



TC05817

Appeal number: TC/2013/06118

INCOME TAX – penalty for failure to make returns

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANNE DUNCAN

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

The Tribunal determined the appeal on 13 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 20 August 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 February 2017. The appellant did not exercise her right to submit a Reply to HMRC's Statement of Case.

DECISION

1. The appellant, Mrs Duncan, 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
- (2) “Daily” penalties totalling £630 under paragraph 4 of Schedule 55 imposed on 16 April 2013.
3. Mrs Duncan’s grounds for appealing against the penalties are broadly that she submitted the return in May or June 2012 and therefore it was not late. She has also referred to what she regards are failures in HMRC’s administration and argues that the penalties are disproportionate.

Findings of fact

4. I have made the findings of fact set out at [5] to [16] below.

The preconditions necessary for a penalty to be chargeable

5. HMRC have produced evidence in the form of a print-out from their computer systems which suggests that Mrs Duncan was sent a notice requiring her to submit a tax return for 2011-12 on 19 April 2012. Mrs Duncan has not expressly accepted that she received that notice. However, her Grounds of Appeal make it clear that she realised she was under an obligation to prepare a return for that year. She can only have realised that if she 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 15 April 2013. However, Mrs Duncan is arguing that the return was submitted in May or June 2012, that she received a notice from HMRC confirming the amount of tax that she had to pay and that she has been paying that amount by direct debit.
7. Mrs Duncan has not provided any proof of posting of her tax return, or even a copy of it showing the date on which it was completed. HMRC’s Statement of Case suggests that Mrs Duncan’s tax return for the preceding year, 2010-11, was received on 11 April 2012 with a tax calculation dealing with that tax year being sent after 18 April 2012.
8. On balance, I have concluded that HMRC’s records are correct and that no return was submitted in April or May 2012. I have reached that conclusion partly because there was no evidence for Mrs Duncan’s arguments although HMRC had

records that at least substantiated their argument and partly because it seems to me likely that Mrs Duncan is confusing her return for 2010-11 (submitted in April 2012) with that for 2011-12.

5 9. In February 2013, Mrs Donaldson received a penalty notice from HMRC because no return for 2011-12 had been received by 31 January 2013. In response to that Mrs Donaldson submitted a return to HMRC that was received on 15 April 2013.

10. 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:

10 (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*).

15 (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.

20 (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.

25 11. 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 Mrs Duncan specifically. The closest they come to addressing this requirement is in the following extract from their Statement of Case:

30 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.

35 12. That is a submission. HMRC have not themselves produced any evidence to make it good. In particular, HMRC have not made a positive assertion that they had sent any document to Mrs Duncan specifically notifying her of the date from which daily penalties would become payable. They have not asserted that Mrs Duncan

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.

received an “SA Reminder” in similar terms to that considered in *Donaldson*. They have not asserted that Mrs Duncan received an “SA 326D notice” in a form similar to that considered in *Donaldson* nor have they sent the actual text of the notice notifying Mrs Duncan of the £100 penalty (or a document that is expressed to be a standard form of such a penalty notice at the relevant time).

13. However, accompanying Mrs Duncan’s Notice of Appeal was a letter dated 20 March 2013. That letter explained that Mrs Duncan’s tax return remained outstanding and that the appeal she had made against the £100 late filing penalty on 21 February 2013 would not be considered until the return was submitted. That letter included the following section:

Daily penalties

If your tax return is more than three months late, we will charge a penalty for each day it remains outstanding. Daily penalties may already be building up. To stop the amount of daily penalties that we may charge you from increasing, you can file your tax return online.

14. I am 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 Mrs Duncan.

Other relevant facts

15. Mrs Duncan appealed to HMRC against the late filing penalty of £100 on 21 February 2013. Although I was not provided with a copy, she evidently appealed against the £560 daily penalties as well since, on 29 May 2013, HMRC dealt with both appeals and rejected them.

16. Mrs Duncan requested a review of that decision on 12 June 2013. HMRC gave Mrs Duncan the conclusions of their review in a letter dated “126 July 2013” which I have taken to mean “26 July 2013” as Mrs Duncan said in her Notice of Appeal that she received this document on 28 July 2013. HMRC’s conclusion was that the penalties should be upheld and Mrs Duncan notified her appeal to the Tribunal in a Notice of Appeal dated 20 August 2013 and stamped as “received” by the Tribunal on 28 August 2013. This may have been a few days late since s49G of the Taxes Management Act 1970 requires the appeal to be notified to the Tribunal within 30 days of the date of the document setting out the conclusions of the review. However, no point is taken in this respect and, owing the confusion as to the date of HMRC’s review conclusion document, I give Mrs Duncan an extension of time to the extent that she needs one.

Discussion

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

18. I have concluded that Mrs Duncan’s tax return for 2011-12 was submitted in paper form on 15 April 2013. A paper return should have been submitted by 31 October 2012. Therefore the return was late. The “penalty date” for the purposes of paragraph 1 of Schedule 55 was 1 November 2012 (the day after the deadline for

filing a paper return). The £100 penalty is due and I cannot see any “reasonable excuse” or “special circumstances” that lead to a different conclusion.

19. In order to be able to charge daily penalties, HMRC must establish that the conditions in paragraph 4(1)(b) and 4(1)(c) of Schedule 55 are satisfied. I have
5 concluded at [14] that the condition in paragraph 4(1)(b) is met.

20. To demonstrate the requirement of paragraph 4(1)(c) HMRC must establish that they have given Mrs Duncan notice specifying the date from which a daily penalty is payable. HMRC have said nothing about this requirement in their Statement of Case and have made no submission as to whether the letter of 20 March 2013 referred to at
10 [13] was sufficient.

21. The problem with the letter is that it does not specify any date from which daily penalties will become payable. The letter states that daily penalties will be chargeable “for each day [the return] remains outstanding” which, given Mrs Duncan had submitted a paper return, suggests that, once the return is three months late, daily
15 penalties start to accrue from 1 November 2012, the day after a paper return should have been submitted. That would contravene the requirement of paragraph 4(1)(3)(b) of Schedule 55, which states that the date specified in the notice cannot be earlier than 3 months after the penalty date, and therefore precludes HMRC from specifying a date in the notice earlier than 1 February 2013. I do not think that the letter can fairly
20 be read as saying that daily penalties will start to accrue for every day more than 3 months that the tax return remains outstanding.

22. Moreover, the contrast between the letter of 20 March 2013 and the notices considered in *Donaldson* is marked. Both the “SA Reminder” and the “SA 326 D notice” referred to in *Donaldson* set out a specific date (within the range of dates
25 permitted by paragraph 4(1)(3) of Schedule 55) by including, in the context of a late paper return, the words “Daily penalties can be charged for a maximum of 90 days starting from 1 February”.

23. Mrs Duncan has not, in her 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
30 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 Mrs Duncan has not taken the point. The letter of 20 March 2013 does not specify a date. To the extent it refers to a date, it is earlier than that permitted by paragraph 4(1)(3)(b) of Schedule 55. HMRC have not, therefore, discharged their
35 burden of proving that they gave a notice falling within paragraph 4(1)(c) of Schedule 55 and the daily penalties are accordingly not chargeable.

24. Mrs Duncan has raised the question of proportionality. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to discharge a fixed penalty such as this on grounds of proportionality. She has also criticised
40 HMRC’s administration, but I have no power to deal with complaints such as this: I can only consider whether the penalties charged are due or not.

Conclusion

25. My overall conclusion is:

- (1) HMRC's decision to charge the £100 penalty is upheld.
- (2) HMRC's decision to charge the £630 daily penalties is cancelled.

5 **Application for permission to appeal**

26. 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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**JONATHAN RICHARDS
TRIBUNAL JUDGE**

RELEASE DATE: 24 APRIL 2017

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)—

(a) may be earlier than the date on which the notice is given, but

20 (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—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (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).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

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

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (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%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

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

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (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%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

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

(6) Paragraph 6A explains the 3 categories of information.

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

23—

35 (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.

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

- 40 (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

(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.

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

16—

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

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

(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.

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

(a) staying a penalty, and

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

20 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:

22—

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

25 (2) On an appeal under paragraph 20(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.

30 (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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

35 (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.

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