



TC04734

Appeal number: TC/2014/06599

CAPITAL GAINS TAX – Late payment penalties – whether time to pay arrangement in force – whether penalty notices were a breach of human rights – appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEPHEN FINCH

Appellant

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

Sitting in public at Fox Court, London on 22 May 2015

The Appellant in person

Hellie Lai, Officer of HMRC, for the respondents

DECISION

Introduction

- 5 1. The appellant, Mr Finch, was appealing against three late payment penalties in relation to late paid capital gains tax. The first penalty was for paying more than 30 days late and amounted to £3867. The second penalty was for paying more than 6 months late and amounted to £3612. The third penalty was for paying more than 12 months late and amounted to £3108.

Evidence

- 10 2. HMRC had prepared a bundle of evidence consisting of:
- (1) print outs of HMRC's internal systems relating to Mr Finch's affairs;
 - (2) copies of correspondence between Mr Finch and HMRC; and
 - (3) copies of the legislation that supported HMRC's position.
- 15 3. Mr Finch also presented at the hearing a number of pieces of correspondence between him and HMRC of which HMRC had not kept copies.

Grounds of appeal

4. Mr Finch raised six separate grounds of appeal against the penalties, which we will deal with in detail below. In summary Mr Finch argued that:
- 20 (1) the first two penalties were invalidly issued because a time to pay arrangement was in place (paras 10-20);
 - (2) the third penalty should not have been issued because HMRC had unreasonably rejected a revised time to pay arrangement (paras 36-42);
 - (3) HMRC had conceded that the first two penalties were not due by issuing a letter excluding the penalties (paras 21-26);
 - 25 (4) HMRC had accepted the second time to pay arrangement implicitly by accepting the payments made by Mr Finch between 30 December 2013 and 26 February 2014 (paras 27-35);
 - 30 (5) HMRC acted unreasonably in failing to accept Mr Finch's reasons for his need to pay late and by instalments, in particular HMRC exhibited bad faith going back several years relating to the winding up of a previous company (which also transpired to be an argument that Mr Finch had a reasonable excuse for paying late (paras 36 – 42 and 43-62); and
 - 35 (6) the penalty notices themselves did not contain sufficient details to enable the taxpayer to verify their accuracy and were therefore invalid and/or in breach of his human rights (paras 63-84).

Law

5. This dispute arises in relation to penalties issued for late payment of capital gains tax.
6. The due date for payment of any balancing amount of capital gains tax by individuals is set out in Taxes Management Act 1970, s 59B(4). Where the individual in question has given the appropriate notice to HMRC that he/she needs to fill out a tax return and HMRC has given the notice to complete one by 31 October, the due date is 31 January following the end of the year of assessment.
7. Penalties for failing to make payments on time arise under Schedule 56 to Finance Act 2009 (Schedule 56), specifically:
- (1) penalties arise if the balancing payment is unpaid 30 days after the due date, ie 30 days after 31st January (paragraph 1(4), item 1 of the table)
 - (2) the penalty is 5% of the unpaid tax (paragraph 3(2))
 - (3) a further penalty of 5% of the unpaid tax arises if the tax remains unpaid 5 months after the penalty date (ie 6 months after the original due date) (paragraph 3(3)), and
 - (4) a further penalty of 5% of the unpaid tax arises if the tax remains unpaid 11 months after the penalty date (ie 12 months after the original due date) (paragraph 3(4))
8. Under paragraph 10 of Schedule 56, penalties can be suspended. In order for the penalties to be suspended several conditions must be met. These are discussed in paras 32-35.

Facts

9. The following facts were not in dispute:
- (1) the tax year in question was the year ended 5 April 2012, ie the 2011/12 tax year;
 - (2) Mr Finch submitted his tax return for that tax year on 23 January 2013, ie in time;
 - (3) the capital gains tax arising in 2011/12 was £77,370.40 and was due on 31 January 2013;
 - (4) on 4 June 2013, HMRC issued a 30 day late payment penalty in the amount of £3867;
 - (5) on 14 August 2013, HMRC issued a 6 month late payment penalty in the amount of £3612; and
 - (6) on 25 February 2014, HMRC issued a 12 month late payment penalty in the amount of £3108.

Ground 1 – First two penalties issued in error

Mr Finch's submissions and evidence

10. Mr Finch's first ground of appeal was that the first two penalties (the 30 days and 6 months late penalties) were issued in error because at the time of their issue (4 June 2013 and 14 August 2013) there was a binding time to pay arrangement in place.

11. Mr Finch submitted the following evidence:

(1) a letter from him to HMRC dated 28 January 2013 in which he explained the reasons why he could not pay his tax bill by 31 January 2013 and suggested an instalment arrangement to pay:

10 (a) £5000 by 31 March 2013; and

(b) the balance, plus interest, by 31 December 2013;

(2) his email response to HMRC (to a letter from HMRC dated 7 February 2013 requesting evidence of his income and liabilities), in which he set out his household income and expenditure, a statement of his assets and liabilities, including a brief description of his business arrangements and a confirmation that he sought the payment arrangement set out in his 28 January 2013 letter;

(3) an email response from Paula Davies at HMRC dated 22 February 2013, which stated:

20 "I can confirm your offer has been accepted. Please ensure the payment of £5000 is made by 31/3/13 and the balance of the liability including interest accrued to this date is cleared no later than 31/12/13";

(4) a letter dated 28 March 2013 to HMRC stating that he enclosed a cheque for £5000 to settle the first tax instalment;

25 (5) a series of letters between HMRC and Mr Finch with a number of different statements of when amounts were due from Mr Finch and what had been agreed, specifically:

30 (a) 22 March 2013 HMRC to Mr Finch: refusal of time to pay arrangement on the basis that no financial information had been submitted by Mr Finch;

(b) 1 April 2013 Mr Finch to HMRC: confirming (and enclosing) correspondence with HMRC in which an instalment payment arrangement had been agreed and that the first instalment had been paid;

35 (c) 19 April 2013 HMRC to Mr Finch: apologising for the incorrect letter of 22 March 2013 and confirming there was a time to pay arrangement in place, but stating that the first payment was expected on 28 February and was to be followed up with monthly payments of £5000. Requesting that Mr Finch brings his payments up to date (for the purposes of this appeal,

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we shall call this arrangement the ‘2013 monthly arrangement’);

5 (d) 7 May 2013 Mr Finch to HMRC: reiterating his position that the agreement was for £5000 by 31 March 2013 with the balance by 31 December 2013 (for the purposes of this appeal we shall call this the ‘2013 two instalment arrangement’). Also referred to the fact that he had submitted the payment on 28 March 2013, not 2 April, as set out in the letter;

10 (e) 15 May 2013 HMRC to Mr Finch: confirming that HMRC’s records show that the time to pay arrangement was for £5000 monthly (with no indication of when that was scheduled to start); and stating that the April and May payments had not been received and asking for those payments to be brought up to date;

15 (f) 28 May 2013 HMRC to Mr Finch: letter headed Payment arrangement – overdue amount: a demand for £4,800 under the time to pay arrangement, requesting that his payment plan is brought up to date;

20 (g) 28 May 2013 Mr Finch to HMRC: attaching again the email correspondence from February 2013 and restating that he had agreed to the 2013 two instalment arrangement;

25 (h) 6 June 2013 HMRC to Mr Finch: reasserting the 2013 monthly arrangement and stating that this arrangement was in default and is therefore cancelled and referring to the letter (TT10) that would have been issued to Mr Finch in February confirming the details of the agreed time to pay arrangement;

(i) 13 June 2013 HMRC to Mr Finch: reasserting the 2013 monthly arrangement and stating that this arrangement was in default and is therefore cancelled;

30 (j) 14 June 2013 Mr Finch to HMRC: reasserting the 2013 two instalment arrangement and appealing against the penalty surcharge dated 4 June 2013;

35 (k) 17 June 2013 HMRC to Mr Finch: reasserting the 2013 monthly arrangement and stating that this was their ‘interpretation of [Mr Finch’s] offer’;

40 (l) 19 June 2013 Mr Finch to HMRC: reasserting the 2013 two instalment arrangement and stating that he does not recall receiving a letter in February setting out the 2013 monthly instalment arrangement and that, if he had, he would have responded immediately;

(m) 25 June 2013, HMRC to Mr Finch: accepting Mr Finch’s dispute on cancellation of the agreement and stating that this

was because they had ‘unintentionally misunderstood that [Mr Finch’s] offer was not for monthly payments’;

(n) 5 July 2013 HMRC to Mr Finch: refusing Mr Finch’s appeal to HMRC against the first penalty; and

5 (o) 22 August 2013 HMRC to Mr Finch: stating that the request for review of a late payment penalty imposed for 2011/12 could not be considered because ‘a payment arrangement was in place and is still ongoing’ and that the penalties would be suspended and cancelled if the arrangement
10 was adhered to.

HMRC’s submissions and evidence

12. HMRC had, until the hearing, asserted that arrangement in place was the 2013 monthly instalment arrangement and that Mr Finch had defaulted on the arrangement by not making payments in April and May, so the arrangement had been cancelled in
15 early June, thus the late payment penalties in June and August were validly issued.

13. The only evidence on these points submitted by HMRC was a print out of their internal records, which included (in addition to notes that confirmed some of the correspondence set out above in Mr Finch’s evidence):

20 (1) 22 February 2013: “TTP [Time to pay] agreed £5k pcm [per calendar month] com [commencing] 30/3/2013 – PIF [payment in full] by 31/12/13 – TTP10 issd’

(2) 2 April 2013: schedule of payments received shows £5,000 received

25 (3) 18 April 2013: “Set up IA [Instalment arrangement] but actually agreed 28/02/13 & first payment 28/02/13 & monthly thereafter until 31/12/13. IDSM7 not issued as Mr Finch already received TTP10.”

(4) 21 August 2013: “Jean Linton from the appeals unit rang to say they are going to uphold the lpp [late payment penalty] appeal, t/p [taxpayer] has produced an email...agreed to £5k by 31/03 and pif by 31/12/13 so we are stuck with this, confirm by email but we must hold off.”

30 14. However, at the hearing, HMRC, after the submissions of evidence by Mr Finch on this ground of appeal, instead submitted that:

(1) the time to pay arrangement that was agreed on 22 February 2013 was the 2013 two instalment arrangement; but

35 (2) the payment due by 31 March 2013 was paid late because it was received by HMRC on 2 April 2013 and therefore the arrangement was cancelled and the late payment penalties were validly issued.

15. HMRC submitted that their standard practice is to date stamp letters on the day they are received and that their internal system states that the letter was received on 2 April 2013 and that the funds from the cheque cleared on 4 April 2013.

Discussion

16. Mr Finch presented an extremely thorough and organised set of evidence and was a very credible witness. He has kept meticulous records of his correspondence with HMRC and has maintained his position on the two instalment arrangement throughout.

17. HMRC, on the other hand, was shown by the evidence presented, including their own internal systems, to have been at best confused about what had and had not been agreed, when payments were due and what arrangements were in place and at worse disingenuous in their correspondence with Mr Finch. The words in the original email dated 22 February 2013 from HMRC are very clear and it is a shame that Mr Finch has had to waste a lot of time and energy, not to mention the Tribunal's time, in persuading HMRC that that was the arrangement that had been agreed.

18. Now that HMRC has accepted that the 2013 two instalment arrangement was agreed, the appeal on this first ground therefore turns on whether or not that arrangement continued in place throughout the period containing 4 June and 14 August 2013 (ie the dates the penalties were issued).

19. I find that the 2013 two instalment arrangement remained in place until Mr Finch cancelled it on 30 December 2013 by telling HMRC that he would not be able to make the final payment because:

(1) the letters Mr Finch received that purported to cancel the time to pay arrangement refer to the wrong arrangement and to failed payments that were not due under the agreed two instalment arrangement;

(2) Mr Finch, from the very beginning, highlighted to HMRC that the incorrect arrangement was being referred to;

(3) HMRC did not issue any letters referring to the late payment of the first instalment due on 31 March 2013; and

(4) the letter dated 22 August 2013 (supported by the HMRC internal memo dated 21 August which is even more unequivocal) stated that they considered the arrangement was still in place at that point.

20. As an aside, I would also say that it is very unlikely that even a reminder letter would ever have been issued, let alone the arrangement cancelled, on the basis of late payment if HMRC had been operating the time to pay arrangement as they normally would. The letters Mr Finch did receive purporting to alert him to his failure to make the monthly payments (letters dated 19 April, 15 and 28 May 2013, detailed above) did not purport to cancel the arrangement, but rather encouraged him to bring the arrangement up to date. The receipt of the first instalment payment a couple of days late (particularly over the Easter weekend, which this was) would be very unlikely to have resulted in a cancellation of the arrangement under normal circumstances. This conclusion is supported by the HMRC manual guidance at DMBM804110 which refers to the issue of a reminder letter and the opportunity to bring the arrangement up to date prior to cancellation.

Ground 3 – HMRC concession that first two penalties did not apply

21. I will deal with this third ground now because it relates to the same set of facts. HMRC issued a letter dated 13 January 2014 to Mr Finch stating that he had failed to comply with ‘the terms of our agreement’ and that the payment arrangement was now
5 being cancelled. It goes on to require payment in full immediately and provides a statement that ‘shows the amount you still owe’. That statement shows a self-assessment balancing charge of £64,746.46 and interest accruing to 13 January 2014 of £2,081. The total of £64,746.46 does not include either of the first two penalties.

22. Mr Finch submits that the absence of the two penalties from this statement of
10 liabilities means that HMRC had conceded that the two penalties had not arisen.

23. HMRC did not have any submissions to make on this issue on the day of the hearing, but submitted after the hearing that this letter did not include the late payment penalties because they had been stood over by the DMB section of HMRC (the section that deals with collection of outstanding debts).

15 24. In a response to this submission Mr Finch reiterated that the “letter is clearly intended to set out a statement of [his] full liabilities” and that he was entitled to rely on the terms of the letter.

25. Given the decision on ground 1, it is not necessary to make a decision on this
20 ground, but I set out my decision here in case a higher court or tribunal disagrees with my conclusion on ground 1.

26. Whether the penalties are validly issued and due from Mr Finch is a question of law and the application of that law to the facts of the case at hand. The exclusion of the penalties from a letter to Mr Finch does not alter the validity of their imposition and so their absence from this letter does not prevent HMRC from subsequently
25 attempting to collect them (ignoring the decision on the first ground).

Ground 4 – the revised time to pay arrangements

Mr Finch’s submissions and evidence

27. In relation to the third penalty, Mr Finch submitted that HMRC had implicitly
30 accepted his revised time to pay proposal by accepting the payments he made under that proposed arrangement and that therefore the third penalty had been issued in error because a valid time to pay arrangement was in place at that time.

28. In support of this ground, Mr Finch submitted the following evidence:

35 (1) an email, dated 30 December 2013 referring to the fact that he was due to pay his final instalment on 31 December 2013 and stating that he was unable to meet that obligation because the hearing against his accountants (discussed in para 52 below) had been pushed back to April 2014 and he had generated no other business income in the year. The letter also made a proposal for a further time to pay arrangement (the first 2014 proposed arrangement) of:

- (a) £7,500 cheque sent on 30 December 2013;
- (b) £2,500 per month commencing January 2014; and
- (c) settlement in full as soon as the negligence claim against his accountants is concluded or funds are secured from his business interests; and
- 5 (2) a letter dated 4 April 2014 from HMRC which referred to the fact that the March payment of £2,500 had been accepted on a without prejudice basis.

29. Mr Finch argued that the earlier payments had been accepted unconditionally and HMRC had accepted the first 2014 proposed arrangement by their conduct and were estopped from denying the existence of that arrangement.

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HMRC submissions and evidence

30. HMRC internal notes state that the revised time to pay arrangement had been rejected and a letter, with explanation, sent on 17 and 24 February 2014. These letters were not presented to the Tribunal.

15 31. HMRC's submissions were that:

- (1) time to pay arrangements are concessions made by agreement only and are not an automatic right;
- (2) HMRC does not, and cannot, refuse to accept tax that is due and payable; and
- 20 (3) when a taxpayer pays part of their tax bill it reduces the future interest and penalties payable, but is not an acceptance of a time to pay arrangement.

Discussion and decision

32. The suspension of penalties during a time to pay arrangement arises under Paragraph 10 of Schedule 56 to Finance Act 2009, which reads as follows:

25 *Suspension of penalty during currency of agreement for deferred payment*

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- (1) This paragraph applies if—
- (a) P fails to pay an amount of tax when it becomes due and payable,
- (b) P makes a request to HMRC that payment of the amount of tax be deferred, and
- 30 (c) HMRC agrees that payment of that amount may be deferred for a period ("the deferral period").
- (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.
- 35 (3) But if—
- (a) P breaks the agreement (see sub-paragraph (4)), and

(b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),
P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if—

- 5 (a) P fails to pay the amount of tax in question when the deferral period ends, or
(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.
- (5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.
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33. It is clear from the wording of the legislation that the penalties can only be suspended if HMRC ‘agree’ to the deferral. There is no special interpretative provision relating to the meaning of the word agree and therefore it has its ordinary
15 meaning in the context in which it is found. The context here is that HMRC must agree that payment be deferred. That agreement must require something active on HMRC’s part, much more than receiving a payment of an amount that is due and not refusing to accept it.

34. I find, as a matter of fact, that HMRC had not agreed to the 2014 first proposed arrangement. There had certainly been no active agreement and, if HMRC’s
20 paperwork is correct, there had been an active rejection of the proposal. Since there was no arrangement in place, there was no suspension of penalties in force as at 25 February 2014.

35. Therefore Mr Finch’s appeal fails on this ground.

25 **Grounds 2 and 5 – unreasonable exercise of discretion by HMRC**

36. Mr Finch raised two grounds related to the unreasonable behaviour of HMRC, namely:

(1) in relation specifically to the third penalty issued on 25 February 2014, that the 2014 first proposed arrangement had been unreasonably rejected by
30 HMRC and that if HMRC had acted reasonably in accepting the new instalment arrangement the third penalty would not have arisen; and

(2) more generally that HMRC has acted unreasonably in failing to accept Mr Finch’s reasons for the need to make payments late and by instalments, going back to their unreasonable behaviour in relation to an earlier tax dispute dating
35 from 2005/06.

37. During the course of the hearing it became apparent that Mr Finch’s submissions and arguments represented an additional ground of appeal that he had a reasonable excuse for failing to pay his tax on time. The reasonable excuse argument is dealt with below in paras 43-62.

38. HMRC's submissions relating to their decisions not to accept the revised time to pay arrangements were that time to pay arrangements are made by concession and are not an automatic right.

Discussion and decision

5 39. Based on the principle established in *HMRC v Noor* [2013] UKUT 071, the First-tier Tribunal does not have a general supervisory jurisdiction over HMRC's powers. Therefore the question arises as to whether a taxpayer has any right to appeal a decision of HMRC not to agree to a time to pay arrangement; and if so what the tribunal's powers are in relation to that appeal.

10 40. The rights of a taxpayer to appeal matters relating to penalties under Schedule 56 to Finance Act 2009 are limited (by paragraph 13) to:

- (1) whether a penalty is payable by that taxpayer; and
- (2) the amount of a penalty payable by that taxpayer.

15 41. Therefore a taxpayer has no right to appeal against a decision of HMRC refusing to agree to a time to pay arrangement and the Tribunal has no powers to set such a decision aside.

20 42. If the taxpayer wishes to pursue an argument based on the reasonableness of HMRC's exercise of that discretion, he would have to bring a claim for judicial review.

Ground 5A – reasonable excuse for late payment

43. As mentioned above, it became apparent during the course of the hearing that Mr Finch was in fact arguing, in addition, that he had a reasonable excuse for failing to pay his tax on time, and that all three penalties should be set aside on that basis.

25 *Mr Finch's submissions*

44. Mr Finch submitted that his inability to pay the tax due on time had been caused by HMRC's unreasonable behaviour going back a number of years relating to the winding up of a company in which he had an interest, Barton-Finch Developments Limited ("Barton-Finch").

30 45. Mr Finch submitted that he runs a property development business that is extremely high risk and is of a transactional nature, ie it generates no income unless and until a development site can be sold.

35 46. During the course of this business, Mr Finch has always operated a 'reserve system' for paying his tax, meaning that when he generates transactional income or gain, he retains an amount representing the tax due on that income or gain in order to pay it when it becomes due the following January.

47. A transaction came to fruition in April 2010 which generated a tax liability that would be due on 31 January 2011. Mr Finch stated that he had made a reserve for that tax.
48. However, also during the course of the same tax year, an unexpected liability arose relating to the winding up of Barton-Finch. Mr Finch had been advised by his accountants that entrepreneurs' relief would be available on the winding up. When it subsequently transpired that it was not, the tax liability was correspondingly larger. This unexpected tax liability used up his tax reserve and he had therefore been unable pay the tax on the April 2010 transaction on time.
49. Mr Finch had then sold another business interest during 2011 in order to be able to pay the tax on the April 2010 transaction by the end of 2011. It is the tax on the sale of this business interest that was paid late and generated the penalties considered in this appeal.
50. Mr Finch submitted that he was unable to make a reserve from the proceeds of the 2011 business interest disposal for the tax due on that disposal (in addition to making the payment for the April 2010 transaction) because he needed some money to live on.
51. Mr Finch submitted that the unexpected tax liability arising in relation to Barton-Finch was caused by the unreasonable behaviour of HMRC, namely the decision not to apply an extra-statutory concession. His accountants had assumed that HMRC would apply the extra-statutory concession and had, as a result, advised that the tax due would be reduced by entrepreneurs' relief.
52. Mr Finch also submitted that he had been advised that he would be very unlikely to be successful in a claim for judicial review against HMRC on this matter and that he had not therefore pursued a claim against HMRC, instead pursuing a claim against his accountants for their incorrect advice in relation to the Barton-Finch matter.
53. The claim against the accountants was originally going to be heard during 2013 and was the basis on which Mr Finch had proposed the 2013 two instalment arrangement, ie that by the end of the year the claim would have been completed and he would have the funds available to pay the outstanding tax. The hearing was delayed until early 2014 and then again until April 2014. Shortly before the hearing in April 2014, Mr Finch's lawyers recommended a settlement, which Mr Finch received in May 2014 (followed by costs in July 2014) and enabled Mr Finch to settle all of his tax liabilities.
54. Mr Finch submitted that now that all the issues had been resolved, he would be able to return to his 'tax reserve' policy and therefore that future payments of tax should be made on time.
55. Mr Finch submitted that this earlier unreasonable behaviour from HMRC had continued in their unreasonable behaviour in refusing to disclose files relating to this matter and in not fully taking the matter into account when considering his time to

pay arrangement or accepting that he had a reasonable excuse for late payment of the tax.

HMRC's submissions

56. HMRC submitted that time to pay arrangements are entirely at HMRC's
5 discretion and that they had not acted unreasonably in refusing to accept the renewed
time to pay arrangement. In relation to reasonable excuse, HMRC submitted the
legislative basis on which a reasonable excuse can remove the liability to a penalty
(set out below) and that the burden of proof was on the taxpayer to show he had a
reasonable excuse. HMRC also submitted that their requests for income, asset and
10 expenditure information had gone unanswered several times.

Discussion and decision

57. Under paragraph 16 of Schedule 56 to Finance Act 2009:

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation
to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier
15 Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

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

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

58. The factors that weigh in Mr Finch's favour are:

(1) this set of facts has already been found by the First-tier Tribunal to have
25 been a reasonable excuse in relation to late payment penalties for an earlier
year;

(2) Mr Finch had relied upon the advice of his accountant in coming to his
conclusions about the amount of money he needed to reserve to pay the tax
30 arising on the winding up of Barton-Finch;

(3) the delay in the proposed hearings for the accountant's claims was not
within Mr Finch's control, but in the control of the lawyers who were running
the case; and

(4) the case did eventually settle paying Mr Finch sufficient in settlement and
costs to enable him to pay the outstanding tax liability in full, showing that Mr
35 Finch's belief in the unexpected nature of the Barton-Finch tax liability and the

likelihood of receiving funds in settlement of that claim was both genuine and reasonable.

59. The factors that weigh against Mr Finch are:

5 (1) the period of time that elapsed between the unexpected liability arising in tax year 2010/11 and the penalties arising between June 2013 and February 2014;

10 (2) Mr Finch's responses to questions about his income, asset and expenditure position often were either not forthcoming or were very scant, with little or no supporting evidence, in particular the lack of evidence as to what Mr Finch had done in order to try to find an alternative solution to making his tax payments on time. Mr Finch stated that he had approached the bank for a loan in 2011 but had chosen not to do so again because of the 'continuing banking crisis at Natwest' leading him to conclude that their response would be the same; and

15 (3) despite receiving the funds in May, Mr Finch did not finally settle his outstanding tax liability until July because he was disputing the validity of the penalties. Although the trigger for the third penalty did not arise in this period, it points against a desire to settle the tax liability as soon as he was able.

20 60. I find that, although Mr Finch clearly had a reasonable and genuine belief in his ability to pay on the settling of his case against the accountants in the Barton-Finch matter, this was not sufficient to amount to a reasonable excuse.

25 61. Mr Finch failed to meet the burden of proof to show that he had a reasonable excuse for not paying his tax on time. Whilst the unexpected nature of the Barton-Finch tax liability might have been a reasonable excuse in the tax year in which it happened, if Mr Finch had been a responsible taxpayer intending to comply with his obligations regarding tax he had had time to make further efforts either to make alternative arrangements to generate the funds to make the payments of tax or provide evidence sufficient to justify his insufficiency of funds.

62. I therefore find that Mr Finch did not have a reasonable excuse for late payment of his tax liability and he therefore fails on this ground.

30 **Ground 6 – validity of the penalty notice**

Mr Finch's submissions

63. Finally, Mr Finch submitted that the penalty notices themselves were invalid and/or in breach of his human rights because they did not contain sufficient details to enable the taxpayer to verify their accuracy.

35 64. In particular, Mr Finch submitted that it was the fact that the penalty notices did not contain an explanation or calculation of the 'total tax unpaid' at the given date left him unable to verify the quantum of the penalty from the face of the notice.

65. Mr Finch submitted that this was a breach of his human rights because he should be able to ascertain clearly the full extent of the penalties being imposed and verify the calculations if HMRC are intending to rely upon the notices to take enforcement action to enforce the liabilities.

5 *HMRC's submissions*

66. HMRC submitted that:

(1) the notice is a statutory notice and complies with the statutory requirements; and

10 (2) Mr Finch was registered for HMRC online services, which would have enabled him to view any statements on that service.

Discussion and decision

67. Looking firstly at the question of whether the penalty notices were valid in accordance with the statutory requirements.

68. FA 2009, Sch 56, para 11, sub-paragraph 1 states that:

15 (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must:

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

20 69. It was clear from the penalty notices that were submitted to the Tribunal that HMRC had assessed the penalty and notified Mr Finch in the form of the penalty notices, which clearly stated the period in respect of which the penalty was assessed, ie the tax year 2011/12. On that basis, I find that the penalty notices issued to Mr Finch met the statutory requirements and were therefore valid under the UK law (leaving aside any human rights argument).

25 70. The human rights argument was not made with specific reference to any elements of the Human Rights Act 1998 (HRA 1998) or the European Convention on Human Rights (ECHR). I will consider the relevant provisions and whether these penalty notices could constitute a breach of Mr Finch's human rights under those provisions.

30 71. Firstly considering Article 6(3) of the ECHR, which provides:

Everyone charged with a criminal offence has the following minimum rights:

(a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him

35 72. Assuming that penalties for late payment of tax can be criminal in nature under the ECHR (which is not certain), I refer to the decision of the High Court in *Pipe v Revenue and Customs Commissioners* [2008] STC 1911, where penalties for late

submission of tax returns were found not to have breached this article. The judge found [53]:

5 ‘The taxpayers were told (a) what they were alleged to have done wrong, (b) what they had to do to remedy the situation; and (c) the nature and maximum amount of penalties that would be imposed for continued non-compliance. Accordingly, the taxpayers were in my judgment informed in appropriate detail of the nature and cause of the ‘accusation’ against them.’

73. I find the same in relation to the penalties imposed on Mr Finch, in particular the penalty notices in question contain the following statements which explain, in language that Mr Finch could understand, the nature of the ‘accusation’ against him and what he had to do to remedy it, including the following statements:

- 10 (1) “late payment penalties for the year ended 5 April 2012”;
- (2) “a penalty of 5% of £62176.99 (the total tax unpaid at 02 February 2014). Paragraph 3(4) of Schedule 56 to Finance Act 2009.” (using the 3rd penalty as an example); and
- 15 (3) “What to do next: Pay all the tax you owe for this year to avoid further penalties for late payment, and interest”.

74. I do not find that the absence of a working to show how ‘total tax unpaid’ was made up is sufficient to breach the requirements of article 6(3). There was not in this case any dispute about the amount of tax that was due. Mr Finch had submitted his return and the amount of tax due had been clear from that date. Mr Finch should also have been aware of the amounts that he had already paid towards that tax liability. As HMRC submitted, Mr Finch had access to his online account which set out the details of what had been paid and what remained due at any time. Therefore I consider that the statement on the face of the penalty notice that the penalty was 5% of the total tax unpaid was sufficient to enable Mr Finch to understand the ‘accusation’ against him.

75. In the alternative, looking at Article 1 of the first protocol to the ECHR (A1P1), which states:

- 30 (1) Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.
- (2) The preceding provisions shall not, however, in any way impair the right off a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

76. It is clear that a penalty for the late payment of capital gains tax is:

- 35 (1) a deprivation of a person’s possessions within paragraph 1 of A1P1, but also
- (2) imposed ‘to secure the payment of taxes’ within paragraph 2 of A1P1.

77. Mr Finch’s human rights arguments were based on the insufficiency of information in the penalty notices themselves. The deprivation of possessions must be subject to the conditions provided for by law, which, relying on *Lithgow v UK (1986)*

8 EHRR 329, requires the “existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions”.

5 78. Mr Finch did not raise any argument that there was any lack of precision in the underlying legislation. Therefore the question which arises is whether the penalty notices, as the tools used to impose a penalty in accordance with that legislation, comply with the underlying legislation and any other principles of international law.

79. As decided above (para 69), I find that the penalty notices issued to Mr Finch met the UK statutory requirements. Therefore the remaining question is whether they comply with other principles of international law.

10 80. The core principle in this context must be the limitations imposed by A1P1 itself. It has long been recognised (*Tre Traktor v Sweden (1991)* 13 EHRR 309) that the second paragraph of A1P1 does not remove the requirement for the state to strike a fair balance between the demands of the general interest of the community and the rights of the individual or that there be a reasonable relationship of proportionality
15 between the means of enforcing tax collection and the aim pursued.

81. In the context of a penalty for late payment of tax it is quite clear that the aim of the penalty is to encourage the payment of tax on time and that the general interest pursued is that of collection of taxes in accordance with the law.

20 82. So the final question is whether or not the ‘fair-balance’ test is met in the case of penalties of 5% of unpaid tax for late payment of tax, that is whether or not the balance between general interest and individual rights has been met and whether there is a reasonable proportionality between the means employed (ie the penalties) and the aims pursued.

25 83. The principle established in *Roth International Transport v Home Secretary* [2003] QB 728 was that to breach A1P1 a penalty regime must be ‘not merely harsh but plainly unfair’. That case related to the VAT default surcharge regime, but the principle has been applied to other tax penalty regimes, such as for late filing of PAYE returns (*Byersmaw properties v HMRC* [2008] STC (SCD) 221). I do not
30 consider that any of the arguments or evidence put before me suggests that the regime for imposing three 5% penalties for late payment of tax is either harsh or unfair. The penalties are in proportion to the offence, in that they are calculated by reference to the tax unpaid; and they are separated out over the course of a 12 month period, thereby giving time to rectify the offence. There is also a grace period of 30 days
35 between the actual due date and the triggering of the first penalty, such that some of the arguments that have been raised in relation to the VAT default surcharge regime, relating to the triggering of substantial penalties even after only one day’s delay, do not arise here. The maximum penalty that can arise under this regime is 15% of the unpaid tax, because no further penalties arise after 13 months, therefore the overall regime does not add up to an unreasonable proportion of the tax unpaid.

84. On the basis of these conclusions, I find that the penalty notices do not breach either Article 6 or A1P1 of the ECHR and therefore do not breach Mr Finch's human rights.

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Decision

85. To summarise the findings made above:

10 (1) I find that, in relation to the first two penalties (ie the first issued on 4 June 2013 in the amount of £3867 and the second issued on 14 August 2013 in the amount of £3612), no penalty has been incurred. I therefore allow the appeal in respect of these penalties and, in accordance with the powers of the First-tier Tribunal under TMA 1970, s 100B(2)(a), require the determination of the penalties to be set aside;

15 (2) In relation to the third penalty (issued on 25 February 2014 in the amount of £3108), I find that:

(a) the penalty validly arose;

(b) HMRC had not implicitly accepted a revised time to pay arrangement by accepting payments from Mr Finch;

20 (c) The First-tier Tribunal does not have the jurisdiction to consider whether HMRC acted reasonably in refusing a revised time to pay arrangement; and

(d) there was no reasonable excuse for the late payment

25 I therefore dismiss the appeal in relation to the third penalty and the penalty stands; and

(3) in relation to all three penalties (although as a result of the first decision, it is only relevant to the third penalty), I find that the penalty notices comply with UK law and that Mr Finch's human rights have not been breached and therefore I dismiss the appeal on that ground.

30 86. In case a higher court or tribunal disagrees with my decision on the first two penalties, I also find that the exclusion of the first two penalties from a letter to the taxpayer does not alter the validity of their imposition and so their absence from a letter does not prevent HMRC from subsequently attempting to collect them.

35 87. 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.

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**TRIBUNAL JUDGE
ABIGAIL MCGREGOR**

RELEASE DATE: 26 NOVEMBER 2015

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