



**TC03988**

**Appeal number: TC/2012/08174**

*INCOME TAX – penalties for failure to comply with information notice – paras 39-48 sch 36 FA 2008 – whether initial penalty notice unreasonable or abusive – No – whether reasonable excuse for noncompliance – No – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MR WILLIAM KERNAHAN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE PETER KEMPSTER  
MRS NORAH CLARKE**

**Sitting in public at Cardiff on 22 July 2014**

**The Appellant did not appear and was not represented**

**Mr Peter Massey (HMRC Appeals Unit) for the Respondents**

## DECISION

### Rule 33

1. The Appellant did not appear and was not represented. Prior to commencement  
5 of the hearing the Tribunal's clerk telephoned the Appellant's representative  
(Freeman & Co) and spoke with Mr Freeman's secretary, who stated that Mr Freeman  
was engaged with a client and was not expected to attend the hearing as he did not  
normally do so. The Tribunal was satisfied that reasonable steps had been taken to  
10 notify the Appellant of the hearing (there were on file notification letters dated 24  
April 2014 to both the Appellant and Freeman & Co) and considered that it was in the  
interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule  
33.

### Matter under appeal

2. Taking together the Appellant's letters to the Tribunal dated 12 November 2013  
15 and 20 February 2014:

(1) There is no appeal (under para 29 sch 36 Finance Act 2008) against the  
taxpayer information notice issued on 7 June 2011 ("the Notice").

(2) There is an appeal (under para 47 sch 36) against both the initial penalty  
of £300 and the daily penalties totalling £5,480 assessed by HMRC for failure  
20 to comply with the Notice.

### Law

3. Schedule 36 Finance Act 2008 provides (so far as relevant):

#### **39**

- (1) This paragraph applies to a person who—  
25 (a) fails to comply with an information notice, ...  
(2) The person is liable to a penalty of £300. ...

#### **40**

- (1) This paragraph applies if the failure or obstruction mentioned in  
30 paragraph 39(1) continues after the date on which a penalty is imposed  
under that paragraph in respect of the failure or obstruction.  
(2) The person is liable to a further penalty or penalties not  
exceeding £60 for each subsequent day on which the failure or  
obstruction continues.

...

35

#### **44**

A failure by a person to do anything required to be done within a  
limited period of time does not give rise to liability to a penalty under

paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

**45**

5 (1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph—

10 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

15 (c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

**46**

20 (1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A —

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

25 (2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

30 (a) the date on which the person became liable to the penalty,

(b) the end of the period in which notice of an appeal against the information notice could have been given, and

(c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

35 ...

**47**

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

40 (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

**48**

- (1) Notice of an appeal under paragraph 47 must be given—
  - (a) in writing,
  - (b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and
  - 5 (c) to HMRC.
- (2) Notice of an appeal under paragraph 47 must state the grounds of appeal.
- (3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.
- 10 (4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—
  - (a) confirm the decision, or
  - (b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.
- 15 (5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.”

**Appellant’s case**

- 20 4. Since the appeal was filed in August 2012 the Tribunal has made extensive efforts to establish the exact grounds of appeal, including case management directions issued by Judge Poole on 15 August 2013.
- 5. Taking together the Appellant’s letters to the Tribunal dated 12 November 2013 and 20 February 2014:
  - 25 (1) The grounds of appeal against the initial penalty are that the penalty notice was “unreasonable and an abuse of process”.
  - (2) The grounds of appeal against the daily penalties are that the Appellant had been given extra time by HMRC to respond until 5 April 2012.

**Respondents’ case**

- 30 6. Mr Massey for HMRC submitted as follows.
- 7. The Notice had not been fully complied with. In particular, the Appellant had initially refused to produce certain documents because of a claim that they were privileged communications (para 23 sch 36 refers). Such a claim would be governed by the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916), which prescribed formal procedures. Those  
35 procedures had not been followed by the Appellant. In any event, the privilege claim (which HMRC consider was misconceived from the outset) had now apparently been abandoned. However, those documents had still not been produced, in breach of the requirements of the Notice.

8. The initial penalty had been assessed on 11 November 2011 at £300. Daily penalties had been assessed on 28 March 2012 at £5,480. Appeals against both items were the matters now before the Tribunal. Further daily penalties assessed on 1 August 2012 at £7,560 had later been cancelled, as HMRC had accepted that assessment was out of time.

9. The disputed penalties had been assessed and calculated in accordance with the relevant statutory provisions. No argument had been supplied by the Appellant as to why the initial penalty notice was “unreasonable and an abuse of process”.

10. HMRC did not accept that they had indicated that compliance with the Notice by 5 April 2012 would be acceptable; the deadline of 5 April 2012 related to a separate matter. However, even if the Appellant had made an incorrect assumption, he had still not complied with the Notice by 5 April 2012 and thus the Appellant is in breach of any purported agreement.

### **Consideration and Conclusions**

11. The onus of proof (to the standard of balance of probabilities) rests with the Appellant.

12. We conclude:

(1) The Appellant appears to accept that, for whatever reasons, he has failed to comply with the Notice in certain respects. That is enough to give a *prima facie* liability for the penalties.

(2) There is no evidence that the initial penalty notice was either unreasonable or “an abuse of process”; it merely levies the statutory non-compliance penalty.

(3) Even if – which HMRC do not accept – HMRC indicated that compliance with the Notice by 5 April 2012 would be acceptable, the Notice was still not complied with even with that (disputed) concession and thus the Appellant is in breach of any purported agreement as to an extension of time.

13. Although not advanced by the Appellant we have out of fairness considered whether the Appellant had any reasonable excuse (as defined by para 45 sch 36) for his failure to comply with the Notice but we cannot find any evidence of such a reasonable excuse.

14. For the above reasons we dismiss the appeal against both the initial and daily penalties.

### **Decision**

15. The appeal is DISMISSED and the initial and daily penalties are confirmed in the amounts assessed.

16. This document contains full findings of fact and reasons for the decision and replaces the summary decision issued on 24 July 2014. Any party dissatisfied with

5 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.

10

**PETER KEMPSTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 3 September 2014**