



TC05885

Appeal number: TC/2013/05213

Income tax - fixed and daily penalties for late filing of self-assessment return - Donaldson considered - whether reasonable excuse - no in respect of 30 day penalty - yes in respect of daily penalties and six and twelve month penalties - Appellant unaware that a return was due - inadequate communication between Appellant and HMRC appeal allowed in part - subject to the outstanding return being filed within 28 days

FIRST-TIER TRIBUNAL

TAX

STEPHEN CHECKSFIELD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 25 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 4 August 2013, and HMRC's Statement of Case received by the Tribunal on 6 February 2017 with enclosures. The Tribunal wrote to the Appellant on 1 February 2017 stating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received

DECISION

- 5 1. This is an appeal by Stephen Checksfield ('the Appellant') against penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2012.
- 10 2. The penalties for late filing of a return can be summarised as follows:
- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2012.
 - 15 ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009 for the year ending 5 April 2012.
 - 20 iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009 for the year ending 5 April 2012.
 - iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009 for the year ending 5 April 2012.
- 25 3. The Appellant's appeal includes an appeal against the 'daily penalties'. Which are calculated at the rate of £10 per day for the period over which the failure to make a return persists, up to a maximum of 90 days.
- 30 4. Daily penalties have been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "Donaldson case"). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties.
5. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed that the appeal should be stood over until the *Donaldson* appeal was determined.
- 35 6. The three issues before the Court of Appeal in respect of daily penalties were:
- a) Whether HMRC had made a decision required by paragraph 4(1)(b) of Schedule 55 FA 2009 to charge daily penalties

- b) Whether HMRC had given notice required under paragraph 4(1)(c) of Schedule 55 FA 2009, specifying the date from which the daily penalties were payable
- c) Whether HMRC had specified the period in respect of which the daily penalties were assessed in the notice of assessment, required under paragraph 18 of Schedule 55 FA 2009.

7. Although only issue (b) was before the Upper Tribunal, Mr Donaldson was given permission to raise the two further points (a and c).

8. The Court of Appeal decided that:

- a. Parliament had not intended that HMRC should only be able to exercise discretion under para 4(1)(b) on an individual taxpayer-by-taxpayer basis. The policy decision taken by HMRC in June 2010 that all taxpayers who were at least three months late in filing their returns would be liable to a daily penalty, satisfied the requirements of para 4(1)(b).
- b. HMRC had given notice under paragraph 4(1)(c) specifying the date from which the penalty was payable in the SA reminder and SA326 Notice. Both notices stated in terms that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three months late and specified the date from which they were payable depending on whether the person filed an electronic or paper return. The notice could be given in advance of any default.
- c. HMRC's notice of assessment under paragraph 18 did not specify the period for which the daily penalties had been assessed. The notice should have specified the period over which the penalty had been incurred and should also have specified the three month period for which the penalty had been charged, or at least state the date when the penalties started. However the court decided the omission fell within the scope of s 114(1) TMA 1970 and thus did not affect the validity of the notice of assessment. The courts view was that Mr Donaldson was not misled or confused by the omission and the period of assessment could be worked out without difficulty.

How the Court of Appeal decision affects this appeal

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

Filing date and Penalty date

5 10. Under s 8(1D) TMA 1970 et seq. for the year ended 5 April 2012, a non-electronic return must be filed by 31 October 2012 and an electronic return by 31 January 2013. The ‘penalty date’ is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the day after the filing date.

Reasonable excuse

10 11. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC, (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

12. The law specifies two situations that are not reasonable excuse:

- 15 (a) An insufficiency of funds, unless attributable to events outside the Appellant’s control and
- (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

13. There is no statutory definition of ‘reasonable excuse’. Whether or not a person had a reasonable excuse is an objective test and “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

20 14. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

15. If there is a reasonable excuse it must exist throughout the failure period.

30 *The background facts*

16. The notice to file for the year ending 5 April 2012 was issued to the Appellant on 6 April 2012.

17. The filing date was 31 October 2012 for a non-electronic return or 31 January 2013 for an electronic return.

18. As the return had not been received by the filing date, HMRC issued a notice of penalty assessment on or around 12 February 2013, in the amount of £100.

5 19. On 19 June 2013 the Appellant appealed and asked HMRC to review their decision to impose the £100 penalty.

20. On 11 July 2013 HMRC rejected the appeal on the grounds that it was out of time, being outside the 30 days within which an appeal must be lodged.

10 21. On 17 July 2013 the Appellant's partner wrote to HMRC saying they had had difficulty contacting HMRC and that the Appellant had filed a return up to the date he started employment.

22. On 6 August 2013 the Appellant lodged an appeal with the Tribunal

15 23. HMRC replied on 8 August 2013 apologising for the difficulty the Appellant had in contacting HMRC and stating that the 2011-12 return was issued as there was no date of cessation shown on the self-employment page of the 2010-11 return and that the return was made up to 5 July 2012. It was also explained that the 2011-12 return was required but that it still remained outstanding. The evidence bundle did not include a copy of the Appellant's return.

20 24. HMRC further explained that their records also showed that the Appellant received payments under the Construction Industry Scheme ('CIS') between May 2011 and July 2011 working as a sub-contractor for Mr Jamieson trading as Straid Builders and that a 2011-12 tax return was therefore still required from the Appellant. The Appellant was shown as receiving a total of £5,280 and that CIS deductions had been made in May 2011 of £408, in June of £528
25 and in July of £120. A copy screen-print of HMRC's records was included with the bundle.

30 25. Penalties continued to accrue and on 14 August 2013, as the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment in the amount of £900, calculated at £10 per day for 90 days.

26. On the same date, 14 August 2013, as the return had not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment in the amount of £300. HMRC notified the Appellant that a total of £1,200 penalties had been imposed and were due payment.

35 27. On 11 September 2013 the First-tier Tribunal directed that the appeal should be stood over until the decision of the Court of Appeal in the *Donaldson* case was finalised.

28. The stay lasted for several years, as the Tribunal's decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761).

5 29. The Court of Appeal's decision became final when the Supreme Court refused permission for leave to appeal on 21 December 2016. Thereafter, HMRC have been asked to provide statements of case on the many appeals stayed behind *Donaldson* in order that they could be resolved.

10 30. On 25 February 2014, as the return had still not been received 12 months after the penalty date, HMRC issued a notice of penalty assessment in the amount of £300.

31. As at 6 February 2017, being the date HMRC's statement of case was lodged with the Tribunal, a return has not been received.

Relevant statutory provisions

Schedule 55 Finance Act 2009:

15 32. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

33. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'

34. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

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

25 (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.

(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).

30 (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).

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

(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
- (b) £300.

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

- (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.
- 10 (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,
 - 15 (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

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

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any para-graph of this Schedule.
- 25 (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.
- 30 (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.

35 39. 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:

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- 40 (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.
- 45 (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
 - 50 (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.

The Appellant's case

5 40. The Appellant says that he had ceased being self-employed at the time he filed his 2010-11 return in January 2012, (which is accepted) and that he was by then employed with tax being taken at source. He does not understand why he had to file any further returns and assumed the penalties issued by HMRC to have been a mistake.

10 *HMRC's case*

41. Late filing penalties for the year ended 5 April 2012 are due in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund.

15 42. The 2011-12 notice to file issued to the Appellant on 6 April 2012 warned that a penalty of £100 would be charged if the return was filed after the relevant deadline.

20 43. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the 2011-12 notice to file issued to the Appellant on 6 April 2012.

44. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure his 2011-12 tax return was filed by the legislative date and payment made on time.

25 45. HMRC's records show that the Appellant has been a self-employed sub-contractor from 15 October 1999, so should be aware of his obligations under self-assessment regime. Filing the tax return and paying any tax due by the deadline forms part of his responsibility to meet these obligations.

30 46. The Appellant states in his appeal to the Tribunal that he doesn't understand why he had to complete the form in the first place as he his employed paying tax at source and thought the form was a mistake.

35 47. HMRC would contend that the legal obligation to make a return is created when the 'Notice to file a return' or paper return - a notice under s 8 TMA 1970 - is issued, and once issued, the customer is legally obliged to complete that return.

48. HMRC issued a return for 2011-12 to the Appellant as their records showed he was still self-employed. The 2010-11 return completed on line by the Appellant on 29 January 2012 showed that he made his self-employment

accounts up to 30 July 2012, suggesting he was still self-employed up to the 2012-13 tax year.

5 49. HMRC received a letter from the Appellant's partner 17 July 2013 saying they had had difficulty contacting HMRC and that the Appellant had filed a return up the date he started employment.

50. At the date of HMRC's submission (February 2017) the 2012-13 return issued to the Appellant on 6 April 2013 is also outstanding and penalties have been charged, but HMRC have not received any appeals against the penalties.

10 51. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

15 52. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

53. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances.

20 "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

25 54. In other contexts "special" has been held to mean "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

30 55. There are no special circumstances which would merit a reduction of the penalties below the statutory amount and the penalties are appropriate in the circumstances.

35 56. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

57. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed but, in any event there are no special circumstances which would require the tribunal to reduce the penalties.

Conclusion

5 58. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case.

10 59. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise would have been complied with.

15 60. It is difficult to understand why the Appellant, having been employed as a subcontractor in the CIS scheme in May, June and July 2012 thought that he did not have to file a return for 2011-12 and that he had completed his returns up to the point in time when he ceased to be self-employed and became employed.

20 61. It appears that the Appellant made a mistake in completing his 2010-11 return. HMRC's statement (paragraph 46 above) that the Appellant's 2010-2011 return 'showed that he made his self-employment accounts up to 30 July 2012, suggesting he was still self-employed up to the 2012-13' is clearly an erroneous assumption. The Appellant would not know at that stage when he completed the return on line on 29 January 2012 that he would still be self-employed in July 2012. He must have meant 31 July 2011, as evidenced by
25 HMRC's screen print of his CIS self-employed records.

30 62. If he was self-employed up until the end of July 2011, he should have been aware that a return for 2011-12 would be necessary. However his correspondence appears to indicate that he thought his financial year ran from January to January and that as he had completed a return at the end of January 2012, his tax was paid up to date (his erroneous assumption possibly being reinforced by the fact that he had received a tax refund of £1,807 on 1 February 2012.) We were not provided with a copy of the Appellant's return and it is possible that he had returned the May, June and July 2011 income in his 2010-11 return thinking that he was obliged to return all his self-employed
35 income up to January 2012.

63. It was therefore unfortunate that the Appellant, on receiving the £100 penalty, was unable to make contact with HMRC. He refers to numerous attempts to speak to HMRC which he followed up by four letters. None of the letters were included in HMRC's bundle.

40 64. The situation was exacerbated by HMRC's issue of the 90 day penalty on 14 August 2013, simultaneously with the six month penalty of £300, which

unfortunately was (contrary to HMRC's assertion in their statement of case) after the Appellant had submitted an appeal to HMRC and more critically also after he had lodged his appeal with the Tribunal on 6 August 2013. The twelve month penalty was issued on 25 February 2015, during the period when the
5 *Donaldson* case was stayed.

65. I accept that the Appellant made attempts to contact HMRC after receiving the first penalty and that because he misunderstood his tax liabilities he had incorrectly assumed that he did not have to file a return for 2011-12. Had he been able to communicate with HMRC, his misconception would have been
10 dispelled and, I have to conclude, the outstanding return would have been filed, I assume without any corresponding tax arising given that he had already paid tax at source under the CIS scheme.

66. Although HMRC are not obliged to give advice to taxpayers it is reasonable to expect some assistance when a taxpayer has so obviously
15 misunderstood his position. HMRC's tax Charter states "*We want to give you a service that is fair, accurate and based on mutual trust and respect. We also want to make it as easy as we can for you to get things right..... We'll help you understand what you have to do and when you have to do it.*"

67. Had there been a clearer explanation by HMRC as to why the Appellant
20 had to file a return for 2011-12, the reasonable assumption must be (particularly when under threat of ever increasing penalties) that the return would have been filed.

68. Ignorance of the law does not amount to a reasonable excuse as for there to be a reasonable excuse the Appellant must have acted as a conscientious
25 taxpayer aware of his obligations to file. The Tribunal therefore finds that the first late filing penalty of £100 was properly charged by HMRC in accordance with legislation, there having been no reasonable excuse for the Appellant's failure to file his tax return on time. The £100 penalty payable for late submission of the Appellant's tax 2011-12 return is therefore confirmed.

69. For the reasons set out above however I find that the Appellant has a
30 reasonable excuse for the delays that followed the initial default particularly given that his appeal to the Tribunal had been received before the daily penalties and the six month penalties were issued.

70. The daily penalties of £900 and the six and twelve month penalties, each
35 of £300 are accordingly discharged, subject to the Appellant filing his 2011-12 return (whether nil or otherwise), within 28 days of the release of this decision. UNLESS HMRC receive the Appellant's 2011-12 return within that period, the penalties are confirmed.

71. This document contains full findings of fact and reasons for the decision.
40 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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MICHAEL CONNELL

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TRIBUNAL JUDGE
RELEASE DATE: 17 MAY 2017