



TC05814

Appeal number: TC/2013/05990

INCOME TAX – penalty for failure to make returns – HMRC’s burden of proof when daily penalties charged – appeal against daily penalties allowed – appeal against £100 penalty dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MOHAMMED SAMUEL ISLAM
T/A
ZAINUB TAKEAWAY**

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

The Tribunal determined the appeal on 12 April 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 19 August 2013 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 9 February 2017. The appellant did not exercise his right to submit a Reply to HMRC’s Statement of Case.

DECISION

- 5 1. The appellant, Mr Islam, is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the tax year 2011-12 on time.
2. The penalties that have been charged can be summarised as follows:
- (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 12 February 2013
- 10 (2) “Daily” penalties totalling £400 under paragraph 4 of Schedule 55 imposed on 19 March 2013.
3. Mr Islam’s grounds for appealing against the penalties are broadly that he had a “reasonable excuse” for the failure to submit the return on time as he needed help from friends and others to complete the return, particularly given that he does not speak much English, and people were slow to give him that help.
- 15

Findings of fact

4. I have made the findings of fact set out at [5] to [15] below.

The preconditions necessary for a penalty to be chargeable

- 20 5. HMRC have produced evidence in the form of a print-out from their computer systems, which suggests that Mr Islam was sent a notice requiring him to submit a tax return for 2011-12 on 6 April 2012. Mr Islam has not expressly accepted that he received that notice. However, his Grounds of Appeal, which refer to his attempts to obtain help with the completion of his tax return, make it clear that he realised he was under an obligation to prepare a return for that year. He can only have realised that if
- 25 he had received a notice from HMRC and therefore I have concluded that HMRC’s computer record is accurate and a return was due by 31 October 2012 (if submitted in paper form) or by 31 January 2013 (if submitted electronically).
6. HMRC have produced evidence in the form of a print-out from their computer systems which suggests that the return was submitted in paper form on 12 March
- 30 2013. Mr Islam is not arguing in this appeal that he submitted his tax return earlier than HMRC said he did. I consider that HMRC’s records are correct.
7. HMRC have, in their Statement of Case, referred extensively to the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761. In that case, the Court of Appeal held that:
- 35 (1) HMRC made a high level policy decision in June 2010 that all taxpayers who were more than 3 months late in filing a tax return would be charged daily penalties. That “generic policy decision” was sufficient to meet the

requirements of paragraph 4(1)(b) of Schedule 55 in Mr Donaldson’s case (see paragraph 18 of the judgment of the Master of the Rolls in *Donaldson*).

5 (2) Mr Donaldson had received an “SA Reminder” (after the deadline for submitting a paper return had expired) that informed him that daily penalties would be charged if his return was not filed by 31 January 2012. He also received an “SA 326D notice” informing him of the first £100 fixed penalty and warning that if the return was more than 3 months late, daily penalties would be charged¹. Those documents were sufficient to constitute notices to Mr Donaldson that complied with paragraph 4(1)(c) of Schedule 55.

10 (3) The penalty notice issued to Mr Donaldson did not state “the period in respect of which the penalty was assessed” and did not, therefore, meet the requirements of paragraph 18(1)(c) of Schedule 55. However, that did not prevent the penalty notice from being valid.

15 8. HMRC have not, however, in their Statement of Case focused on how the requirements of paragraph 4(1)(b) or paragraph 4(1)(c) of Schedule 55 are met in the case of Mr Islam specifically. The closest they come to addressing this requirement is in the following extract from their Statement of Case:

20 HMRC submit that following the Court of Appeal decision [i.e. *Donaldson*] the tribunal should find that in the present case HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which the daily penalties had been assessed in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice.

25 9. That is a submission. However, no evidence has been produced to make it good. In particular, HMRC have not made a positive assertion that they had sent any document to Mr Islam specifically notifying him of the date from which daily penalties would become payable. They have not asserted that Mr Islam received an “SA Reminder” in similar terms to that considered in *Donaldson*. They have not asserted that Mr Islam received an “SA 326D notice” in a form similar to that
30 considered in *Donaldson* nor have they sent the actual text of the notice notifying Mr Islam of the £100 penalty (or a document that is expressed to be a standard form of such a penalty notice at the relevant time). It is of course clear that Mr Islam has received some form of notice telling him that a £100 penalty is due (as he has appealed against that penalty). One can speculate that this notice was identical to the
35 “SA 326D notice” referred to in *Donaldson*. However, if HMRC want to charge Mr Islam daily penalties, they must prove that the requirements of paragraph 4(1)(c) of Schedule 55 are met, not merely invite the Tribunal to speculate that they may be satisfied. I am not satisfied on the evidence before me that the requirement of paragraph 4(1)(c) of Schedule 55 is met in Mr Islam’s case.

¹ Paragraph 5 of the Court of Appeal’s decision suggests that this SA 326D notice was sent on 6 January 2012. However, it is clear from the context that this document notified Mr Donaldson of the first £100 penalty for late submission and so cannot have been sent before 31 January 2012 (as Mr Donaldson had until that date to submit an online return). I therefore deduce that there is a typographical error and the SA 326D notice was sent to Mr Donaldson on 6 February 2012.

10. I am, however, satisfied that HMRC have made a “decision” of the kind required by paragraph 4(1)(b) of Schedule 55 since the “generic policy decision” referred to in *Donaldson* applied to all taxpayers, which must include Mr Islam.

Other relevant facts

5 11. In the 2011-12 tax year, Mr Islam was running a takeaway restaurant business. However, the business was not profitable and he ceased trading on 31 August 2011. He says that he lost money in the business and HMRC do not dispute this.

12. Mr Islam has said, in his Notice of Appeal, that he does not speak very good English and his understanding of written English is poor. HMRC do not dispute that
10 and I have therefore accepted Mr Islam’s evidence. I also accept that Mr Islam needed help from others to submit his tax return and that the necessary help was slow to appear. He engaged an accountant to submit the 2010-11 tax return on his behalf, but did not do the same for the 2011-12 return.

13. On 7 March 2013, Mr Islam appealed against the £100 late filing penalty that
15 had been imposed. That appeal was made in time. HMRC rejected that appeal on 25 April 2013 and offered Mr Islam a review. On 11 June 2013 (by which time Mr Islam had received the daily penalties totalling £400), Mr Islam requested a review of HMRC’s decision.

14. I have not seen any letter in which Mr Islam appealed to HMRC against the
20 £400 daily penalties (as opposed to the £100 late filing penalty). However, I do not consider that anything turns on this as on 26 July 2013, HMRC wrote to Mr Islam to set out the conclusions of their review in a letter headed “Appeal against daily penalty for late filing of your 2011-2012 Self Assessment Tax Return”. That demonstrates that HMRC were treating Mr Islam as appealing against both the £100 and the £400
25 penalties.

15. HMRC’s conclusion was that the penalties charged should be upheld. On 26 August 2013, Mr Islam notified his appeal to this Tribunal.

Discussion

16. Relevant statutory provisions are included as an Appendix to this decision.

30 17. I have concluded that Mr Islam’s tax return for 2011-12 was submitted in paper form on 12 March 2013. A paper return should have been submitted by 31 October 2012 or an electronic return by 31 January 2013. Therefore the return was late. The £100 penalty is therefore due (subject to considerations of “reasonable excuse” and “special circumstances” set out below).

35 18. HMRC have the burden of proving the daily penalties are chargeable. Mr Islam has not, in his Notice of Appeal or other correspondence, taken any point to the effect that the requirement of paragraph 4(1)(c) of Schedule 55 is not met. However, HMRC have the burden of proof on this point. It is clear from *Burgess and Brimheath Limited*

v HMRC [2015] UKUT 0578 (TCC) that HMRC must prove their case even if Mr Islam has not taken the point. For reasons I have given at [9], HMRC have not discharged their burden on paragraph 4(1)(c). The daily penalties are not, therefore chargeable.

5 19. I do not consider that Mr Islam has established a “reasonable excuse” for the late filing of his tax return. A reasonable businessman would realise that he would need to comply with his tax obligations in the same way as he has to comply with other obligations associated with his business. If he did not feel able to comply with those obligations himself, he would either have paid for professional help or obtained
10 help from friends and family in good time before the deadline. Mr Islam had several months to prepare the return and therefore had plenty of time to obtain the help necessary.

15 20. I accept that Mr Islam does not have a good command of English. However, that does not alter the position above. Fluent English speakers often need help with their tax returns. Therefore, Mr Islam’s difficulties with English simply represent an additional reason why he needed help to prepare his return. Once it was clear that he needed help, he should have obtained that in good time before the deadline, if necessary by paying a professional accountant.

20 21. Mr Islam has my sympathy that his business failed. However, the obligation to deliver tax returns on time applies both to successful and unsuccessful businesses. Therefore, the fact that the business was unsuccessful is not an excuse for failing to deliver the return on time.

25 22. HMRC have said in their Statement of Case that they have considered the question of “special circumstances”. Their conclusion is that Mr Islam’s difficulties with English are not “special circumstances” such as to merit a reduction in the penalty. That is a reasonable conclusion and I cannot interfere with it. As I have noted above, experiencing difficulty in understanding tax obligations (whether because of a lack of familiarity with English or for any other reason) is not a “special
30 circumstance” as a significant proportion of the population has the same difficulty. People who find tax difficult should obtain assistance, if necessary by engaging a professional to help and Mr Islam is no different from other members of the community in this respect.

23. In the absence of a “reasonable excuse” or “special circumstances” the £100 fixed penalty remains due.

35 **Conclusion**

24. My overall conclusion is:

- (1) HMRC’s decision to charge the £100 penalty is upheld.
- (2) HMRC’s decision to charge the £400 daily penalties is cancelled.

Application for permission to appeal

25. 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.

10

**JONATHAN RICHARDS
TRIBUNAL JUDGE**

RELEASE DATE: 24 APRIL 2017

15

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

- 5 2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

- 10 (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.

15 (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)—

- 20 (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).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

25 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
- 5 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 10 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- 15 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 20 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- 25 (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—
- (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 30 (6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

- 23—
- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 attributable to events outside P's control,

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

5

(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.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

10

16—

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

(2) In sub-paragraph (1) “special circumstances” does not include—

15

(a) ability to pay, or

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

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

20

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

25

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

30

(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 16—

35

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

40

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

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