[2016] UKFTT 0311 (TC)

TC05080

Appeal number: TC/2015/02943

INCOME TAX – late submission of tax returns – assessments under Section 36 Taxes Management Act 1970 – imposition of penalties under Schedule 41 to Finance Act 2008 – whether properly notified by HMRC – no – penalties imposed under Schedule 56 to Finance Act 2009 – whether reasonable excuse – no – whether appeal can be made against interest charged under Section 86 Taxes Management Act 1970 – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

FUNDA CATAL **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR TYM MARSH

Sitting in public at Fox Court, London on 26 February 2016

The Appellant appeared in person

Mrs Sanu, presenting officer, for the Respondents

DECISION

Introduction

1. By a Notice of Appeal received by the Tribunal on 28 April 2015, the Appellant appeals against the imposition of tax totalling £45,016.58, the imposition of penalties totalling £7,820.08, and interest totalling £4,231.62. These figures add up to £57,068.28. The Notice of Appeal did not specify the tax years in dispute.

2. In their Statement of Case, the Respondents assert that the Appellant's appeal is against the Respondents' decision to:

(a) Raise an assessment to tax in the sum of £7,178.05 for the tax year 2008/09

(b) Raise an assessment to tax in the sum of £11,922.00 for the tax year 2009/10

(c) Impose three late payment penalties totalling £2,256 in respect of the late payment of tax due for the tax year 2010/11

(d) Impose three late payment penalties totalling £1,644 in respect of the late payment of tax due for the tax year 2011/12

(e) Charge interest totalling £4,231.63 in respect of the tax paid late for the tax years 2008/09 to 2011/12.

3. The Respondents originally considered that only £27,231.68 was in dispute. At the hearing Mrs Sanu told us that the Respondents did not know how the Appellant arrived at her much higher figures.

4. As the Respondents were unable to suggest what additional amounts the Appellant wished to challenge, after the hearing we endeavoured to identify the origin of the nearly £30,000 difference between the amounts which the parties considered to be in dispute. It is clear from the Self-Assessment Statement of account sent to the Appellant (under cover of the Respondents letter dated 20 November 2014) that the Respondents sought payment of additional amounts for the years 2008/09 to 2011/12 besides those set out in their Statement of Case. The additional amounts sought by the Respondents are:

(f) Tax in the sum of £15,047.57 due for the tax year 2010/11

(g) Tax in the sum of £10,970.39 due for the tax year 2011/12

(h) A penalty in the sum of £1,435.61 in respect of an apparent default for the tax year 2008/09

(i) A penalty in the sum of £2,384.47 in respect of an apparent default for the tax year 2009/10.

5. The addition of these amounts to the figures in the Statement of Case brings the total in dispute to £57,069.72, a figure almost identical to the £57,068.28 total of the figures quoted in the Appellant's notice of appeal.

6. Having reached this conclusion we sought further submissions from the Respondents as to the basis on which penalties had been imposed for 2008/09 and 2009/10 (items (h) and (i) above). The Respondents filed their further submissions and supporting material on 28 April 2016. On 15 April 2016 the Appellant also submitted further paperwork.

7. We comment below on the question of which of the items (a) – (i) can be appealable matters and whether each has been appealed. Putting those issues to one side for the moment, it seems to us that all of items (f) – (i) are also in dispute and therefore we make this decision on that basis. We consider it clear that the Appellant wishes to challenge as many of items (a) – (i) as is possible.

Background

8. The Appellant entered the UK in 2004 on a visa which enabled her to work as a nanny and study. The Appellant worked as a nanny and studied until 2008. In August 2008 the Appellant was granted a full working visa, and in September 2008 the Appellant began working part-time as a dancer. The Appellant continued this part-time work until about 2013.

9. On 30 April 2014 the Appellant notified HMRC that she needed to file tax returns to declare her self-employed income for the tax years 2008/09 onwards.

10. On 18 August 2014 the Appellant filed tax returns for the tax years 2010/11 and 2011/12 containing self-assessments of her liability to tax. (The amounts of tax due under each of these self-assessments are items (f) and (g) set out above.)

11. Upon receipt of the Appellant's tax returns, also on 18 August 2014, the Respondents issued penalties to the Appellant for late payment of the tax due for the years 2010/11 and 2011/12. For each tax year the Respondents imposed a penalty for paying the tax 30 days late, a penalty for paying the tax six months late and a penalty for paying the tax 12 months late. (These are items (c) and (d) set out in the introduction above.)

12. On 20 August 2014 the Appellant filed tax returns for the tax years 2008/09 and 2009/10.

13. By notices dated 2 October 2014, the Appellant sought a review of the Respondents' decision to impose late payment penalties for 2010/11 and 2011/12. On 3 November 2014 the Respondents rejected the Appellant's appeal.

14. On 20 November 2014 the Respondents raised an assessment to tax in the sum of £7,178.05 for the tax year 2008/09, and an assessment to tax in the sum of £11,922.39 for the tax year 2009/10. These assessments (items (a) and (b) above) were each within £1 of the figures provided by the Appellant in her tax returns for the

same years. Apparently also on 20 November 2014, the Respondents issued penalties for late submission of a tax return in respect of 2008/09 and 2009/10 (items (h) and (i) above).

15. On 2 December 2014 the Appellant sent a letter headed tax returns 2009-2014 to the Respondents. In that letter the Appellant asked the Respondents to give further consideration to her case without specifying which aspects. The Respondents originally treated this letter as an appeal against the assessments to tax for 2008/09 and 2009/10, and also as a request for a review of the decision to uphold the late payment penalties for 2010/11 and 2011/12. In their post hearing submissions, the Respondents accepted that this letter was also an appeal against the penalties imposed for 2008/09 and 2009/10.

16. By letter dated 22 January 2015 the Respondents upheld their decision to impose penalties for late payment of the tax due for 2010/11 and 2011/12.

17. On 21 February 2015 the Appellant attempted to appeal to this Tribunal but there was a postal delay in delivering her documents. The notice of appeal was then returned to the Appellant for further completion. On 28 April 2015 the Appellant appealed to this Tribunal.

Respondents' submissions

18. We invited the Respondents to outline their case before we heard from the Appellant. As an initial point Mrs Sanu confirmed to us that the Respondents did not raise any objection to the Appellant's appeal being admitted out of time.

19. Mrs Sanu took us to the Respondents' Self-Assessment notes and took us through a brief chronology of events following receipt of the Appellant's notification of chargeability on 30 April 2014. Late payment penalties had been imposed for 2010/11 and 2011/12. The last date for payment of the tax due for each tax year was 31 January in the year following the relevant tax year. As the Appellant had not paid any tax in respect of her self-employment until August 2014, the Respondents submitted that it followed that she was late in making payment of the tax due. The Respondents' main contention in respect of the penalties imposed for 2010/11 and 2011/12 was that the reasons the Appellant had given for the delay had no bearing on why the tax had been paid late. Mrs Sanu submitted that the penalties were only in respect of the Appellant's self-employed income and that neither her visa status nor the injuries she had suffered in 2013 constituted a reasonable excuse for late payment of tax.

20. Mrs Sanu also submitted that the Respondents had considered whether the Appellant qualified for a special reduction of the penalties imposed but concluded that she did not. Although this assertion was set out in the Respondents' Statement of Case, Mrs Sanu was unable to point us to any document in the bundle which demonstrated that the Respondents had in fact considered whether there were special circumstances which would make it appropriate to reduce the penalties imposed.

21. The assessments to tax for 2008/09 and 2009/10 had been raised under the extended time limit set out in Section 36 Taxes Management Act 1970 ("TMA 1970"). Mrs Sanu submitted that, as the Appellant had not received a notice under Section 8 TMA 1970 requiring her to file a return, the deadline for the Appellant to notify the Respondents that she was chargeable to tax in any year of assessment was six months from the end of that year of assessment. Tax returns had not been received until August 2014 so the Appellant had been late in notifying her chargeability for each of the years 2008/09 and 2009/10. Mrs Sanu submitted that the Appellant should have known that she would have to pay tax and should have contacted the Respondents at a much earlier date. It was the Respondents submission that there was no reasonable excuse for the Appellant's delay.

22. Finally, in respect of the charge to interest under Section 86 TMA 1970, Mrs Sanu submitted that the imposition of interest for late payment of tax was not a matter against which the Appellant could appeal.

Appellant's submissions

23. The Appellant told us that she was unaware until 2014 that she was required to notify the tax authorities that she was liable to pay tax. During the time she was working in the UK as a nanny and as a dancer, the Appellant had not received any letters from the Respondents telling her that she must submit tax returns. The Appellant was not aware of other people around her, other dancers and students, paying tax. The Appellant's understanding was that students did not pay tax.

24. The Appellant said that she did not understand how she could be in the current position of being asked to pay penalties and interest as well as the tax which was due for the four years. The Appellant said that she had reported her income to the Home Office and complied with all the obligations of her visas, and it was not until she was preparing for her naturalisation as a British citizen that tax had been mentioned.

25. The Appellant confirmed to us that she wished to appeal against the amounts of tax, penalties and interest due for the four tax years in question. We are informed by both parties that the Appellant has paid all of the tax, penalties and interest sought for these four tax years. The Appellant told us that making this appeal was the only way for her to achieve resolution and to move forward in her life.

26. In her post hearing statement the Appellant submitted that she did not owe tax because she was not self-employed.

Facts found

27. As part of her submissions to us the Appellant gave factual evidence. We considered the Appellant to be an honest witness and we accept the truth of what she told us.

28. The Appellant entered the UK in 2004 on a visa to work as a nanny, and she undertook this work for four years. The Appellant also studied during this period. In August 2008 the Appellant was granted a visa to undertake other work, and in

September 2008 the Appellant started working part-time as a dancer in two nightclubs. This work continued until about 2013 when the Appellant was attacked in the vicinity of one of the clubs. The Appellant is still undergoing medical treatment as a consequence of that attack and is currently unable to work as a dancer.

29. The Appellant was paid in cash for all the work she undertook, both as a nanny and as a dancer. The Appellant did not receive payslips from her work as a nanny or as a dancer. In around December 2011 the Appellant received an email from Mr Silver who worked in the finance department of the organisation running the nightclubs. The Appellant's recollection (she did not have a copy of the email with her) was that in that email Mr Silver had suggested that the Appellant might need to make a payment to the government due to her level of income. The Appellant took no action in response to Mr Silver's email.

30. In about 2014, when she was taking active steps to become a British citizen and learned that there was a requirement to demonstrate her taxes were up to date, the Appellant contacted a tax advisor for help. The Appellant understood her advisor to be connected to HMRC and that she was bound by the advice given by him, including his conclusion that she was self-employed when she was working as a dancer.

31. On the basis of his conclusion that the Appellant was self-employed, the advisor encouraged the Appellant to notify HMRC that she was chargeable to tax; the Appellant notified HMRC in April 2014. The Appellant's advisor completed tax returns for the tax years 2008/09, 2009/10, 2010/11 and 2011/12 based upon the information in the Appellant's bank statements. On behalf of the Appellant, two tax returns were submitted to the Respondents on 18 August 2014, and a further two tax returns were submitted on 20 August 2014.

32. The Appellant's advisor had obtained statements from each of the two nightclubs where the Appellant danced, showing the amounts earned by the Appellant and the various deductions which had been made from those amounts. The Appellant showed us these statements and explained that the final column on each statement, entitled "envelope", showed the amount of cash which she was due to be paid. The column was entitled "envelope" as the cash to be paid to the Appellant would be put in a brown envelope for her to collect from the nightclub on the day after she had worked.

33. The Appellant also explained that the "envelope" figure was not always correct as sometimes she was required to pay commission to the managers in one of the nightclubs where she worked. This amount of commission was deducted from the cash paid to her but not shown as a deduction in the figure in the "envelope" column. The Appellant told us she did not know why she was asked to pay commission to the managers or what it was for. When we asked her if she had thought that this deduction might be to pay tax, the Appellant said she did not know. We find that this deduction was not a payment in respect of income tax.

Decision

34. Having established that the Appellant disputes all of items (a) – (i) as set out in our Introduction, it seems to us that the initial matters for us to decide are:

- what is properly before us to determine?
- where there is an appeal for us to determine, was the Appellant in time in appealing to this Tribunal?
- Where there is an appeal for us to determine but the Appellant was out of time to appeal to this Tribunal, should the Appellant be given permission to appeal out of time to this Tribunal in respect of that matter?

What is before us to determine?

35. We look first at the tax which is said to be in dispute, items (a), (b), (f) and (g). The Appellant confirmed to us at the conclusion of the hearing that she wished to appeal against the amounts of tax due for each of the four years.

36. For each of 2008/09 and 2009/10, the Respondents raised assessments upon the Appellant. These were raised on 20 November 2014. Under Section 31(1)(d) TMA 1970 an appeal may be brought against an assessment which is not a self-assessment. Section 31A(1)(b) TMA 1970 provides that such an appeal must be made to the Respondents within 30 days of its issue. The Appellant's letter of 2 December 2014 was an in-time appeal against these assessments. Under Section 49D TMA 1970, where a taxpayer has appealed to the Respondents then the taxpayer may notify that appeal to the Tribunal for it to determine. The Appellant's Notice of Appeal to this Tribunal included reference to an appeal against the imposition of tax. We conclude that there was an appeal against the assessment to tax for each of 2008/09 and 2009/10 which has been properly made to the Respondents and properly notified to us. Therefore items (a) and (b) are before us to determine.

37. For each of 2010/11 and 2011/12, the Appellant submitted a tax return which contained a self-assessment. Those returns were submitted on 18 August 2014. Under Section 9A(2)(b) TMA 1970 the Respondents had until the quarter day following the first anniversary of the submission of the returns to open an enquiry into the returns, i.e. until 31 October 2015. No enquiry was opened. As the Respondents did not open an enquiry, they could not make an amendment under Section 9C TMA 1970 to either of the Appellant's self-assessments, and they could not state an enquiry conclusion. As there was no amendment to either self-assessment and no enquiry conclusion, there is nothing against which the Appellant can appeal in respect of the self-assessments. Therefore we have no jurisdiction in relation to either of these years, and items (f) and (g) are not before us to determine. The self-assessments made by the Appellant for 2010/11 and 2011/12 each stand as the amount of tax due for those years.

38. We look next at the penalties said to be in dispute, items (c), (d), (h) and (i). The Appellant confirmed she wished to appeal against all of the penalties.

39. The penalties imposed in respect of the tax years 2008/09 and 2009/10 were apparently imposed on 20 November 2014. As the Respondents did not originally appreciate that these might be in dispute there was no copy of the penalty notices in

our bundle. At the hearing the only information we had relating to them was the letter of 20 November 2014, the Appellant's SA Statement of Account and the Respondents' SA Notes. The penalties are tax geared penalties (set at 20% of the tax due) and are described as being charged for the late submission of a tax return.

40. In their post-hearing submissions, the Respondents explained that the two penalties were imposed under Subsection 7(8) TMA 1970 for late notification of chargeability to income tax. As Subsection 7(8) TMA 1970 was repealed by Section 123 Finance Act 2008 with effect from 1 April 2010, we do consider that this was the basis for the two penalties imposed on the Appellant on 20 November 2014. We assume that the Respondents intended to refer to Paragraph 1 of Schedule 41 to the Finance Act 2008 which provides that a penalty is payable for failure to notify chargeability to income tax under Section 7 TMA 1970.

41. Paragraph 16 of Schedule 41 provides that a penalty may be assessed upon a person who is liable to a penalty under Paragraph 1 of Schedule 41. Paragraph 17 provides that an appeal may be brought against an assessment under Paragraph 16. Paragraph 18 of Schedule 41 provides that an appeal under Paragraph 17 shall be treated in the same way as an appeal against an assessment to the underlying tax. Therefore the deadline for appealing against a Schedule 41 penalty for 2008/09 or 2009/10 would be 30 days.

42. We have carefully considered the Appellant's letter of 2 December 2014 to see if this includes an appeal against the penalties apparently imposed on 20 November 2014 for late notification of chargeability. Although this letter is far from clear, it seems to us that the Appellant does attempt to provide reasons for her actions and (as the penalty is tax geared with abatement dependent upon the Appellant's behaviour) that the Appellant's letter of 2 December 2014 should be interpreted as an appeal against the imposition of the penalties imposed for 2008/09 and 2009/10. In their post-hearing submissions the Respondents accept that this is the case. On that basis there has been an in-time appeal against each of the penalties imposed for 2008/09 and 2009/10, and these have been properly notified to the Tribunal. Therefore items (h) and (i) are before us to determine.

43. The penalties imposed in respect of the tax years 2010/11 and 2011/12 were imposed on 18 August 2014 and are for late payment of the tax due. The penalties are imposed under Paragraphs 1 and 3 of Schedule 56 to the Finance Act 2009, and assessed under Paragraph 11 of Schedule 56. It is clear that by her notice dated 2 October 2014, the Appellant made an out of time appeal against the imposition of these penalties. On 3 November 2014 the Respondents upheld their original decision to impose the penalties. The Respondents treated the Appellant's letter of 2 December 2014 as a request for a review of that decision. By letter dated 22 January 2015 the Respondents again upheld their decision to impose penalties. In her Notice of Appeal received on 28 April 2015, the Appellant appealed to this Tribunal against this decision. Subject to the issue of the appeal against these penalties having been received by the Tribunal out of time, we consider that items (c) and (d) are before us to determine.

44. Finally we consider whether the interest charge, item (e), is before us to determine. Interest is charged under Section 86 TMA 1970, and there is no appeal against its imposition. Therefore we conclude that item (e) is not before us to determine.

45. Therefore, subject to the success of the Appellant's application to appeal out of time, the six items for us to determine are (a)-(d), and (h)-(i).

Should the Appellant be given permission to appeal out of time?

46. As we have set out above, the appeals against the assessments to tax (items (a) and (b)) and the penalties for 2008/09 and 2009/10 (items (h) and (i)) were made to the Respondents within time, and have been properly notified to the Tribunal. However, the Appellant's appeal to this Tribunal against the Respondents' decision dated 22 January 2015 to uphold the decision to impose penalties for 2010/11 and 2011/12 (items (c) and (d)) should have been made within 30 days of the Respondents' decision. The Appellant's Notice of Appeal was not received by the Tribunal until 28 April 2015, and so is out of time in respect of the penalties for 2008/09 and 2009/10.

47. As we notified the parties during the course of the hearing, we consider it appropriate to give the Appellant permission to appeal out of time in respect of this aspect of her appeal applying the principles set out in *Data Select v HMRC* [2012] UKUT 187 (TCC). The deadline for the Appellant's appeal to be received by the Tribunal was 21 February 2015. The Appellant provided the Tribunal with evidence that she had posted her Notice of Appeal on 21 February 2015 (so it would have been received only one or two days late) and that it was a delay on the part of the postal service which constituted much of the subsequent delay. The Respondents had no objection to the appeal being admitted out of time. We considered the prejudice which each party would suffer if we decided to admit, or not to admit, and concluded that it was appropriate for the appeal to be admitted.

The substantive appeals

48. Having decided that the Appellant should be given permission to appeal out of time in respect of items (c) and (d), the items for us to determine are (a)-(d), and (h)-(i).

Appeal against amounts of tax due

49. We consider first the Appellant's appeal against the assessments to tax raised for 2008/09 and 2009/10.

50. As is clear from the covering letter dated 20 November 2014, the Respondents considered that Section 36(1A) TMA 1970 applied so as to enable them to raise assessments to tax upon the Appellant for 2008/09 and 2009/10. Section 36(1A) TMA 1970 provides:

> An assessment on a person in a case involving a loss of income tax or capital gains tax-
>
> > (b) attributable to a failure by the person to comply with an obligation under section 7,
> >
> > …
>
> May be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

51. The onus of proof is first upon the Respondents to establish that the conditions of Section 36(1A) are established. In her submissions Mrs Sanu relied upon Section 7(1C)(a) TMA 1970 in specifying the dates by which the Appellant should have notified the Respondents of her chargeability for each of 2008/09 and 2009/10. Subsection 7(1C) TMA 1970 only has effect for returns for the tax year 2012/13 onwards. We assume Mrs Sanu intended to refer to Section 7(1) TMA 1970, as it applied in the tax years in question, which provided that the deadline for notification of chargeability was six months from the end of the tax year in question. The Appellant notified her chargeability to income tax in April 2014 and so we are satisfied that the Appellant did not meet her obligations under Section 7 TMA 1970. We are also satisfied that due to the Appellant's failure to meet those obligations there was a loss of income tax. Therefore we conclude that the conditions of Section 36(1A) are satisfied.

52. The onus then switches to the Appellant to satisfy us that the assessments raised by the Respondents are excessive, and should be reduced. We bear in mind the comments of the Privy Council in *BiFlex Caribbean Limited v Board of Inland Revenue Co. (Trinidad and Tobago)* [1990] UKPC 35 that the assessments are presumed to be correct until the Appellant satisfies us of a better figure or figures.

53. In this case the Respondents raised the assessments for 2008/09 and 2009/10 in the amounts (within £1) set out in the tax returns filed by the Appellant for each of those two years. The Appellant told us that the statements that the nightclubs had produced for her advisor and which she showed us, showing the amounts she had earned, were incorrect (because they did not show the additional deductions from the cash in the envelopes which she had been required to pay in one of the clubs). But, that does not affect the figures set out in the Appellant's returns because the Appellant also told us her advisor had calculated the amounts she had earned from the deposits shown on her bank statements. The advisor had also considered the Appellant's receipts and advised her on what he considered could legitimately be treated as expenses. The figures in the Appellant's tax returns were completed by the Appellant's tax advisor. The Appellant did not suggest that these calculations were incorrect or offer us any alternative figures. The Appellant did not bring a copy of her terms of engagement with the nightclubs in order that we might consider whether she was in fact self-employed during 2008/09 and 2009/10.

54. In her post-hearing statement the Appellant submitted that she was not self-employed between 2008 and 2013. We had not requested submissions on this point, as it was only the issue of penalties for 2008/09 and 2009/10 which required clarification. We consider that the hearing was the occasion when the Appellant should have put forward her submissions and evidence in support of her appeal. But, in any event, the Appellant's post-hearing submission was not supported by any evidence that she was not self-employed when she worked as a dancer.

55. In the circumstances the Appellant has not satisfied us that the figures in the assessments should be displaced. We confirm the assessment for 2008/09 in the amount of £7,178.05, and we confirm the assessment for 2009/10 in the amount of £11,922.

Appeal against the penalties issued for 2008/09 and 2009/10

56. In relation to the penalties which were imposed upon the Appellant under Paragraphs 1 and 16 of Schedule 41 to Finance Act 2008 for her late notification of her chargeability to tax in respect of both 2008/09 and 2009/10, the onus of proof is first upon the Respondents. For each of 2008/09 and 2009/10, the Respondents must demonstrate that the Appellant satisfied the conditions set out in Paragraph 1 and that she is liable to a penalty, and also that they have met the conditions set out in Paragraph 16 of Schedule 41 in raising an assessment to a penalty.

57. Paragraph 1 of Schedule 41 provides:

> 1. A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

Tax to which obligation relates	*Obligation*
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

58. The deadline for the Appellant to have notified her chargeability to tax was six months from the end of the relevant year of assessment (as provided by Section 7(1) TMA 1970 as it applied in both years). For the tax year 2008/09 the deadline for the Appellant to notify her chargeability to tax was 5 October 2009; for the year 2009/10 the deadline was 5 October 2010. The Appellant accepted that she did not notify the Respondents of her chargeability to tax until April 2014. Therefore the conditions in Paragraph 1 of Schedule 41 are met.

59. Paragraph 16 of Schedule 41 begins:

> 16 (1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall-

(a) assess the penalty,

(b) notify P, and

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

60. In their post-hearing submissions the Respondents accepted that they did not properly notify the Appellant of the imposition of the penalty for either 2008/09 or 2009/10. As they accepted that they had not met the conditions set out in Paragraph 16(1)(b) of Schedule 41, the Respondents sought to withdraw their opposition to this aspect of the Appellant's appeal.

61. We agree that, prima facie, no penalty under Schedule 41 was properly notified to the Appellant. Therefore we allow the Appellant's appeal against the penalties imposed upon her for late notification of chargeability for 2008/09 and for 2009/10. The Appellant is successful in this aspect of her appeal.

Appeal against the penalties issued for 2010/11 and 2011/12

62. In relation to the penalties imposed upon the Appellant under Schedule 56 to Finance Act 2009 for late payment of the tax due for 2010/11 and 2011/12, the burden is first upon the Respondents to demonstrate that the Appellant was late in making payment of the tax due.

63. The Appellant accepted that it was not until April 2014 that she notified the Respondents of her chargeability for the tax years 2008/09-2011/12, that she did not submit returns for these tax years until August 2014, and that she did not pay income tax until August and September 2014. The deadline for payment of tax due for 2010/11 was 31 January 2012; the deadline for payment of tax due for 2011/12 was 31 January 2013. Therefore we are satisfied that the Respondents have discharged their burden of proof and that the Appellant was late in paying tax for the years 2010/11 and 2011/12.

64. The onus then shifts to the Appellant to demonstrate that she had a reasonable excuse for making late payment of the tax due. We have considered carefully all that the Appellant has told us. We accept that the Appellant was genuinely unaware of her obligation to notify the Respondents that she had a liability to tax or to submit tax returns. However, it is clear that prior to 2014 the Appellant maintained herself in this state of ignorance by failing to address her mind to whether she might have tax obligations. This is despite receiving an email from Mr Silver in 2011 which, according to the Appellant's recollection, suggested the Appellant might be obliged to make payment to the government due to her level of income. The Appellant's self-imposed ignorance of her obligations cannot constitute a reasonable excuse for her late payment of the tax due.

65. We have also considered the effect of Paragraph 9 of Schedule 56 which enables the Respondents to consider whether there are special circumstances which would make it appropriate to reduce the penalties for 2010/11 and 2011/12. Despite the assertion in the Statement of Case, we are not satisfied that this issue was

considered at all by the Respondents as it was not mentioned in the Respondents' letter of 22 January 2015.

66. Paragraph 15 of Schedule 56 begins:

> **15** (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (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—
>
> (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 9 was flawed.

67. Therefore this Tribunal can rely upon Paragraph 9 only if we substitute our decision for the Respondents' decision, and if we are satisfied that the decision taken by the Respondents was flawed (in the sense that word would be understood in proceedings for judicial review). We consider that a failure by the Respondents to consider at all whether to exercise their discretion under Paragraph 9 is flawed. However, we have not substituted our decision in relation to the imposition of penalties for the Respondents' decision. Therefore we have no power to consider whether there are special circumstances which would make it appropriate to reduce the penalties imposed.

68. In those circumstances we confirm each penalty raised for the late payment of the tax due for 2010/11 (30 days late penalty, six months late penalty and 12 months late penalty) in the sum of £752. The total amount of penalties for 2010/11 is £2,256. We confirm each penalty raised for late payment of the tax due for 2011/12 (30 days late penalty, six months late penalty and 12 months late penalty) in the sum of £548. The total amount of penalties for 2011/12 is £1,644.

Conclusion

69. For the reasons set out above, the Appellant is successful in her appeal against the imposition of a penalty in the sum of £1,435.61 in respect of 2008/09, and against the imposition of a penalty in the sum of £2,384.47 in respect of 2009/10.

70. The remainder of the Appellant's appeal is dismissed.

71. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 6 MAY 2016