



TC05931

Appeal number: TC/2014/00560

INCOME TAX – penalty for taxpayer’s delay in filing tax return – paragraphs 4 and 5 of Schedule 55 of Finance Act 2009 – whether taxpayer had reasonable excuse for delay – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARY ASIA

Appellant

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

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 22 January 2014 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 22 February 2017.

DECISION

- 5 1. The Tribunal decided that this appeal would be dismissed.

Introduction

2. This appeal by Ms Asia is against HMRC's decision to issue her with a number of penalties in respect of her delay in filing her tax return for the tax year 2011/12. Those penalties are daily penalties totalling £900 and a six months delay penalty of
10 £300, raised under paragraphs 4 and 5 respectively of Schedule 55 to the Finance Act 2009.

The Donaldson appeal and procedural background

3. Ms Asia filed her appeal to this Tribunal on 23 January 2014, after the Tribunal released its decision in *Donaldson v HMRC* [2013] UKFTT 317 (TC). This decision
15 raised a number of questions about whether daily penalties imposed by HMRC had been imposed correctly or whether there were procedural irregularities which would invalidate them. HMRC had appealed the decision in *Donaldson* and, as the outcome of that appeal could affect a number of other cases where daily penalties had been imposed, those cases (including the present appeal of Ms Asia) were put on hold until
20 the *Donaldson* appeal was finally resolved.

4. The *Donaldson* appeal was heard by the Upper Tribunal, which released a decision on 2 December 2014 (reported at [2014] UKUT 536 (TCC)) and then by the Court of Appeal which released its judgment on 18 July 2016 (reported at [2016] EWCA Civ 761). On 21 December 2016 the Supreme Court refused to give Mr
25 Donaldson permission to appeal further, resulting in the Court of Appeal Judgment becoming final.

5. The Judgment of the Court of Appeal in *Donaldson* was that HMRC had taken a policy decision to raise penalties after a certain period of delay and that this was sufficient by way of decision, and that Self-Assessment reminders gave sufficient
30 warning to taxpayers that daily penalties would be imposed. The Court of Appeal also decided that although HMRC had failed to state the period (over which the daily penalties were imposed) in the penalty assessment, this omission did not invalidate the penalty assessment raised as the relevant period could be worked out without difficulty. Therefore, the Court of Appeal concluded, the penalties imposed upon Mr
35 Donaldson were not invalidated by procedural irregularities. This Tribunal is bound by the Judgment of the Court of Appeal.

6. As a result of the Court of Appeal Judgment in *Donaldson* becoming final, all the appeals which had been put on hold (including the present appeal of Ms Asia) were released to be individually heard.

7. On 22 February 2017 HMRC sent the Tribunal and Ms Asia their Statement of Case in respect of this appeal. I assume that was sent by international standard delivery and so it would be presumed to be received by Ms Asia five postal delivery days later, i.e. by 28 February 2017. On 22 February 2017 the Tribunal emailed Ms Asia to notify her that if she wished to send a Reply to HMRC's Statement of Case, or any further documents, it/they should be received by the Tribunal no less than 30 days after receipt of the Statement of Case. I calculate that date to be 30 March 2017. As at the date of this paper hearing (25 April 2017) no Reply or further documents have been received from Ms Asia and so I proceed to hear this appeal on the basis of the documents specified above.

Chronology of Ms Asia's appeal

8. On 6 April 2012, HMRC issued Ms Asia with a return to file for the tax year 2011/12. The deadline for this return to be filed was 31 January 2013 if filed by electronic means or 31 October 2012 if filed as a paper return.
9. On 12 February 2013, HMRC issued a £100 penalty to Ms Asia as her return for 2011/12 had not been received by 31 January 2013.
10. HMRC received Ms Asia's return for the tax year 2011/12 on 7 August 2013.
11. On 14 August 2013, HMRC issued Ms Asia with daily penalties totalling £900 as the return had been outstanding for more than three months for 90 days. On 3 September 2013 HMRC issued Ms Asia with a penalty of £300 as the return had been outstanding for more than six months.
12. On 1 October 2013 Ms Asia appealed to HMRC against the late filing penalties imposed in the 3 September 2013 notice. In two separate letters sent on 22 October 2013, HMRC refused to consider Ms Asia's appeal against the late filing penalty of £100 as it was received out of time, and rejected Ms Asia's appeal against the six month late filing penalty of £300.
13. On 6 November 2013 Ms Asia sought a review. By letter dated 23 December 2013 HMRC upheld the decision to impose a six month delay penalty.
14. On 23 January 2014 Ms Asia appealed to this Tribunal against the daily penalties and six month filing delay penalty. The basis of Ms Asia's appeal is that she had a reasonable excuse for her delay in filing her return and in making her appeal to HMRC, and also that she cannot afford to pay the penalties imposed.

Procedural point on this Tribunal's jurisdiction

15. Although this appeal to the Tribunal is against the daily penalties as well as the six month late filing penalty (as described in paragraph 2 above), it is not clear that Ms Asia's original appeal to HMRC included an appeal against the daily penalties. In that first appeal Ms Asia referred to the 3 September 2013 notice which imposed the six month delay filing penalty. There was no reference to the 14 August 2013 penalty notification in that first appeal.

16. The correct procedure for a person appealing against Schedule 55 penalties is to appeal first to HMRC, and then refer that appeal to the Tribunal – see Sections 49D and 49G Taxes Management Act 1970. However, taxpayers are not always aware that they must appeal in this order. Where a taxpayer appeals directly to the Tribunal as the first appeal, and the Tribunal notifies HMRC of such an appeal, HMRC's practice (set out in their manuals: ARTG2440) is to consider whether the notification of the appeal to them by the Tribunal can be treated as the appeal to them by the taxpayer. Where the Tribunal's notification can be treated in this way, this avoids the otherwise inevitable delay in the Tribunal returning the appeal to the taxpayer and requiring an appeal be made to HMRC before an appeal to the Tribunal can be accepted.

17. In this case, HMRC do not comment upon the route by which Ms Asia's appeal against daily penalties has reached this Tribunal or suggest that the Tribunal has no jurisdiction to consider Ms Asia's appeal against the daily penalties because of the lack of an appeal directly to them. Therefore I assume HMRC have concluded that the Tribunal's notification of the appeal can be treated as Ms Asia's appeal to them, in accordance with ARTG2440, and that the Tribunal has jurisdiction to consider the appeal against the daily penalties as well as the six month late filing penalty.

Findings of fact

18. On the basis of the papers before me I find the following facts:

a) Ms Asia had filed tax returns in respect of rental income for the tax years 2007/08 and onwards. Ms Asia's tax returns for 2007/08, 2008/09 and 2010/11 were filed late, and in each of these years Ms Asia incurred a £100 late filing penalty. In 2007/08 and 2008/09 these £100 late filing penalties were reduced to zero once Ms Asia's tax return was received.

b) In early 2012 Ms Asia moved to Germany. She notified HMRC of her new address which was with effect from 16 February 2012. Ms Asia had lived in the USA before moving to Germany.

c) In her 6 November 2013 review request Ms Asia stated:

I have no control over postal mailing processes between continents and countries. At the time of submitting the 1st of 2 2012 returns, I lived in the US. Since then I have moved to Germany where I reside now.

d) This letter suggests that a tax return for 2011/12 was submitted by Ms Asia at a time when she lived in the USA. However, when Ms Asia moved from the USA to Germany on 16 February 2012, HMRC had not yet issued tax returns for 2011/12 to taxpayers and the tax year 2011/12 had not concluded. On that basis I find that Ms Asia could not have sent a tax return for 2011/12 from the USA prior to 16 February 2012.

e) On 6 April 2012, HMRC issued a return for 2011/12 to Ms Asia at her address in Germany. The paper filing deadline was 31 October 2012. The filing dates were

stated on the tax return; Ms Asia would also have been aware of the filing dates from her previous filing history and her receipt of late filing penalties.

5 f) On 12 February 2013 HMRC issued Ms Asia with a £100 late filing penalty. On 4 June 2013 HMRC sent a 30 day daily penalty reminder letter to Ms Asia. On 2 July 2013 HMRC sent a 60 day daily penalty reminder letter to Ms Asia.

g) HMRC received Ms Asia's paper tax return for 2011/12 on 7 August 2013.

h) On 14 August 2013, HMRC issued Ms Asia with daily penalties totalling £900, and on 3 September 2013 HMRC issued Ms Asia with a six month delay penalty of £300.

10 i) In Ms Asia's 1 October 2013 letter of appeal to HMRC, she wrote:

15 I submitted a return when it was due. Unfortunately I do not have the postal tracking records as support. I understand from your agent, Andre, to my great surprise, that you only received the return on 7 August 2013. Whilst I believe Andre, what I find truly unbelievable is that the return took that long to reach you. I can only think of the local postal services both in Germany and the UK as possible causes.

20 j) From her reference to the German postal services I assume Ms Asia is suggesting that her return was posted from Germany. At this point Ms Asia suggests that only one return was sent, and states that it was sent in good time for it to have been received by HMRC in the UK by the 31 October 2012 deadline. If a tax return was posted prior to 31 October 2012 in Germany but received in the UK on 7 August 2013 then that return spent approximately nine and a half months in the postal systems of Germany and the UK. That seems highly unlikely.

k) However, in her 6 November 2013 review, Ms Asia states:

25 I submitted a return twice already, originally when it was due and recently in July/Aug of this year following the first penalty notice. Unfortunately I do not have the postal tracking records anymore for the first return submitted. For the second I do have these. My family lived in the US previously before relocating to Germany and during March/April 2012 I was moving and setting up a base and address in Germany. It is thus very possible that the return could have been
30 lost and/not delivered in 2012.

35 l) If Ms Asia sent a tax return from Germany in July or August 2013 then it is far from surprising that it should be received by HMRC on 7 August 2013. A posting date of July or August 2013 is consistent with HMRC's receipt of Ms Asia's return on 7 August 2013. Therefore, on the balance of probabilities, I find that Ms Asia posted a tax return for 2011/12 to HMRC from Germany in late July or early August 2013.

m) I need to determine whether Ms Asia sent one tax return, as she said in October 2013, or two returns, as she said in November 2013. HMRC have no record of receiving a second return but that does not mean one was not posted and subsequently

lost in the post. I have found that no return was sent from the USA but it is possible that a first return, sent prior to July/August 2013, could have been sent from Germany.

5 n) I have considered Ms Asia's explanations of events very carefully. It seems to me that the inconsistencies in those explanations lessen the reliability of both explanations. If two tax returns were sent then it is surprising that it was not mentioned in the 1 October 2013 letter of appeal. It is also odd that Ms Asia should express surprise about HMRC receiving a return on 7 August 2013 when she was aware that she had posted a return to HMRC a week or two before that date.
10 Similarly the review letter of 6 November 2013 contains the odd suggestion that a first return was sent from the USA when Ms Asia must have known that the 2011/12 tax return was issued to her in Germany, after she had left the USA, and that she could not have filed a tax return before the tax year had ended.

15 o) On the balance of probabilities, I find that Ms Asia did not post a tax return for 2011/12 from Germany prior to 31 October 2012. I find that the first and only return for 2011/12 sent by Ms Asia was that sent to HMRC in July or August of 2013, after Ms Asia had started to receive the daily penalty reminder letters.

Discussion and decision

19. In an appeal against the imposition of penalties the onus of proof is first upon
20 HMRC to satisfy the Tribunal that the penalties are properly imposed. The onus then switches to the Appellant, Ms Asia, to demonstrate that she has a reasonable excuse. The standard of proof in both cases is the civil standard of the balance of probabilities.

Schedule 55

20. The relevant parts of paragraph 1 of Schedule 55 provide as follows:

25 (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(4) In this Schedule-

30 "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC ...;

"penalty date", in relation to a return or other document [falling within any of items 1 to 3 and 5 to 13 in the Table], means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

35 21. A personal tax return is one of the items specified in the Table mentioned in paragraph 1.

22. The daily penalties imposed upon Ms Asia are imposed under paragraph 4 and the six month delay penalty is imposed under paragraph 5.

23. The relevant parts of paragraph 4 provide as follows:

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

- 5 (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.

10 (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 subparagraph (1)(c).

24. So, if Ms Asia fails to file her return on time, and that failure continues for three months after the filing date of 31 October 2012 (i.e. 31 January 2013), then she is
15 liable to paragraph 4 daily penalties of £10 for each day in the 90 days after 31 January 2013 that the failure persists.

25. The relevant parts of paragraph 5 provide as follows:

20 **5** (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.

25 26. As set out in the definitions provided in paragraph 1, the penalty date for any return is the day after the filing date for that document, and the filing date for any document is the date on which that document is required to be made or delivered to HMRC. So if Ms Asia has failed to file her return six months after the filing date of 31 October 2012 then she is liable to a paragraph 5 penalty.

30 27. Having found that Ms Asia's tax return for 2010/11 was not received by HMRC until 7 August 2013, I am satisfied that Ms Asia has, on the face of it, incurred liability to 90 daily penalties and a six month filing delay penalty as imposed by HMRC under paragraphs 4 and 5 of Schedule 55.

28. Therefore, I now consider whether Ms Asia has a reasonable excuse for her filing delay.

Reasonable excuse

29. As noted above, the penalties imposed upon Ms Asia are imposed under provisions in Schedule 55 to the Finance Act 2009. Sub-paragraph 23(1) of Schedule 55 provides that liability to any penalty imposed under Schedule 55 does not arise if there is a reasonable excuse for the failure for which the penalty has been imposed. "Reasonable excuse" is not defined but sub-paragraph 23(2) of Schedule 55 excludes certain matters from being a reasonable excuse. Sub-paragraph (2) provides:

10 (2) For the purposes of subparagraph (1)-

(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

15 (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.

Ms Asia's submissions

30. I have set out above the relevant parts of Ms Asia's letter of appeal to HMRC dated 1 October 2013 and her 6 November 2013 request for a review. In her Notice of Appeal to the Tribunal dated 22 January 2014, Ms Asia summarised her position as follows:

25 I reside abroad and mailed return to the HMRC. As stated I have no control and/influence over postal services. HMRC received return late for which the penalties were then changed.

31. Ms Asia also referred to having previously always filed her tax returns on time. This does not seem to be entirely accurate given the late filing penalties imposed in previous years.

Conclusions on reasonable excuse

30 32. I have found as a fact that Ms Asia posted one tax return for 2011/12, from Germany, and that this was sent to HMRC in late July or early August 2013. It follows from this finding that I do not accept that Ms Asia posted her return in good time for it to be received by HMRC by the filing deadline of 31 October 2012. It follows that I do not accept that postal delays were to blame for Ms Asia's delay in
35 filing her return for 2011/12 on time.

33. Ms Asia's suggestion that she had previously always filed her tax returns on time does not seem to be entirely accurate given the late filing penalties imposed for earlier years. However, even if Ms Asia had not previously filed her return late, that would not provide a reasonable excuse for her delay in filing her return for 2011/12.

5 34. I have looked carefully at all the circumstances of this case but I do not consider that Ms Asia has provided a reasonable excuse for her delay.

Special Reduction

10 35. A penalty under Schedule 55 can be reduced under the power in Paragraph 16. Sub-paragraph 16(1) of Schedule 55 to the Finance Act 2009 enables HMRC to reduce a penalty imposed under Schedule 55 in certain circumstances. Sub-paragraphs (1) and (2) provide:

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

(2) In subparagraph (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 overpayment by another.

20 36. I can only interfere with HMRC's conclusion on the grounds relevant to judicial review proceedings, that is to say, if I consider that HMRC's conclusion is one that no decision-maker, properly directed, could reach. If HMRC had failed to consider the matter at all then I could set aside that lack of conclusion and consider the matter myself.

25 37. Paragraph 16 was clearly not considered by HMRC in their decision letters. However the point was considered by HMRC in their Statement of Case. Following the reasoning of the Tribunal (Judge Redston and Mr Speller) in *Bluu Solutions Limited v HMRC* [2015] UKFTT 95 (TC), which considered the similarly worded Schedule 56, it is open to HMRC to consider whether there are special circumstances at any time up until the conclusion of the hearing of an appeal, including in their Statement of Case. On that basis HMRC have not failed to consider the point.

30 38. HMRC concluded in their Statement of Case that there were no circumstances present in Ms Asia's case which would make it right to reduce the penalties imposed. On all the material available to me, I do not consider that I can interfere with HMRC's conclusion in this case.

Inability to pay

35 39. Ms Asia states that she is unable to pay the penalties which have been imposed. This Tribunal only has jurisdiction to determine what is legally due and payable, and I have no power to make any decisions as to whether Ms Asia is able to pay the amount

due. If Ms Asia still has concerns regarding payment then she should discuss these with HMRC.

Conclusion

40. Therefore, for the reasons set out above, this appeal is dismissed.

5 41. A summary decision was issued to the parties on 4 May 2017, informing them that if they wished to appeal, they must apply in writing within 28 days for full findings or facts and reasons for the decision. Ms Asia made such an application. This document contains the full findings of fact and reasons for the decision.

10 42. 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.

15

JANE BAILEY

TRIBUNAL JUDGE

20

RELEASE DATE: 15 JUNE 2017