



TC05792

**Appeal numbers: TC/2012/10957
TC/2013/04282
TC/2013/04697
TC/2014/00350**

INCOME TAX – daily penalties – stayed behind Donaldson – Court of Appeal decision in favour of HMRC – whether Appellant’s position was the same as that of Mr Donaldson in relation to the issues decided by that Court – no reasonable excuse – no special circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTINE PERRIN

Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE REDSTON
LESLEY STALKER**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 10 April 2014

The Appellant in person

Ms Hellie Lai, of HM Revenue and Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. HMRC levied the following penalties in relation to Mrs Perrin’s self-assessment (“SA”) tax return for 2010-11:

- (1) A thirty day fixed penalty for late filing of £100;
- 5 (2) A six month fixed penalty for late filing of £300;
- (3) daily penalties for late filing totalling £900; and
- (4) three fixed penalties for late payment, each of £57, totalling £171.

2. HMRC also levied penalties for late payment in relation to Mrs Perrin’s 2011-12 return. Mrs Perrin appealed against all the penalties.

10 3. We heard her appeal on 10 April 2014. At the beginning of the hearing, HMRC asked us to stay the appeal against the £900 daily penalties behind the case of another taxpayer, Mr Donaldson, who had also appealed against £900 daily penalties in relation to the same year.

15 4. As explained further below, the Tribunal agreed to stay Mrs Perrin’s appeal against the daily penalties. We went on to determine all her other appeals, and issued our decision. This was published on 21 May 2014 as *Perrin v HMRC* [2014] UKFTT 488 (TC) (“the 2014 Decision”). Mrs Perrin has asked for a full decision in relation to the daily penalties, and this is that full decision.

20 5. The legislation relevant to Mrs Perrin’s appeals was set out as an Appendix to that Decision, other than in relation to the daily penalties, which is at §7 and §20 below.

6. The next following paragraphs explain what happened in Mr Donaldson’s appeals, so far as relevant to Mrs Perrin’s own appeal.

The FTT’s decision in Mr Donaldson’s case

25 7. The First-tier Tribunal (“the FTT”) heard Mr Donaldson’s appeal and that of another taxpayer, Mr Morgan, in early 2013. The relevant legislation is at Finance Act 2009, Schedule 55, paragraph 4, and reads:

- “(1) P is liable to a penalty under this paragraph if (and only if)
- 30 (a) P’s failure continues after the end of the period of 3 months beginning with the penalty date,
 - (b) HMRC decide that such a penalty should be payable, and
 - (c) HMRC give notice to P specifying the date from which the penalty is payable.
- 35 (2) The penalty under this paragraph is 10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
- (3) The date specified in the notice under sub-paragraph (1)(c)
- (a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).”

8. In relation to para 4(1)(c) above, HMRC submitted that the required “notice” had been included in the “Self Assessment - Tax return and payment reminder” (“the SA Reminder”) and also in the Notice of liability to the £100 fixed penalty (Form SA326D).

9. The FTT considered those two documents in the context of the purpose of the legislation, and held at [62] of their decision that:

“when Parliament said HMRC must ‘give notice specifying the date from which the penalty is payable’ they intended that the taxpayer (1) should be given clear warning of the (in general) future imposition of a penalty charged each day he failed to file and (2) clear notice of the date from which such daily penalties would run.”

10. The FTT went on to decide that neither the SA Reminder, nor form SA326D, constituted a “notice” within the meaning of para 4(1)(c). As a result, the penalties had been invalidly issued, and Mr Morgan’s and Mr Donaldson’s appeals were allowed. The FTT’s decision is published as *Morgan and Donaldson v HMRC* [2013] UKFTT 317 (TC) (“*Morgan and Donaldson*”).

11. The FTT also considered para 4(1)(b), which states that a person is only liable to a daily penalty if “HMRC decide” such a penalty should be payable. HMRC said that one or more HMRC officers had decided that all taxpayers meeting certain criteria should pay daily penalties, and HMRC’s computer had then been programmed to issue penalties if those criteria were met.

12. Judge Mosedale accepted that this was sufficient to meet the requirement that “HMRC decide” to issue a penalty, but Mr Thomas did not agree. He said that that the phrase required that an officer of HMRC had to make the decision to impose a penalty on a particular taxpayer. However, as Judge Mosedale had the casting vote, this point was decided against the appellants. Mr Thomas explained the reasons for his dissent in an Appendix.

The possible consequences for other taxpayers

13. HMRC was given permission to appeal to the Upper Tribunal (“UT”) against the FTT’s decision in Mr Donaldson’s case. Had the Upper Tribunal agreed with the FTT, and had there had been no further successful appeal by HMRC, the daily penalties issued to Mr Donaldson would have been cancelled.

14. The documents which HMRC had sent Mr Donaldson were standardised, so most if not all other taxpayers who had been issued with daily penalties would have had the same documents.

15. Had Mr Donaldson succeeded in his appeal on the basis that he had not been given “notice” of the daily penalties, most if not all other taxpayers who had been issued with those penalties would also not been given notice. Their appeals against

daily penalties would then have been allowed on the same basis as Mr Donaldson’s appeal.

The stay of Mrs Perrin’s appeal

5 16. The UT hearing of HMRC’s appeal against the FTT decision in Mr Donaldson’s case was listed for 10 July 2014, some three months after our hearing of Mrs Perrin’s appeal.

10 17. We decided to stay Mrs Perrin’s case behind that of Mr Donaldson, see [4] of the 2014 Decision. However, we also stated that when we came to decide Mrs Perrin’s appeal against the daily penalties, we would rely on the facts set out in the 2014 Decision.

Mr Donaldson’s appeal to the UT

18. The UT agreed with HMRC that notice had been given to Mr Donaldson, so that the condition in para 4(1)(c) was met. HMRC’s appeal was allowed.

15 19. The UT were unable to consider whether HMRC had failed to meet the requirement in para 4(1)(b) – ie that the penalty decision had to be made by in relation to each taxpayer. Had Mr Donaldson wanted to raise that point at the UT hearing, he would have had to make a cross-appeal.

20 20. The UT also noted that HMRC’s penalty assessment failed to state the period in respect of which Mr Donaldson had been assessed, despite that being a requirement of the legislation: Sch 55, para 18(1)(c) reads as follows:

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

- 25 (a) assess the penalty,
(b) notify P, and
(c) state in the notice the period in respect of which the penalty is assessed.”

21. However, as that issue had not been raised by the parties, the UT said “we shall not address it further”.

30 22. The UT decision was published on 2 December 2014 as *HMRC v Donaldson* [2014] UKUT 535 (TCC). Mr Donaldson subsequently received, permission to appeal to the Court of Appeal on all three points: para 4(1)(b), para 4(1)(c) and para 18(1)(c).

Mr Donaldson’s appeal to the Court of Appeal

35 23. On 18 July 2016 the Court of Appeal issued its judgment in Mr Donaldson’s appeal as *Donaldson v HMRC* [2016] EWCA Civ 761. The Court found that an individual officer did not have to make the decision to issue the penalty notice, so the para 4(1)(b) point did not succeed. It also decided that both the SA Reminder document and the SA326D constituted a “notice” within the meaning of para 4(1)(c), and so that requirement was also satisfied.

24. In relation to para 18(1)(c), the Court found that there had been a failure to state the period of the assessment, but that the daily penalties were not invalid as a result. That was because Taxes Management Act 1970, s 114 allows certain defects in assessments to be ignored. The Master of the Rolls, giving the only judgment, which the other members of the Court agreed, said:

“Although the period was not stated, it could be worked out without difficulty...Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission.”

25. The Court therefore decided that Mr Donaldson had failed on all the grounds which had been put forward. Mr Donaldson sought permission to appeal that decision to the Supreme Court, but permission was refused.

Mrs Perrin’s appeal

26. It follows that the Court of Appeal’s decision is now final. The Tribunal therefore considered whether to allow Mrs Perrin’s appeal against the daily penalties.

The “Donaldson” points

27. We considered the three points raised in Mr Donaldson’s appeal, and found as follows:

(1) in relation to para 4(1)(b), the Court of Appeal decided that was not necessary for an individual HMRC officer to make a decision to impose a daily penalty on a particular person. The decision of that Court is binding on us, so applies to Mrs Perrin just as it did to Mr Donaldson;

(2) The Court decided that form SA326D contains the requisite notice for the purposes of para 4(1)(c). Mrs Perrin was issued with that form, see [42] of the 2014 Decision, and its wording is identical to that on the form sent to Mr Donaldson, see [54] of *Morgan and Donaldson*. As a result, Mrs Perrin cannot rely on that point either;

(3) in relation to para 18(1)(c), no period was stated in the notice imposing daily penalties on Mrs Perrin, so the position was the same as in Mr Donaldson’s case. However, on 3 July 2012 HMRC issued Mrs Perrin with a “60 day daily penalties reminder”. This stated that daily penalties had been accruing at £10 a day since 1 May 2012, and already totalled more than £600, see [53] of the 2014 Decision. Mrs Perrin therefore knew that the start date for the period of daily penalty was 1 May 2012 and also knew that they were accruing at a rate of £10 a day. Since the total penalty was for £900, it followed that, like Mr Donaldson, Mrs Perrin “could have been in no doubt as to the period over which [s]he had incurred a liability for daily penalty”.

28. For the above reasons, none of the points raised by Mr Donaldson’s appeal is of any assistance to Mrs Perrin.

Reasonable excuse

29. We therefore turned to the “reasonable excuse” provision at Sch 55, para 23(1).
5 This provides that “liability to a penalty under any paragraph of this Schedule does not arise...if [the person] satisfies HMRC, or (on appeal) the First-tier Tribunal...that there is a reasonable excuse for the failure”.

30. The £900 penalty was charged because Mrs Perrin failed to file her 2010-11 return by the due date. She was also charged two fixed penalties for late filing of the
10 same return, one for £100 and one for £300. In the 2014 Decision the Tribunal has therefore already considered, in relation to those fixed penalties, whether Mrs Perrin had a reasonable excuse.

31. We decided she did not have such an excuse, and explained our reasons at [128] to [130] of the 2014 Decision. Since the daily penalties were charged for the same
15 failure – the late filing of Mrs Perrin’s return – we come to the same conclusion in relation to those daily penalties.

Special circumstances

32. In the 2014 Decision we also considered whether Mrs Perrin’s appeals against the fixed penalties could be set aside because of special circumstances, see [133]-
20 [139] of that Decision. Ms Lai submitted that HMRC considered that there were no special circumstances. The Tribunal agreed with HMRC.

33. The position is the same in relation to the daily penalties, so there is no basis for HMRC’s decision to charge daily penalties to be changed because of special circumstances.

25 **Decision and appeal rights**

34. For the reasons set out above, we therefore uphold the daily penalties charged on Mrs Perrin in the amount of £900 and dismiss her appeal.

35. 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
30 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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**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 19 APRIL 2017

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