



TC02795

Appeal number: TC/2012/7656

INCOME TAX – penalty for late payment of income tax balancing payment – whether tribunal has jurisdiction where HMRC’s decision flawed – yes – whether tribunal is bound to allow the appeal where HMRC’s decision flawed – no – whether accountant’s negligence or fact owed money by Legal Services Commission amounted to reasonable excuse or special circumstances - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL DUFFY

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 16 July 2013

The Appellant in person

Mrs Gloria Orimoloye, officer of HMRC, for the Respondents

DECISION

1. The appellant appeals against a 5% late payment penalty of £395 imposed on him on 18 April 2012 in respect of his late payment of income tax for the year ending 5 April 2011.

Preliminary point on flawed decision making

2. The appellant raised a preliminary point on the effect of HMRC reaching a flawed decision. He had appealed to HMRC against the penalty on 26 April 2012. In his notice of appeal he set out 7 grounds of appeal.

3. An HMRC officer, Mr Priest, replied to his appeal on 18 May 2012. This letter read as follows:

Appeal against penalty on tax paid late

HMRC view of your appeal and offer of review

This letter requires action within 30 days

I have considered your appeal against the 30 day penalty for not paying the tax that you owe on time for the tax year ended 5 April 2011.

I am sorry to tell you that I do not agree that you have a reasonable excuse for not paying your tax liability by the due date.

About reasonable excuse

The law says.....

.....

Why I do not think that you have a reasonable excuse

Unfortunately failure by tax agent to notify you of sums to be paid is not a reasonable excuse. It is the responsibility of the taxpayer to ensure that payments are made on time.

Action to take within 30 days of this letter

If you accept my decision, please write to let me know as soon as possible.

If you think that my decision is wrong, and you still think you had a good reason, you can do one of two things.

- You can ask HMRC to carry out an independent review of my decision; or
- You can continue your appeal by sending it to HM Courts & Tribunal Service.

.....

The letter continued in standard form for another page setting out exactly how to ask HMRC for a review or make an appeal to this Tribunal.

4. Mr Duffy's response to this letter was to ask for a review of this decision 'without prejudice' to a claim that Mr Priest's letter was so fundamentally flawed that it did not amount to a decision, or, as required by s 49C Taxes Management Act 1970 ("TMA") did not amount to a "view" on his appeal. This was because, under the
5 heading "Why I do not think that you have a reasonable excuse" it only referred to one of Mr Duffy's grounds of appeal (a failure by his tax agent) and made no reference to the other six.

5. Another HMRC officer carried out the review and notified the conclusion to Mr Duffy by letter dated 17 July 2012. Mr Duffy appealed the reviewed decision to this
10 tribunal, again 'without prejudice' to his claim that Mr Priest's letter was fundamentally flawed, that therefore the review was invalid, and that therefore the Tribunal was bound to allow his appeal.

6. There are at least three issues in Mr Duffy's claim that the appeal should be allowed because Mr Priest's decision was flawed: the first is, of course, whether or
15 not Mr Priest's view was flawed or at least so flawed it was not a decision or 'view' at all; the second is whether, if it was, does this Tribunal have jurisdiction to hear this appeal; and the last is what would be the remedy to which Mr Duffy would be entitled if Mr Priest's letter did not amount to a 'view'?

Was Mr Priest's letter fundamentally flawed?

7. Again this question breaks down. Mr Priest was required by s 49C TMA to
20 state "HMRC's view of the matter in question". The matter in question was Mr Duffy's appeal on seven grounds against the imposition of the penalty for late payment.

8. The options are that:

- 25
- Mr Priest's letter was a 'view' which was not flawed in the public law sense;
 - Mr Priest's letter was a 'view' which was nevertheless a flawed view;
 - Mr Priest's letter was not a 'view' at all.

9. No one suggested that the first option was the correct one here. HMRC had
30 recognised and apologised in its review letter for the inadequacies of Mr Priest's letter and in particular its failure to deal with all 7 of Mr Duffy's grounds of appeal. A public body is required to consider all relevant matters, which were in this case Mr Duffy's grounds of appeal, and Mr Priest's letter fails to do this.

10. HMRC's position was that, despite its inadequacies, Mr Priest's letter was nevertheless effective as a 'view' as required by law.

35 11. Mr Duffy's submission was that Mr Priest's letter was not a view at all.

12. My decision which I announced at the hearing, without hearing from HMRC, was that Mr Priest's letter was clearly a 'view' which dismissed Mr Duffy's appeal.

However flawed, it was quite apparent to a reader of the whole of the letter and not just the offending paragraph that HMRC's "view" was to reject Mr Duffy's appeal and that the next step for Mr Duffy was to ask for a review or to appeal to the Tribunal.

5 13. In other words, my decision is that as long as it is clear whether the appeal has
been allowed or dismissed, then there is a decision or 'view'. While courts or
tribunals or persons (such as HMRC officers required to state HMRC's view)
exercising an appellate jurisdiction are required as a matter of natural justice to state
reasons for their decisions, a failure to fully or properly state their reasons would not
10 invalidate the 'view' at least in the case of s 49C TMA.

14. This is because Parliament clearly intended the remedy for an inadequate or
wrong 'view' to be a review by an independent HMRC officer and ultimately by this
Tribunal. As this Tribunal has both the jurisdiction to determine the law and find the
facts, it is not in any way dependant on the 'view' of the HMRC officer in reaching its
15 own decision. Similarly the officer carrying out the review is not fettered in any way
in his consideration of the appeal by the 'view' expressed by his colleague. While Mr
Duffy seems to think there would be merit in remitting decisions to the HMRC officer
who gave the initial 'view' unless and until that officer gave a 'view' on all grounds
of appeal put to him, I cannot. It would unnecessarily extend the appeal process. The
20 remedy intended by Parliament for a flawed 'view' under S 49C was firstly a review
by HMRC and secondly an appeal to this tribunal.

15. That is not to say that there could never be a purported 'view' given by HMRC
which was not in fact a 'view' at all. For instance, if the offending paragraph had
been the only paragraph in the entire letter, it would have been far less clear to anyone
25 whether Mr Priest had dealt with the entire appeal or was merely rejecting one of Mr
Duffy's grounds of appeal but leaving the others outstanding. Had the letter just
comprised those two sentences, then I do not consider that it would have been a
'view' at all.

Jurisdiction where 'view' flawed

30 16. As I decided that Mr Priest's letter was a 'view' within s 49C, the effect is that
the review which Mr Duffy requested was properly carried out following a "view"
and that therefore this Tribunal had jurisdiction to consider an appeal against that
reviewed decision under s 49G TMA, and that is what I do below.

17. My opinion, although not relevant on the facts of this case, is that if Mr Priest's
35 letter had not amounted to a 'view' at all, the review of that 'view' would be
ineffective. It would not be a review carried out under s 49C at all because of
HMRC's failure to state their 'view' as required by s 49C. And to that extent I would
have agreed with Mr Duffy

18. However, that would not remove jurisdiction from this Tribunal. The Tribunal
40 has jurisdiction in any case where the appellant, having notified an appeal to HMRC,
then notifies an appeal to the Tribunal: see S49A(c). The appellant in this case had

5 both notified an appeal to HMRC and notified an appeal to the Tribunal. This would give the Tribunal jurisdiction under S49A(c) to consider an appeal against the imposition of the penalty. It would not be an appeal against the review decision but in practice that makes no difference as the Tribunal must and does find its own facts and reaches its own conclusion on the law.

19. So it seems that whether or not Mr Priest's decision was a 'view' this Tribunal has jurisdiction to hear Mr Duffy's appeal against the imposition of the penalty.

Remedy for flawed view

10 20. While I have considered Mr Duffy's submission in the light of what impact it would have on this Tribunal's jurisdiction, Mr Duffy's position was not really that this Tribunal would not have jurisdiction if Mr Priest's decision was invalid, but that the Tribunal would have jurisdiction and must allow his appeal.

15 21. This is a somewhat extraordinary submission. He is saying that the Tribunal must allow his appeal where HMRC makes a decision which is flawed in the public law sense, irrespective of whether the decision was right or wrong.

22. I cannot agree. It does not matter whether the decision, view or the review were flawed decisions. The Tribunal was given full appellate jurisdiction. This follows from Schedule 56 to the Finance Act 2009. Regulation 13(1) provides that:

20 "P may appeal against a decision of HMRC that a penalty is payable by P."

Regulation 15 provides that:

"On an appeal under paragraph 13(1) that is notified to the Tribunal, the tribunal may cancel or affirm HMRC's decision."

25 23. This makes it quite clear it is full appellant jurisdiction as the Tribunal can cancel or affirm HMRC's decision that a penalty is payable. Therefore, the question for this Tribunal is whether a penalty is payable. The question is not whether HMRC reached a proper decision in the public law sense.

30 24. Full appellate jurisdiction is the norm for this tribunal and clearly intended in appeals under s 49A-G TMA. Where Parliament intends limited supervisory jurisdiction, it makes this clear, as with the hybrid jurisdiction in Regulation 15 with respect to special circumstances. And even if Parliament had intended the Tribunal to have a supervisory role over the imposition of penalties, it most certainly does not follow that this Tribunal would allow an appeal merely because HMRC's decision was flawed. Where a Tribunal has supervisory jurisdiction, where it finds the
35 decision maker's decision was flawed, it would normally remit the decision. It could only allow the appeal where it was obvious that HMRC acting properly would have allowed the appeal.

25. It is certainly the case that this Tribunal cannot allow the appeal simply because HMRC reached a flawed decision in the public law sense irrespective of whether that

was the right or wrong decision on the merits of the case. This Tribunal can only allow the appeal if HMRC reached the wrong decision on the merits. And that is what I proceed to consider below.

Natural Justice

5 26. But before I do, I mention in passing that I cannot agree with Mr Duffy that the process as I have analysed it leads to any breach of natural justice. Mr Priest does not appear in his written decision to reflect all the grounds of appeal Mr Duffy put to him: it therefore appears to be a flawed decision in the public law sense. But the appeals process allows Mr Duffy a complete re-hearing of his grounds of appeal, both fact and
10 law, before an independent tribunal. That cannot be said to be a breach of natural justice. It is not.

27. Further, if this tribunal didn't have full appellate jurisdiction, this would be of no help to the appellant: it would mean that if the Tribunal considered HMRC's decision flawed in the public law sense, the Tribunal would have to remit the case for
15 reconsideration, which could greatly draw out the appeal process. Indeed it would mean that in any case of a flawed decision, "view" or "review" the appeal would have to be remitted, and perhaps re-remitted many times, until the HMRC decision maker had made reference to every ground of appeal in detail. This would not best serve justice.

20 28. Lastly, Mr Duffy's suggestion was that this tribunal has some kind of hybrid jurisdiction which would give it the power to allow an appeal (full appellate jurisdiction) where HMRC reached a public law flawed decision (supervisory jurisdiction). There would be no natural justice in this: if Mr Priest's decision was right but for the wrong reasons then there would be no natural justice in allowing the
25 appeal.

29. This tribunal has full appellate jurisdiction. I will therefore consider whether HMRC were right to impose a late payment penalty on Mr Duffy. Whether HMRC's original decision, view or review were flawed in the public law sense is irrelevant to my consideration of Mr Duffy's liability to the penalty. (This is subject to one small
30 exception which I mention below in relation to consideration of 'special circumstances'.)

30. So I move on to consideration of the merits of the case.

The facts

31. The appellant is a self-employed barrister. His work at the relevant time was
35 entirely funded by the Legal Services Commission ("LSC") as he worked exclusively for clients who had been awarded legal aid.

32. At the relevant time (2011-2012) the LSC only paid barristers on completion of a case. Completion would occur on the earlier of a guilty plea, a conviction or an

acquittal. The LSC would only pay after the barrister made a claim following completion of the case.

33. This meant Mr Duffy's income flow was very irregular. If he was tied up on a number of long cases, he might not receive any income for months on end.

5 34. The LSC had a target date of payment of claims within 30 days of receipt of a claim but it was well known to Mr Duffy that the LSC had never achieved its target and it usually paid within about 42 days of a claim, but sometimes it took much longer.

10 35. Mr Duffy decided around Easter 2007 to employ a chartered accountant to prepare and file his tax returns. Thereafter, in June each year Mr Duffy submitted to his accountant all his records to enable him to agree with HMRC his payments on account for the next tax year and ultimately to file his tax return.

15 36. He did not instruct his accountant to inform him by a particular date each year of what his liability on 31 January would be, but in the first three years that the accountant prepared his returns the accountant had always informed Mr Duffy in December of what his liability to tax would be on the next 31 January, and Mr Duffy expected him to continue to do so.

20 37. However, the accountant did not do this in the fourth year, which was December 2011. Despite the expectation that his accountant would give him warning no later than the end of the calendar year of what tax he would be liable to pay on 31 January next, Mr Duffy did not make enquiries when his accountant failed to do this by the end of 2011.

25 38. I find that the reason for this was that on 1 December 2011 Mr Duffy had received a notification from HMRC that he had no tax to pay. I accept Mr Duffy's evidence that he believed that this related to his tax liability for the tax year 10/11. I consider this in more detail below, but in the meantime I continue with the chronology.

30 39. Mr Duffy accepted that he knew and expected that, despite (as he believed) being told he had no further tax to pay for 10/11, he would nevertheless have a payment on account for 11/12 to make on 31 January 2012. He did not chase up his accountant to find out what this would be despite knowing, as I have said, that for the previous 3 years his accountant had told him the figure in December. His explanation for not contacting his accountant is that he did not expect the payment on account to be any more than he could afford to pay out of cash reserves because he knew his turnover was down and he had (he thought) been notified that no further tax was due
35 for 10/11 and he thought that all this would impact on how much HMRC expected him to pay on account.

40 40. In about mid January, his accountant wrote to him with his tax calculation from which it was apparent to Mr Duffy that his accountant had not looked at the figures he had sent him in June 2011. After contact with his accountant to point this out, the accountant found the missing figures, re-calculated Mr Duffy's tax position, and by

letter of 27 January informed him that he should pay £11,351.12 on 31 January. This comprised £7910.64 in tax liability and the rest was a payment on account for 11/12. On the same day the accountant filed Mr Duffy's self assessment return online.

5 41. At this point Mr Duffy, who had had no previous cause for complaint with his accountant, now felt completely let down by him as the accountant had not given him early warning of a substantial tax liability. His accountant would not accept that he was to blame and Mr Duffy dispensed with his services.

42. Mr Duffy did not have sufficient available cash reserves to pay the tax liability on the due date, which was only 4 days after discovering his tax liability.

10 43. At the time, he was owed by the LSC a sum greater than the outstanding tax liability. He reviewed the various invoices that he had submitted to LSC which were outstanding at that time, and estimated the likely dates on which LSC would pay them taking into account their 42 day turnaround time. From this analysis, he did not expect the LSC to pay him sufficient of the monies owed to him in time to enable him
15 to pay his tax liability in 4 days time nor indeed in the next month.

44. He decided instead to realise an investment. His evidence on this was a little confused but I find that he knew that it would take at least a month and possibly longer for this investment to be realised, and he did not chose to investigate the possibility of realising it earlier and paying a penalty for failing to give notice. In the
20 event Mr Duffy did not receive the funds from this investment until late March and he paid his tax liability in full on 30 March 2012.

45. He did not consider the possibility of obtaining a short term loan which could have been repaid out of the realised investment, in order to bridge the gap between the tax due date and the date on which the investment would be realised.

25 46. He did not approach HMRC for a time to pay agreement. He says this was not offered to him and in any event it was not appropriate to ask for stage payments: he had the money to pay but it was going to take time to realise it. He also said that correspondence with HMRC takes several months and the payment was due in 4 days.

30 47. On 26 March 2012 Mr Duffy paid his wife's second payment on account (due 31 July 2012) early and on 20 June 2012 he paid his own second payment on account (due 31 July 2012) early.

The December notice

35 48. The notice which Mr Duffy received on 1 December 2011 was not produced in evidence. Mr Duffy no longer has it. HMRC did not produce a copy of it either but they did produce print outs of Mr Duffy's account with HMRC at the relevant times. What the statement to December 2011 shows is that the only sum owing by Mr Duffy mid-2011 was his second payment on account for 10/11. This was not paid until September 2011, but his payment brought his account into a nil balance. It is

therefore highly probable that any statement of his account sent to Mr Duffy on 1 December 2011 would have shown nothing owing.

49. And I accept Mr Duffy's unchallenged evidence that he received from HMRC a notification on 1 December 2011 that as at that point in time he had nothing to pay.
5 But this does not tell me whether it was reasonable for Mr Duffy to believe that this notice was telling him that he had no tax to pay on 31 January 2012.

50. Mr Duffy maintains that the notice must have been referring to his tax liability for 10/11 because the tax year 11/12 was still in progress. However, I find it highly improbable that HMRC would have told Mr Duffy on 1 December 2011 that he had
10 no tax to pay for 10/11 as, at the date of the notice, HMRC did not have Mr Duffy's tax return for 10/11 and therefore HMRC did not know if there would be a balancing payment due on 31 January. It is possible that the notice was referring to 09/10 or merely to the payments on account for 10/11, or simply reflecting the state of his account. I am satisfied that on the balance of probabilities it did not tell Mr Duffy that
15 he would have no tax to pay for tax year 10/11 on 31 January 2012.

51. I am also satisfied that Mr Duffy honestly believed at the time that it did tell him he had no balancing payment due on 31 January and this explains why he acted as he did, and in particular why he did not chase up his accountant. Who is at fault for the misunderstanding? Was the notice clearly worded and the mistake made by
20 Mr Duffy; or was the notice badly worded and misleading?

52. I do not have a copy of the notice to judge for myself whether the notice was misleading. The burden of proof is on Mr Duffy. Therefore, I conclude that Mr Duffy has not satisfied me that it was reasonable for him to have concluded on receipt of that notice that he was not liable to pay a balancing payment on 31 January. His
25 view was honestly but mistakenly held: but, in the face of this lack of evidence, I cannot find that it was reasonably so held.

The law

53. Mr Duffy did not dispute the late payment of the tax. All parties accepted the tax was paid on 30 March 2012 having been due on 31 January 2012 and a penalty
30 was payable under paragraphs 2 & 3 of Schedule 56 of the Finance Act 2009 unless there was a reasonable excuse.

54. Regulation 16 of Schedule 56 of the Finance Act 2009 provides:

“Reasonable excuse

(1) Liability to a penalty under any paragraph of this Schedule does not
35 arise in relation to a failure to make a payment 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
40 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

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(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.”

55. The Tribunal also has jurisdiction in some instances to consider whether the penalty should be reduced because of “special circumstances”. Neither party made any reference to this. However, some of Mr Duffy’s grounds of appeal could not be a reasonable excuse and so could only be relevant if they amounted to ‘special circumstances.’

56. Paragraph 9 of Schedule 56 provides as follows:

“Special reduction

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(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) ‘special circumstances’ does not include –

(a) ability to pay, or

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(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

....”

57. Perhaps ironically in view of Mr Duffy’s submissions on Mr Priest’s flawed decision, this tribunal can only consider ‘special circumstances’ where HMRC’s decision on ‘special circumstances’ was flawed in the public law sense. This is because regulation 15 provides as follows:

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“15

...

(2) On an appeal ...the tribunal may –

...

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(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 9 –

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(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.

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(4) In sub-paragraph (3)(b) ‘flawed’ means flawed when considered in the light of the principles applicable in proceedings for judicial review.”

In other words, a penalty may be reduced by HMRC on the grounds of 'special circumstances'. HMRC did not reduce Mr Duffy's penalty. But on appeal this tribunal may also reduce Mr Duffy's penalty on the grounds of 'special circumstances' but *only* if HMRC's decision not to do so was flawed in the public law sense.

58. As this is an appeal against a review decision, whether I can consider special circumstances depends on whether the review officer's decision was flawed in its consideration of special circumstances. Mr Duffy may find this ironic as Mr Priest's decision is clearly flawed on this point as he fails to consider special circumstances at all.

59. Was the review officer's decision flawed? This letter runs to some three and half pages and deals with some 15 separate points made in Mr Duffy's various letters (I have summarised these down to 7 grounds below). But again it entirely fails to mention 'special circumstances' and therefore I conclude that it was flawed in its consideration of special circumstances. Therefore, I can and do consider special circumstances when reaching my decision below.

60. But what are special circumstances? There is not a great deal of authority on this. It will normally be something unusual. In an entirely different context, the Court of Appeal in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H said:

"...to be special the event must be something out of the ordinary, something uncommon; ..."

61. In *Warren* [2012] UKFTT 57 (TC) the Tribunal said of "special circumstances" in the context of the new penalty regimes:

"[53.] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.

[54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

62. I consider that a special circumstance would be something that had not caused the default. The thing that *caused* the default could only justify cancellation of the

penalty if it amounted to reasonable excuse. If it was causative, but not a reasonable excuse, it could not be special circumstances. The special circumstance would have to be something that was not causative of the late payment but nevertheless justified cancellation or partial cancellation of the penalty. It might include HMRC's behaviour (see *Morgan & Donaldson* [2013] UKFTT 317 (TC)) or that the taxpayer was HMRC's creditor as well as debtor (*Horne*). It might include a reason, albeit not the cause of the original late payment, why tax continued to be paid late such that a second penalty was incurred (see *Morgan & Donaldson* [2013] UKFTT 317 (TC)). I agree with the Tribunal in *Warren* that special circumstances would normally, but not necessarily, be unusual or exceptional events.

Appellant's submissions

63. The appellant considered that a number of matters amounted to a reasonable excuse. They were to extent overlapping and I summarise them as follows:

- (1) His primary ground was that, for the 8 weeks or so the tax was due and outstanding, the LSC actually owed him more money than the amount of the outstanding tax. HMRC and the LSC are both part of the United Kingdom Government.
- (2) The December Notice misled him into believing he had nothing to pay
- (3) He was the victim of his accountant's negligence;
- (4) The public purse has not suffered as he paid other tax liabilities early;
- (5) The public purse has not suffered as he paid interest on the late paid tax;
- (6) The tax return was filed on time;
- (7) He did not receive a statement from HMRC setting out his tax liability until 22 February 2012.

Decision

Statement not received until 22 February

64. I can deal with this ground of appeal shortly. It cannot be a reasonable excuse. To be a reasonable excuse it must be the reason for the late payment. Mr Duffy's failure to pay the tax was not because he did not know what to pay. On the contrary, he knew what he owed as his accountant had told him on 27 January. He was late paying because he did not have sufficient instantly available cash as at 31 January.

65. Neither can the receipt of the statement on 22 February amount to special circumstances. Mr Duffy was not dependant on HMRC to tell him what he owed. His accountant had already told him this. In any event, had he paid what he owed when he received the statement he would not have been given a penalty (as liability to the penalty does not arise until 30 days after 31 January)

Tax return filed on time

66. This cannot be a reasonable excuse. To be a reasonable excuse it must be the reason for the late payment. Filing the tax return on time did not cause the late payment.

5 67. Neither can it amount to special circumstances. The scheme of the legislation is clear that a penalty is payable for late filing and a separate penalty is due for late payment. Filing on time and avoiding a penalty for late filing is irrelevant to the question of whether the taxpayer is liable to a penalty for late payment.

10 68. Doing what you are obliged to do by law cannot amount to special circumstances.

Other tax was paid early

15 69. This cannot be a reasonable excuse. To be a reasonable excuse it must be the reason for the late payment. Mr Duffy's early payment of other taxes later in 2012 did not cause the late payment on 31 January. His shortage of funds was not caused by paying other taxes early.

70. What Mr Duffy is claiming is that he should be let off the penalty for paying his income tax late because he paid his wife's and his own second payment on account due July 2012 early and that taken in the round there has been no loss to the public purse. Does this amount to special circumstances?

20 71. It does not. Parliament has specifically provided at Regulation 9(2)(b) that "the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another" is not a special circumstance. Although this relates to *over* payments, the obvious intention here is that an *early* payment by one taxpayer (Mr Duffy's wife) does not cancel out a *late* payment by another (Mr Duffy).

25 72. Nor do I consider that Mr Duffy's early payment of his own tax (his second payment on account for 2012) could amount to special circumstances for the same reasons. I do consider that it would be a special circumstance if *at the same time* that Mr Duffy owed his balancing payment for 10/11 (ie from 31 January to 30 March 2012) he had overpaid tax (to which effect see my decision in *Horne* [2013] UKFTT
30 177 (TC)). This is because a taxpayer in that position, as Mr Horne was, could scarcely be said to owe money to HMRC. But this is not the case here. During the period 31 January to 30 March 2012 Mr Duffy owed money to HMRC.

35 73. It is not relevant that later in the same year he paid other tax one month early: as explained in the section below, the penalty is not to compensate for the loss of the use of the money and Mr Duffy's argument amounts to saying that paying other tax early compensated HMRC for the loss of the use of the money due on 31 January for the period it was outstanding. Paying interest, however, as I explain below, is not a special circumstance.

Mr Duffy paid interest on the late paid tax

74. This cannot be a reasonable excuse. To be a reasonable excuse it must be the reason for the late payment. Mr Duffy's payment of interest on the late paid tax clearly did not cause the late payment on 31 January.

5 75. What Mr Duffy is claiming is that he should be let off the penalty for paying his income tax late because he paid interest on the late paid tax and that taken in the round there has been no loss to the public purse. Does this amount to special circumstances?

10 76. It does not. There are many reasons for this. Firstly, Parliament provided for *both* interest and penalties to be payable on the same late payment. It clearly did not intend the payment of interest to discharge the taxpayer from liability to the penalty. Secondly, it is not an 'extraordinary' or even unusual event and certainly not a special circumstance: all late paying taxpayers are liable to interest. Thirdly, the scheme of the legislation is that the interest is to compensate the Government for the late
15 payment: the penalty is a civil punishment to deter future late payments. Interest and penalties complement each other: they are not alternatives. Fourthly, doing what you are obliged to do by law (ie pay interest on late payments of tax) cannot amount to special circumstances.

Mr Duffy relied on a third party

20 77. Reliance on a third party can, in certain circumstances, amount to a reasonable excuse, as set out in paragraph 54 above. However, to be a reasonable excuse it must be the cause of the late payment.

25 78. I am not satisfied that Mr Duffy's reliance on his accountant *caused* his late payment. Mr Duffy's reliance was on his accountant's habit for the previous three years of informing him some time in December of his forthcoming liability to pay tax on the next 31 January. However, Mr Duffy knew by no later than the end of December 2011 that his accountant had not acted as he had in previous years and given him warning of his forthcoming tax liability. Mr Duffy did not contact his accountant to find out why he had not done as he had in previous years.

30 79. So the immediate cause of the late payment was not his accountant's failure to do something, but the fact Mr Duffy did not act on his own knowledge that his accountant had failed to do what he expected him to do. The chain of causation was broken.

80. That is enough to dispose of this ground of appeal.

35 81. But I comment that in any event, to be a reasonable excuse, Mr Duffy's reliance on his accountant must not only have been causative but reasonable. And I do not consider that it was reasonable. Mr Duffy chose to keep his reserves in a form which meant it would take him at least a month and possibly longer to realise them as cash. Yet he was content to rely on his accountant's habit of informing him of his tax
40 liability some time in December each year. This took the risk that if the tax liability

was higher than the sum he had in ready cash, he would be unable to pay the tax on 31 January even if his accountant did follow his normal habit of letting him know sometime in December as that sometime might be too late in December to realise the investments. A prudent person would have asked to be told his liability, at least in
5 rough terms, no later than end of November so that he could take an informed decision whether it would be necessary to start realising his investments.

82. But in addition, I note that the accountant did tell Mr Duffy of his liability four days before it was due to be paid. Mr Duffy did not have the ready funds to pay this. But neither did he investigate the possibility of obtaining a loan nor of realising the
10 investment subject to payment of a penalty, nor of arranging a time to pay agree with HMRC. As he had the funds, albeit not immediately available, to pay the tax, it seems me more likely than not that he could have obtained a loan. For this reason too, I would not consider the accountant's failings to amount to a *reasonable* excuse for failing to pay the tax on time. This is because Mr Duffy had not taken all
15 reasonable steps to try to pay the tax by the due date.

83. Lastly, the legislation specifically provides that "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". In respect of this I repeat what I said in the immediately
20 preceding paragraph. By not asking his accountant to let him know his liability by late November/early December and certainly by not chasing him when he did not contact him by the end of December, Mr Duffy did not take reasonable care to avoid the failure.

84. So the accountant's failings do not amount to a reasonable excuse. Could they amount to special circumstances? No; for the same reasons the accountant's failings
25 do not amount to a reasonable excuse they do not amount to special circumstances.

85. I note in passing that at one point in the hearing Mr Duffy seemed to suggest it was his accountant's fault that Mr Duffy owed a balancing payment on 31 January 2012. Mr Duffy seemed to suggest that his accountant should have ensured his
30 payments on account were exactly equal to his ultimate tax liability. As a matter of fact this is not made out. Payments on account are based on previous year's liability and it is quite normal for a balancing payment to be due. As a matter of law it could not be reasonable excuse in any event. It may have caused the liability to pay tax: it did not cause the tax to be paid late.

Mr Duffy was misled by the 1 December 2011 notice

35 86. As I have said, I accept that Mr Duffy honestly believed the notice from HMRC on 1 December 2011 was that he had no balancing payment due for 10/11 to be paid on 31 January. I have also said that Mr Duffy has failed to prove that this honestly held belief was a *reasonably* held belief.

87. For this reason it cannot amount to a reasonable excuse. It was the *cause* of
40 why Mr Duffy did nothing to chase his accountant. He believed he would only have a

small payment on account to make and could do this out of cash reserves. But, as I have said, Mr Duffy has failed to satisfy me that it was a reasonably held belief.

88. Therefore, I find that it follows that as Mr Duffy did not reasonably hold the view that the HMRC notice told him that he would have no tax to pay for 10/11 on 31 January, it is not a reasonable explanation for his failure to chase up his accountant when his accountant failed to inform Mr Duffy in December of what tax would be due on 31 January next year. *Knowing* that it would take at least a month if not longer to realise his reserves, and *not knowing* what his tax liability would be, Mr Duffy should have contacted his accountant in early December rather than wait until mid-January to be contacted by his accountant. Had he done so, it is probable that the situation would have been sorted out in time for him to realise his reserves and pay the tax by the due date.

89. The notice therefore does not amount to a reasonable excuse. Could it amount to special circumstances? No, it could not: as I said above the cause of default could only lead to cancellation of a penalty if it amounted to a reasonable excuse.

Mr Duffy was owed a greater amount of money by the LSC

90. This is not a reasonable excuse. As I have said, to be a reasonable excuse the reason must be causative of the default. It was no part of Mr Duffy's case that he could not afford to pay the tax: he did not claim that he paid the tax late because he had sums outstanding due to him from LSC.

91. As he said, he had the funds. The problem was that the funds were tied up in investments.

92. In any event, lack of funds by itself could not be a reasonable excuse. Only the cause of the lack of funds might be. And while late payment of a debt owing to the taxpayer could be a reasonable excuse, in my view this would normally only be where it was unforeseeable. In this case it was clear that the LSC was a habitual slow payer and in any event Mr Duffy was well aware of this and he had not been relying on overdue payments from the LSC in order to pay his tax liability.

93. Although Mr Duffy phrased his case as reasonable excuse, it came down to saying that it was unjust to penalise him for late payment of tax when at the same time another government body owed him a greater sum than he owed HMRC. This is not a reasonable excuse as it is not causative, but it might be special circumstances.

94. I am of the view that (normally) there would be special circumstances where, although the taxpayer was late in paying tax, he did not actually owe tax as, at the time, the taxpayer had overpaid some other tax. See *Horne* [2013] UKFTT 177 (TC).

95. The position here is not the same as in *Horne*. Mr Duffy owed HMRC tax, and was owed reimbursement of his fee from the LSC. The LSC is a government body but not a part of HMRC.

96. Mr Duffy considered that this made no difference. It is all ‘taxpayer money’. HMRC and the LSC are all part of the government.

97. I am unable to agree that the debt owed by LSC to Mr Duffy amounts to special circumstances. HMRC and LSC are separate legal entities. There can be no
5 oversetting of liabilities owed to one against liabilities owed by the other.

Decision

98. In conclusion, I have determined that this tribunal does have jurisdiction to hear this appeal, and is not bound, by reason of the flawed nature of Mr Priest’s original decision, to automatically allow the appeal. Rather this tribunal must determine the
10 merits of the appeal.

99. I have done so. I have considered Mr Duffy’s various grounds of appeal and concluded that none of them amount to a reasonable excuse or special circumstances. Therefore, I dismiss the appeal and confirm the penalty.

100. This document contains full findings of fact and reasons for the decision. Any
15 party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 23 July 2013