm view on whether not any part of it was late, as I considered in view of the circumstances it was right to admit it even if it was late.

THE EVIDENCE

5. The appellant gave oral evidence; in addition, I had documentary evidence which comprised a bundle produced by HMRC running to 194 pages and a bundle produced by the appellant which included his written representations ('appellant's grounds of resistance') and copies of a few letters.

6. As is fairly common, I had no copies of the penalties under appeal. HMRC do not keep copies of them and the appellant did not produce copies of them. As mentioned above, I

received further evidence and representations from the parties in response to my directions of 14 October 2020. Both parties were directed to provide the Tribunal with:

- (a) The date on which Mr Hampel's company (which I shall refer to as 'Progressive') filed its tax return for 15/16;
- (b) Copies of Mr Hampel's personal tax returns for 15/16 and 16/17;
- (c) Whether HMRC have opened an enquiry into either or both returns mentioned in (b);
- (d) The date (if any) that would have been specified in the 30 and 60 daily penalties reminder letter.

Both parties were also given the opportunity to make further representations within 14 days if they choose to do so on the following subjects:

- (a) Whether they agree that the reading of the transcripts of the calls between Mr Hampel and HMRC on 28/3/17 and 30/10/17 suggests Mr Hampel was led to believe that filing his company's tax return would be sufficient to discharge his obligation to file his personal tax return?
- (b) Whether, in light of Mr Hampel's income in the relevant tax years, the amount of the penalties charged were disproportionate?

7. In response, the Tribunal received submissions from Officer Kane O'Leary dated 28 October 2020 and further evidence from HMRC comprising a tax return for Progressive and the appellant's personal returns for 2015/16 and 2016/17. In addition, I was given print outs of HMRC's digital log recording the date of receipt of Progressive's returns for 14/15 and 15/16 and recording the date Mr Hampel's 14/15 personal tax return was filed. Mr Hampel provided draft accounts for his company and some comments in reply to the Tribunal's questions.

The Facts

8. The following are my findings of fact based on the evidence before me.

9. I find that Mr Hampel set up Progressive in around 2012. For most of its existence, he used an accountant to file his company and personal tax returns. The company's business started to run down and he ceased to use an accountant to file his personal tax returns: his evidence was unclear whether the last returns filed by the accountant were for tax year 13/14 or 14/15 and I make no finding on this as it is not important. The evidence shows that Mr Hampel's personal return for 14/15 was filed on time and the appeal only concerned penalties imposed for late filing of the personal returns for 15/16 and 17/18 in any event.

10. Progressive still had a few clients in 15/16 and 16/17 although its income from these, and therefore Mr Hampel's income, was diminishing. In the hearing, Mr Hampel's recollection was that the income from his company was less than £3000 per year at this point, but I prefer the more precise evidence shown in his personal tax returns which was that his income from Progressive was £4,949 in 15/16 and £488 in 16/17. Mr Hampel explained that at around this time he became an employed delivery driver in order to make ends meet: I accept the evidence of his returns that his other income in 15/16 amounted to £2,122 and in 16/17 to £3,592. This meant the total of his income was £7,121 in 15/16 and £4,080 in 16/17 and I find this as a fact based on the evidence of his returns coupled with HMRC's evidence that they have not opened any enquiries into these returns.

11. I find, and it was not in dispute, that Progressive filed its tax return for 14/15 on 29 April 2016 and for 15/16 on 28 March 2017. These were therefore both filed late but this appeal does not concern any penalties that may have been imposed on Progressive in respect of this

late filing. The relevance of the late filing of the company return for 15/16 concerns Mr Hampel's explanation for the late filing of his personal tax returns and I deal with this at paragraphs 5—62 below.

12. The appellant at all times accepted that his tax returns for 15/16 and 16/17, in respect of which the penalties the subject of this appeal were imposed, were filed late: he did not challenge HMRC's case that his return for 15/16 was filed on 30/10/17 and his return for 16/17 was filed on 29 August 2018. And, therefore, I find as a fact that they were filed on these dates.

13. I make other findings of fact related to the reasons the returns were filed late, but it makes more sense to consider them in context as set out below. So I move on to consider whether the penalties were correctly imposed and, if they were, whether Mr Hampel has a reasonable excuse for the late filing and whether the penalties were proportionate.

WERE THE PENALTIES CORRECTLY IMPOSED?

Were notices to file issued?

14. Penalties for late filing of returns are only payable if returns which should have been filed on time were in fact filed late. And a person is only liable to file a tax return if they were in receipt of a timely notice to file from HMRC. A notice to file used to be incorporated in a blank tax return although now, with digital filing, a notice to file may be a single piece of paper.

15. Prior to the hearing, Mr Hampel had never suggested that he had not received notices to file for the relevant years. During the hearing, however, Mr Hampel said that he had no recollection of receiving reminder letters from HMRC. He specifically denied receiving the notice to file for tax year 16/17.

16. HMRC's representative in the hearing, Mr Hunter, obviously could not give any direct evidence of whether or not the notices to file were sent to Mr Hampel; the evidence which HMRC relied on to demonstrate this were two computer printouts, one for each tax year. These were the standard self-assessment 'Return summaries' which appear to record for any particular tax year and taxpayer, the date on which a notice to file was issued and the date on which the tax return was due and actually received.

17. There are two issues here. Firstly, should the Tribunal allow Mr Hampel to make out a case he had not received the notice to file bearing in mind that he had not put HMRC on notice of this case before the hearing commenced? Secondly, if the Tribunal did consider the issue, what finding of fact should it make?

18. Dealing with the first issue, my impression of Mr Hampel was that he was unsophisticated in tax matters and had not raised the issue of the notices to file before the hearing because he had not realised, until the hearing took place, that liability to file a tax return depended on receiving a notice to file. In a case where the sum in dispute did not justify the expense of being represented by a tax specialist in the proceedings, that seemed a good explanation for why he had not raised the matter before the hearing. Nevertheless, it would normally be unfair to expect HMRC to answer a case of which they had not been given advance warning. However, Mr Hunter did not suggest that HMRC would have been able to bring further evidence had they been given more warning of this dispute and indeed it is difficult to see what evidence they could bring with more time, bearing in mind it is obvious that notices to file are issued automatically in very large numbers. It was very likely, and Mr Hunter did not suggest otherwise, that HMRC's only evidence that Mr Hampel was issued with notices to file were the computer printouts which were already before the Tribunal. Therefore, on balance, I decided that I would allow Mr Hampel to take this point.

19. The second issue is what findings of fact I should reach on whether the notices to file were actually sent to, and received by, Mr Hampel. The evidential status of HMRC's 'return

summaries' and in particular their status as evidence that a notice to file was sent to a taxpayer, was considered in the recent Upper Tribunal case of *Barry Edwards* [2019] UKUT 131 (TCC) where the Upper Tribunal said:

As is usual with these records, they always record that the return was issued on 6 April in the relevant tax year, which is the first day of the tax year, but it is well known that in practice notices to file are issued in batches during the early part of the tax year.

20. Mr Hunter effectively appeared to accept, on behalf of HMRC, that that statement was correct as he himself said that whereas Mr Hampel's records showed that the notices to file were issued on 6th April in the relevant years, in practice HMRC could only claim that they were issued 'on or about' that date. I accept that the precise date of issue would not matter as the notice to file does not need to be issued exactly on 6 April of any given year.

21. The Upper Tribunal went on to say (at paragraph 50) that the Tribunal can accept documentary evidence as evidence of matters contained in the document even in the absence of any witness evidence about the source of the documents. I would comment that in this case it was implicit in what Mr Hunter said that the Return Summaries for Mr Hampel had been printed off HMRC's computer system by Mr Hunter or a colleague for the purpose of this hearing. What I did not have is any witness evidence to explain HMRC's processes on issuing notices to file, although, as I have said, the Upper Tribunal appeared content to accept HMRC issue notices to file in batches on or after 6 April each year.

22. The Upper Tribunal's conclusion at [56] appears to have been that it would be improper for a Tribunal to rely solely on a Return Summary to make a finding that a notice to file was sent but that the Tribunal might reach that conclusion if there was other corroborating evidence:

We accept that on its own the material before the FTT would not have enabled the FTT properly to draw the necessary inference that notices to file were sent to Mr Edwards. However, there was other evidence available to the FTT on the notice to file issue, namely the oral evidence that Mr Edwards gave at the hearing, as well as the 5 entries in HMRC's records recording its interactions with Mr Edwards, and in particular the sending of penalty notices and the subsequent communications with Mr Edwards in relation to those notices. Mr Edwards did not dispute the fact that he was sent the various penalty notices and reminders, as recorded by the FTT at [10] of the Decision.

23. My view is that HMRC have to show on the balance of probability that it is more likely than not that the notices to file were sent to Mr Hampel's correct address around 6 April in the relevant tax years; if they can do that, it would be for Mr Hampel to demonstrate that the notices were not received.

24. In my view, the Return Summary by itself indicates that HMRC had a system in place to issue Mr Hampel with notices to file. That is corroborated by other evidence which was not in dispute; firstly, all parties accepted that Mr Hampel had filed tax returns for previous years, which suggests that HMRC's system for requiring tax returns to be filed worked. Secondly, Mr Hampel did not deny receiving the notice to file for 15/16 and (see evidence at paragraph 46 below) did indeed attempt to file his 15/16 return in January or February 2017 and it seems this was in response to a notice to file as, in a phone call to HMRC on 28 March 2017, Mr Hampel appeared to accept that HMRC had sent him a blank tax return (as mentioned above, blank tax returns incorporate a notice to file). Lastly, while Mr Hampel's address for correspondence with HMRC may have changed when his accountant ceased to act, it is abundantly clear HMRC had his correct address as one of Mr Hampel's complaints was that he received a barrage of communications from HMRC which he found very stressful. Another

point is that the Return Summary also recorded the receipt of Mr Hampel's completed tax returns and the accuracy of that part of the record is accepted.

25. I accept the evidence of the Return Summary for 15/16 and find as a fact that HMRC issued Mr Hampel with a notice to file for tax year 15/16 on or shortly after 6 April 2016. It is more likely than not that he received it for the reasons given above.

26. As for the following year, I have found that HMRC's system for issuing him with notices to file was working up to and including the previous year. I consider it more likely than not that it continued to work in the following year and accept the evidence of the Return Summary for 16/17 and find as a fact that HMRC issued Mr Hampel with a notice to file for tax year 16/17 on or shortly after 6 April 2017.

27. As I have said, Mr Hampel denied receiving this notice to file. However, I find it more likely than not that he did receive it but simply ignored and then forgot about it. I make this finding because it was clear from his evidence that he received a lot of communications, including penalty notifications, from HMRC and found them very stressful. I find it clear that he was finding the situation very difficult to deal with and to some extent this led him to bury his head in the sand. While I accept he now believes he did not receive it, I cannot accept that belief as reliable evidence that he did not receive the notice to file for 16/17. I find as a fact he received it.

28. In conclusion, HMRC have proved that Mr Hampel was liable to file tax returns in respect of tax years 15/16 by 31 January 2017 and for tax year 16/17 by 31 January 2018. The effect of the law is that it follows from this that Mr Hampel was liable to file his 15/16 tax return no later than 31 January 2017 and his 16/17 tax return no later than 31 January 2018.

29. *Late filing of returns*

30. If the matter was in dispute, it would also be incumbent on HMRC to prove that the returns were filed late. However, as I have said, Mr Hampel accepted that the returns were filed late, as HMRC claimed. His tax return for 15/16 was filed on 30 October 2017 and for 16/17 was filed on 29 August 2018. Each was therefore more than 6 months' late but less than 12 months' late.

Were the penalties correctly served?

31. If the matter was in dispute, it would also be incumbent on HMRC to prove that notices imposing the penalties were sent to Mr Hampel, and also, in respect of the daily penalties of £900 for each year, that HMRC gave Mr Hampel a notice specifying the date from which the daily penalties would be payable.

32. Mr Hampel, at least prior to the hearing, had not suggested that he had not been served with notice of the imposition of the penalties. In the hearing, he was not prepared to accept he had received proper notification of them. As I said above, on the one hand it would not normally be fair to allow a party to put in issue at the hearing something of which the other side had had no warning, but, on the other hand, Mr Hampel was unsophisticated tax appeals and clearly would not have appreciated before the hearing what points he could take. As Mr Hunter had prepared the bundle intending to prove that the penalty notices had been properly served and did not suggest he had other evidence relevant to this matter which was not included in the bundle, I considered it fair to allow Mr Hampel to raise the point.

33. Again, as I said above, it is for HMRC to prove the penalty notices had been sent by post, but if they could do that, it would be for Mr Hampel to prove they had not been received.

34. The evidence on which HMRC relied to show that the penalties had been raised and posted to Mr Hampel were two computer printouts dated 2 October 2019, one showing the

three late filing penalties for 15/16 and one showing the three late filing penalties for 16/17, being the six penalties under appeal. Each showed a date and the statutory fixed amount of the penalty and was the only evidence HMRC produced to show that they had been posted. I have already commented, as is well known to those who deal with tax appeals but perhaps not to the general public, HMRC do not keep copies of mass-produced standard letters sent to individual taxpayers: all they can produce is a copy of a blank standard letter and computer printouts showing dates on which standard letters were sent.

35. Again, as I have said above, the recent Upper Tribunal decision in *Barry Edwards* suggests that the Tribunal could not accept a computer printout by itself as satisfactory evidence that penalty notices were issued to Mr Hampel. The Upper Tribunal said that some corroboratory evidence would be necessary.

36. In this case, there is further corroboratory evidence of the computer printouts. This includes a letter from Mr Hampel to HMRC dated 18 April 2017 which stated that ‘I have recently received a penalty for late filing.....’ It does not specify which penalty notice was recently received but indicates that he had received at least one. He wrote the letter as director of Progressive so it was possible that his letter referred to a penalty imposed on the company. However, more generally, as mentioned above, it was clear from Mr Hampel’s evidence that he felt somewhat overwhelmed by the imposition of HMRC penalties on him personally at this time. I take into the account the evidence recorded at the end of paragraph 47 below. I conclude Mr Hampel was therefore clearly receiving at least some of the penalty notices. I find, therefore, that there is corroborating evidence for HMRC’s computer printouts.

37. In conclusion, it is clear that Mr Hampel did receive at least some of the notices so at least some were clearly sent; that corroborates the reliability of HMRC’s computer printout to some extent. Further, there is no reliable evidence that any one of the notices was not received. I conclude it is more likely than not that all were sent and so find. Mr Hampel has not proved that any were not received and so I find all the penalty notices were both sent and received, as HMRC claim.

Daily penalty warning letters

38. In addition to proving that they imposed the penalties, HMRC have to prove, in respect of daily penalties, that they issued to Mr Hampel in both years the warning letter required by legislation. HMRC’s computer records, referred to as ‘SA notes’, record that 30 day daily penalties reminder letters were sent on 6/6/17 and 5/6/18 and 60 day daily penalties reminder letters were sent on 4/7/17 and 3/7/18.

39. For the reasons given above, I accept the SA notes as proof that the necessary warning letters were sent to Mr Hampel. For the reasons given above, I also accept as proved that Mr Hampel received them.

40. The question of the validity of the daily penalty warning letters was not raised by Mr Hampel. As I have said, he was unsophisticated in tax matters and litigation and I consider it fair for a tribunal to adopt a somewhat inquisitorial attitude when dealing with an appeal in such circumstances, particularly where very substantial penalties are imposed relative to the taxpayer’s income, as in this case. Having said that, it would not be right to expect HMRC to prove anything of which they were not given fair notice. In this case, HMRC came to the hearing clearly prepared to prove the penalties were properly imposed, and the bundle already contained pro forma copies of the daily penalties reminder letters. However, the legislation requires HMRC to give to the taxpayer in these letters notice ‘specifying the date from which the [daily penalty] is payable’. This is para 4(1)(c) of sch 55 FA 2009. The question whether HMRC specified the date from which the daily penalties were payable in these warning letters

was not something HMRC appeared completely ready to address and was therefore something I asked for evidence in October 2020 (see paragraph 6). I consider it fair to both parties to consider this issue: HMRC were given the opportunity to respond.

41. As I have said, HMRC do not keep copies of standard letters which are actually sent to individual tax papers and nor, it appears, do they keep a record of the date which was inserted into these warning letters. As I have said, HMRC did produce a pro forma copy of the relevant warning letter but the date was a blank. (In fact, the year and amount of penalty were also blanks). In their response in October 2020, HMRC's comment on the question of the date was to assert in submissions:

The 30 and 60 daily penalties reminder letters would have specified that after 30 April 2017, a daily penalty is payable for each day the online return is outstanding, for a maximum of 90 days.

42. The meaning of para 4(1)(c) was considered by the Court of Appeal in *Donaldson* [2016] EWCA Civ 761 and it is clear from what was said that although HMRC have a lot of discretion in how the letters are worded and when they are sent, nevertheless a date from which the penalties are payable must be specified: penultimate sentence of [21].

43. HMRC's assertion that the date inserted would have been 30 April of the relevant year is not evidence. I have no evidence at all as to what the date would have been: no record of the actual date inserted has been produced to me nor evidence of HMRC's processes in issuing such letters (such as how the computer would select and insert the date into the reminder). In the absence of evidence, HMRC have failed to prove that a correct date, a date that would have allowed them to impose daily penalties, was in the reminder letters sent to Mr Hampel.

44. HMRC have therefore not satisfied me that the daily penalties in either year were correctly imposed on Mr Hampel. That disposes of the appeal against the daily penalties as it is ALLOWED but I go on to consider the question of reasonable excuse and proportionality in respect of the fixed penalties imposed in each year.

REASONABLE EXCUSE?

45. The next question for the Tribunal was why the appellant filed his self-assessment returns for 15/16 and 16/17 late. It is for the appellant to prove, if he can, that he had a reasonable excuse for the late filing.

Logon difficulties for 15/16 return

46. Mr Hampel's case was that he had tried to file his 15/16 tax return before the due date of 31 January 2017 but had been prevented from doing so due to IT failures and in particular an inability to logon to HMRC's self-assessment website.

47. Apart from Mr Hampel oral evidence, evidence provided by HMRC supported his case on this to an extent. There was a note on his SA record for 1 February 2017 which recorded 'TP filing late due to log in issues'. This indicates Mr Hampel had, as he said, attempted first to file in January 2017 (before the due date) but had failed and had reported this to HMRC the day after the due date. Mr Hampel clearly continued to attempt to file his online return as he phoned HMRC on 10 February with a query over his income not being finalised. He phoned HMRC again on 28 March 2017, although from what Mr Hampel said on the call, it seems this was triggered by receipt of the first penalty notice.

48. Mr Hampel accepted in the hearing that his filing difficulties were probably caused, not by a malfunction with HMRC's self-assessment system, but because Mr Hampel was confused between his logon for his company tax return and his personal tax return. Mr Hunter considered such confusion to be careless and not to amount to a reasonable excuse.

49. I am unable to be satisfied Mr Hampel had a reasonable excuse at this time. I consider that Mr Hampel, as director of his wholly owned company was, and should have been, aware that he was liable to make both personal and corporate tax returns. It follows that, even if in previous years he had employed an accountant to make these returns, he should have been alive to the possibility that he would have two different logons to access HMRC's assessment systems. Moreover, while he made attempts to file online on or before 31 January, and to some extent kept HMRC informed of the problem, he did not make a concerted effort to resolve the problem until he received the first penalty notice. The fact that he queried on 10 February whether he could file estimated figures further suggests that it was not just logon problems which meant he did not file his 15/16 personal tax return on time. While I have sympathy for Mr Hampel's position, on balance I do not think that I am satisfied that he has, for the period 31 January -28 March 2017, a reasonable excuse for not filing his 15/16 personal tax return.

Confusion between personal and business tax returns?

50. Mr Hampel's case in the hearing, which Mr Hunter did not challenge although the Tribunal had no documentary evidence of this, was that, following his call to HMRC on 28 March 2017, he filed Progressive's tax return. In HMRC's supplementary representations in October 2020, HMRC confirmed that Mr Hampel did indeed file Progressive's 15/16 tax return on 28 March 2017. I find as a fact he filed it on that date.

51. But Mr Hampel didn't file his personal tax return until after a call to HMRC on 30 October 2017. That call to HMRC was clearly triggered by receipt of further penalty letters. In the hearing, he explained he had thought his personal tax return was 'together' with his company tax return.

52. The transcript of the call of 30 October 2017 makes it clear that at the time Mr Hampel had been labouring under the misapprehension that filing his company tax return would also amount to filing his personal tax return. In the October call, when asked if he had filed his 15/16 tax return, he stated 'I thought I did when I'd done my business account'; he repeated this when the HMRC operative said he had not filed his tax return: 'does that mean when I done my business accounts my tax return wasn't included in that package?'

53. The HMRC operative explained to Mr Hampel that he was still liable to file his 15/16 tax return and Mr Hampel filed it on that day. Taking into account it was clear from the earlier events summarised at paragraph 47 that Mr Hampel was attempting to sort out his tax obligations, and from what was said by him in his conversation with HMRC on 30 October, I am satisfied that Mr Hampel believed on 28 March 2017 when he filed his company tax return that he in effect also discharged his obligations in respect of filing his personal tax return. And that belief is the explanation for why he filed his company tax return but not his personal tax return on 28 March 2017 and why he didn't file his personal tax return until he was put right on 30 October 2017.

54. The belief was genuine; but to be a reasonable excuse it must also be a reasonable belief.

55. I find, relying on the transcript of the call of 28 March 2017, that that erroneous belief arose out of what was said to Mr Hampel by the HMRC operative in that call. The transcript of this call shows that Mr Hampel was anxious to comply with his tax obligations but struggling to understand exactly what he had to do.

56. I have already said that I did not find his apparent confusion between his company and personal logon to amount to a reasonable excuse because he should have been aware of the legal distinction between himself and his company. Consistent with that, Mr Hampel appeared at the start of the conversation in March 2017 to be clearly aware of the distinction between his company tax return and his personal tax return.

57. However, while most of the call appears to be a discussion of Mr Hampel's company's tax return, Mr Hampel three times asked about his personal tax return. Twice he asked the HMRC operative if information from his company tax return will 'automatically' be included on his personal tax return. He is told 'that's right'. This comment by the HMRC operative is very important because it is quite wrong and very misleading. I also note that Mr Hampel was told that his income as a delivery driver should be put in the company tax return, which appears to be incorrect advice and must have fed onto the previous misinformation which led him to believe filing his corporate return would automatically lead to the completion of his personal return.

58. Reading the transcript of the phonecall, it is quite possible to see how Mr Hampel formed the view that what was required was for him to file his company's tax return. The operative, no doubt unintentionally, made comments which would and did lead Mr Hampel to believe that his self assessment return would be populated from his company tax return. The operative took no steps to correct the misunderstanding which should have been apparent to him/her. Mr Hampel was clearly anxious to do the right thing and filed his company tax return almost immediately after this conversation but, in the belief it would follow automatically from his corporate return, he did not file his personal tax return.

59. The two telephone transcripts make it clear that there was a misunderstanding arising between Mr Hampel and the original HMRC operative which caused Mr Hampel to incorrectly form the belief that filing his corporation tax return was sufficient to meet his all his filing obligations. It is also clear he operated on that basis.

60. It is often said that ignorance of the law is no excuse; however, that is not the case where the ignorance arises from misinformation provided by the very government body which imposes the obligation, in this case HMRC. While I appreciate the HMRC operative was trying to help Mr Hampel, statements were made by him/her on 28 March 2017 on which Mr Hampel relied and which led Mr Hampel to form the view that all that he was required to do was file his corporation tax return in order to make a return of both the company's and his own income.

61. I consider, had it been the cause of the default, then that misunderstanding would amount to a reasonable excuse as HMRC ought not to penalise where the mistake arose from misleading information they provided. However, it is also clear that a reasonable excuse (or at least a succession of reasonable excuses) must exist from or before the due date for the tax return. The misunderstanding arose in a call which took place on 28 March 2017; the return was due to be filed on 31 January 2017.

62. Mr Hampel has, in my view, a reasonable excuse for not filing his 15/16 personal tax return from 28 March 2017 until the date it was filed (which was the date on which the misunderstanding was rectified). But, as I have said, he does not have a reasonable excuse for the period 31 January to 28 March 2017.

63. That means I cannot discharge any of the penalties in respect of the late filing of his 15/16 return on the grounds of reasonable excuse.

A belief that an employed person was not liable to file a tax return?

64. Mr Hampel did not suggest logon difficulties were the cause of his late filing of his tax return for the next year. His explanation for that late filing was that he thought self-assessment was tied to having business income and, as by 16/17 he had become employed, and paid his tax via PAYE, he thought he no longer had to file a self-assessment return.

65. His evidence was that he later filed a tax return only because he needed it as proof of income in order to secure some financial benefit for his child. He thought he was filing voluntarily.

66. I have already found that HMRC sent him a notice to file (in the form of a blank tax return) for tax year 16/17; he effectively admitted that he didn't remember getting specific letters from HMRC and that he was very stressed by all the correspondence he was getting from HMRC. I have not accepted as reliable his denial that he received the notice to file.

67. I think he did receive the notice to file but ignored it, and then forgot it, because he thought, for the reasons he gave, that it did not apply to him. He was mistaken and I am unable to find that mistake reasonable: he should have clarified the position by ringing HMRC and not merely by making assumptions.

68. I am unable to find that he had a reasonable excuse for not filing his 16/17 tax return on time.

SPECIAL CIRCUMSTANCES

69. That is not the end of the appeal as I must also consider any special circumstances.

70. Sch 55 of the FA 2009 gives HMRC power to reduce penalties for special circumstances, although in Mr Hampel's case, HMRC made no reduction for special circumstances.

71. Then §22(3) of Sch 55 provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of special circumstances was 'flawed', in the sense that HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision; a decision by HMRC is also 'flawed' in this sense if HMRC simply failed to think about the matter at all.

Was HMRC's decision on special circumstances flawed?

72. I find that at the time the penalties were imposed, HMRC never considered the possibility of remitting the whole or part of the penalties due to special circumstances: this is obvious because the penalties were imposed automatically by a computer and without knowledge of any of Mr Hampel's particular circumstances. The first occasion on which HMRC could consider special circumstances was on review of the penalties. HMRC issued their review letters in respect of both years' penalties on 16 July 2019. As part of their review, HMRC considered as possible special circumstances:

- (a) Mr Hampel's previous tax return filing history;
- (b) His contact with HMRC by telephone and letter;
- (c) His failure to provide evidence of technical issues he had with logging in.

The officer conducting the review concluded that there were no special circumstances.

73. So in order to decide if I can consider special circumstances, I have to first decide whether HMRC's decision on special circumstances was flawed. I consider that HMR failed to take into account some relevant facts when considering special circumstances. There were two matters which were relevant and which HMRC did not consider:

- (a) HMRC failed to consider Mr Hampel's low income and the proportionality of the penalties; and
- (b) HMRC failed to consider whether there was a good reason for Mr Hampel's failure to file for a part of the time for which penalties accrued which would have been a reasonable excuse had it extended for the entire period.

74. For either and both of these reasons, HMRC's decision on special circumstances was therefore flawed, and the Tribunal is entitled to remake it.

Tribunal's decision on special circumstances

75. I therefore move on to consider whether this Tribunal finds that there are special circumstances. In order to make a decision on this, I must consider what the legislation means by 'special circumstances'.

76. At [74] of *Barry Edwards* the Upper Tribunal said, in effect, that special circumstances means special circumstances, by approving what the FTT had said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [101]

....What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.

Special circumstances and proportionality

77. *Barry Edwards* [66] makes it clear that lack of proportionality is something to be considered as a special circumstance:

.... Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, 5 been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is in the context of that specific jurisdiction that the question of proportionality must be considered.

78. I would comment that the legislation precludes lack of ability to pay being special circumstances but that is not the same issue as whether a penalty is proportionate. Ability to pay looks at the taxpayer's means at the time the penalty is due to be paid: proportionality is a much broader question which will include, but not be limited to, the amount of the penalty imposed.

79. The reason why the Tribunal is said to have the power to consider the proportionality of penalties is that taxpayers are given the right to protection of their property, and that therefore any penalty that deprives them of property must be proportionate. What 'proportionality' means was explained in *International Transport Roth* [2002] EWCA Civ 158 where it was said that to lack proportionality a penalty must be 'not merely harsh but plainly unfair'. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC).

80. These cases indicate that the penalty legislation as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate in its particular circumstances, without the entire scheme of the legislation being disproportionate.

81. The Upper Tribunal considered the Sch 55 penalty regime in *Barry Edwards* and concluded that it was proportionate:

[85] In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on 40 time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

82. The aspect of alleged disproportionality in that case was the fact the penalties were payable even if no tax was due. The Upper Tribunal said that that was proportional:

[86]. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances

where no tax is ultimately 20 found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

83. It is therefore not open to this Tribunal, for the reasons given by the Upper Tribunal, to take the view that a penalty for late filing is disproportionate simply because the taxpayer owed little or no tax, as is the case here. It is proportionate for the Government to require timely tax returns and to penalise subjects who do not make timely tax returns even where no tax is owing.

84. However, as I have said, penalties that are proportionate in general can nevertheless be disproportionate in the particular circumstances of any particular taxpayer. Mr Hampel says that the penalties levied on him are disproportionate when compared to his low income and the nature of his offence.

85. Mr Hampel gave evidence in the hearing that his income at the time was in the order of £9,000. There was no documentary evidence of this. For reasons given at paragraph 10 above, I have found his income was just over £7,000 in 15/16 and just over £4,000 in 16/17. His income in the relevant years was even lower than he recollected it to be.

86. It is obviously reasonable for a taxing authority to require a subject to make a return of their income whether or not that income is low or high and whether or not tax is outstanding at the date of the return. But it is clearly possible for a penalty imposed for failure to make a return to be disproportionate when compared to the taxpayer's income. This is not the same issue as dealt with in paragraph 82 which was whether tax was outstanding at the time the return was due; nor is it a question of whether the taxpayer can afford to pay the penalties. It is simply that fixed penalties are clearly more onerous on a taxpayer with few resources than on a taxpayer with large resources. And while fixed penalties can clearly be justified for many reasons, it must be possible in extreme circumstances for a large fixed penalty to be plainly unfair to someone with little or no resources.

87. In the case of *Haines* [2018] UKFTT 471 (TC) I ruled that fixed penalties of £1,300 in one year was disproportionate to someone with an income of £6,000 per year, particularly when I took into account the limited culpability for the offence. I allowed the appeal to a large extent on the basis of special circumstances.

88. In 15/16, Mr Hampel had income of just over £7,000 and has been fined £1,300. Mathematically, the fine amounts to very nearly one fifth of his income. That fine was imposed for filing his return about 8 months late: it was not imposed for a total failure to file; nor was it the case that Mr Hampel paid any tax late. Moreover, it was imposed in circumstances where, however ineptly, he had made attempts to comply with his obligations and, as I have found at paragraph 62, in circumstances where misinformation from HMRC was to blame for the continued late filing

89. In my view, being fined one fifth of his income for this offence was plainly unfair.

90. In 16/17, Mr Hampel had income of just over £4,000 and has been fined £1,300. Mathematically, the fine amounts to one third of his income. The fine was imposed for filing his tax return just over 6 months late. It was not imposed for a total failure to file; nor was it the case that Mr Hampel paid any tax late. While his behaviour was careless, and must have involved ignoring communications from HMRC, I am satisfied his late filing was not deliberate.

91. In my view, being fined one third of his income for this offence was plainly unfair.

92. I consider that the fines in both years lacked proportionality for the reasons given above and that there were special circumstances.

Special circumstances and partial reasonable excuses

93. One of the most common special circumstances Tribunals have found is where the taxpayer has a partial reasonable excuse: this occurs where the taxpayer has no reasonable excuse for his initial failure to file, but his prolonged failure to file, and his accumulation of liability to the more substantial penalties has arisen, because of something that would have been a reasonable excuse had it existed for the entire period of the default.

94. While it is possible that such a situation might not always amount to special circumstances, I consider that in this case it does. The situation is 'special': the later higher penalties are substantially unfair and could not have been intended by Parliament. That is the case here where, as I have found, HMRC were responsible for the misunderstanding that caused Mr Hampel to delay filing his personal tax return from 28 March to 30 October 2017. Mr Hampel clearly would have filed it at the same time as his company tax return had he not been, however unintentionally, misled by HMRC.

95. I consider that this misunderstanding for which HMRC were responsible amounts to special circumstances and that in the circumstances it is right to reduce to nil the daily penalties and six month penalty charged for the late filing of the 15/16 return. This is because I consider that, without that misunderstanding, Mr Hampel would have filed his 15/16 return at the same time as his company return which was on or around 28 March 2017, such that neither daily penalties nor the sixth month penalty would have been incurred.

CONCLUSION

96. I have found the late filing and six-month late filing penalties were properly imposed: I have found that both the 15/16 and 16/17 daily penalties were not proved to have been properly imposed because HMRC did not prove that they sent a correct warning letter. As I stated in paragraph 44, the appeal against the daily penalties imposed in both years is therefore ALLOWED.

97. I have found that Mr Hampel did not have a reasonable excuse for filing his two personal tax returns late. However, I have found that there were special circumstances in respect of both years. Where there is special circumstances, the Tribunal is able to make up its own mind as to how much, if at all, the penalties should be reduced.

98. In respect of 15/16, I have found that there were two special circumstances. Firstly, the penalties imposed (£1,300) lacked proportionality because of Mr Hampel's low income; secondly, I have found that he was misled, however innocently, by HMRC and that was the reason that in 15/16 his failure to file continued beyond 28 March 2017. In these circumstances, I would allow the appeal against the six month late filing penalty and the daily penalties – although in the case of the daily penalties the appeal has already been allowed for reasons given above.

99. In conclusion, for 15/16 I ALLOW the appeal against the daily penalties and the six month penalty. The appeal against the initial £100 late filing penalty is not allowed as I do not consider it disproportionate nor has Mr Hampel any reasonable excuse for his failure to file by 31 January 2017.

100. In respect of 16/17, I have found that Mr Hampel had no reasonable excuse but there were special circumstances in that the total of the penalty imposed (£1,300) lacked proportionality due to Mr Hampel's low income. Although I have allowed the appeal against a part of this total on the basis the daily penalties were not properly imposed, that does not alter the position that as imposed, the penalties lacked proportionality. I need to consider what

would have been proportionate. My view is that the initial £100 late filing penalty was proportionate, and that a further penalty once the late filing continued beyond six months would also have been proportionate as, unlike the previous year, Mr Hampel had no good explanation for the continued late filing.

101. In conclusion, for 16/17 I ALLOW the appeal against the daily penalties on the additional grounds of lack of proportionality. I DISMISS the appeal against the initial late filing penalty of £100 and the six month late filing penalty of £300.

102. In summary, I ALLOW the appeal against £2,100 worth of the penalties. Mr Hampel remains liable to pay £500.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

103. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 28 APRIL 2021