



TC05886

Appeal number: TC/2013/05165

Income tax - daily penalties for late filing of self-assessment return - Donaldson considered - Appellant thought she had submitted her return on line but had been unsuccessful - only became aware of this on receipt of £100 penalty - further delay before submitting a paper return - whether reasonable excuse - no - appeal disallowed

FIRST-TIER TRIBUNAL

TAX

BARBARA HARVEY

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 2 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 8 February 2017 stating that if she 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 Barbara Harvey ('the Appellant') against penalties totalling £760 imposed by the Respondents ('HMRC') under Paragraphs 4 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of her self-assessment ('SA') tax return for the tax year ending 5 April 2012.

2. The penalties for late filing of a return can be summarised as follows:

10 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.

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.

20 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 is against the 'daily penalties'. The penalty is 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.

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.

30 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.

6. The three issues before the Court of Appeal in respect of daily penalties were:

35 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 in 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:

- (a) An insufficiency of funds, unless attributable to events outside the Appellant’s control and
- 15 (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. The Appellant's non-electronic return for the year 2011-12 was received on 17 April 2013. An extract from HMRC's computer records for the Appellant showing the date the return was received was included with HMRC's bundle of evidence to the Tribunal.

10 20. As the return had not been received 3 months after the penalty date, the day after the 'filing date' - which in this case, for a *paper* return was 31 January 2012, HMRC issued a notice of daily penalty assessment on or around 23 April 2013 in the amount of £760, calculated at £10 per day for 76 days.

21. On 30 April 2013 the Appellant appealed against the penalty on the grounds that:

15 i. She filed her tax return online on 24 January 2013 and sent payment for the amount of tax due on the same day.

20 ii. No e-mail was received to confirm whether the return had been filed or not. Her sons did their returns at the same time and on the same computer and received repayments of tax without receiving any confirmation e-mail.

iii. When she received a letter on 21 March 2013 asking for her return she sent paper copies of the original return from her computer.

iv. If she had not completed a return she would not have known to pay tax of £537.20.

25 v. As a pensioner she has paid what was owed but cannot pay £760.

22. On 16 May 2013 HMRC sent the Appellant a decision letter rejecting her appeal and offering a review. HMRC carried out a review and issued their review conclusion on 9 July 2013. The outcome of the review was that HMRC's decision should be upheld.

30 23. On 2 August 2013 the Appellant lodged an appeal with the Tribunal. The grounds of appeal were:

i. Her tax return and payment were both sent online on 24 January 2013 and she would not have sent one without the other.

35 ii. Her sons sent their returns at the same time and on the same computer and received (tax) rebates two weeks later.

- iii. Her sons did not get an e-mail receipt for their returns, so she did not expect one.
- iv. She responded to HMRC's letter, received 12 February, and said her return had been sent and sent copies from her computer.
- 5 v. She received a further letter three weeks later suggesting she appealed and the penalties were now £760. This amount accrued whilst she was waiting for a reply to her first letter. She paid the penalty to stop it going up.
- 10 vi. Her appeal was rejected as she was a director which was wrong as the company went into liquidation 12 months earlier.
- vii. She cannot see how HMRC can prove she did not send her return when she did. She sent the return as she needed the tax from it – “computers are not infallible”.

15 24. 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.

25. 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).

20 26. 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.

Relevant statutory provisions

25 **Taxes Management Act 1970**

Section 8 - Personal return - provides as follows:

30 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board—

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- 35 b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under this section is given after the 31st October next following the year, the last j day of the period of three months beginning with the day on which the notice is given]

5 (1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

10 (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

15 (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

20 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under this section for a year of assessment (Year 1) must be delivered—

25 (a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered—

30 (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

35 (1H) The Commissioners—

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.]

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

5 (3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.]

10 (4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.]

15 (5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Schedule 55 Finance Act 2009:

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

20 28. Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’

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

25 30. 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)--

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.

(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)--

35 (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).

31. 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.

32. 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.
- (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,
 - (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

33. 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.
- (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.
- (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.

34. 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.
- (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.
- (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

(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.

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The Appellant's case

35. The Appellant's grounds of appeal are as set out in her Notice of Appeal to the Tribunal.

HMRC's case

10 36. 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 37. 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.

20 38. 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 her 2011-12 tax return was filed by the legislative date and payment made on time.

39. HMRC's records show that the Appellant initially registered for online services on 16 January 2013. The records also show that although the Appellant accessed her online account again on 24 January 2013, HMRC did not receive her tax return on this date.

25 40. The Appellant would have been able to see the calculation of the tax due for 2011-12 at step 6 of the filing process - however this is not the final stage. Taxpayers are advised at step 6 to press the 'Next' button to save and then submit their return. At step 7 (Save Your Return) taxpayers are told to select 'Next' at the bottom of the screen to submit their return.

30 41. Following the completion of the return the customer is required to check and correct any errors that are highlighted. The calculation is then viewed and the following page then has options to view, print and save a copy of the return. The text at the top of this page clearly states "Before submitting your return you can view, print and save a copy of your return to your own computer. Select 'Next' at the bottom of the screen to go on to submit your return".

35 42. To submit the return online the customer has to read and agree a statement confirming that the information provided is complete and correct. As an additional security check, customers are asked to re-input their details User ID and password. When the return had been successfully submitted to HMRC

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there is an onscreen message to confirm receipt and a confirmation email is sent to the email address if provided.

5 43. The Appellant successfully filed her previous four years tax returns online and HMRC would expect her to have been aware of the online filing procedure. The fact that she did not receive the confirmation messages should have alerted her to the fact that the return had not been successfully submitted to HMRC. An extract from HMRC's records for the Appellant showing the submission of her previous returns was included in the bundle of evidence before the Tribunal.

10 44. HMRC are unable to comment on the position of the returns submitted by the Appellant's sons.

15 45. HMRC sent a late filing penalty notice to the Appellant on 12 February 2013 for £100. HMRC's view is that this should have acted as a prompt to the Appellant that her return had not been received. However, she did not send a paper copy of her return to HMRC until 14 April 2013.

46. It is the taxpayer's responsibility to ensure that the tax return is fully completed and submitted on time. HMRC provide guidance to taxpayers to show the progress of completion of the tax return and give instructions on how to submit the return.

20 47. The Appellant did not file her return online correctly within the deadline specified and/or respond timely to HMRC's correspondence, including a penalty notice, by forwarding a paper copy of her 2011-12 return. The penalties accrued as a result of this.

25 48. Although the Appellant lodged a *paper* return, the daily penalties were only charged from 1 February 2013 to 17 April 2013 when the Appellant's return was received. HMRC received payment of £760 from the Appellant on 22 May 2013.

30 49. The Appellant's PAYE employment record shows that she was a director at Parkrose Joinery until 3 February 2011 and at Parkrose Builders until 3 February 2012. As the Appellant was a director during 2011-12 she was required to complete a self-assessment tax return. HMRC refused her appeal against the penalty charges because she was not considered to have a reasonable excuse, not because she was a director. The same reasoning is used for all taxpayers, regardless of office.

35 50. 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.

51. 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

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

10 53. 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),
15 paragraph 40).

54. 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

20 55. 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”.

25 56. 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

30 57. 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.

35 58. 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.

59. I find that the Appellant, although accessing her online account on 24 January 2013, failed to file her return on that date. As HMRC say, when a return has been successfully submitted electronically an on-screen message is

generated to acknowledge receipt. A confirmation of receipt is also sent to the sender's email address.

5 60. The Appellant had successfully filed her previous four years tax returns online and should have been aware of the online filing procedures. The fact that she did not receive the confirmation messages should have alerted her to the fact that the return had not been successfully submitted to HMRC.

61. HMRC sent a late filing penalty to Mrs Harvey on 12 February 2013 for £100. This should have acted as a prompt to her that her return had not been received.

10 62. The Appellant says that by letter dated 21 March 2013 she received a request from HMRC to file her return. However she did not submit her return to HMRC until 14 April 2013, and then did so by way of a paper return rather than an electronic submission.

15 63. Daily penalties fall due when there has been a failure to file a return for three months from the date of the 'penalty date', that is the date after the 'filing date'. Because the Appellant had filed a paper return rather than electronic return this meant that the penalties strictly speaking fell due three months after 1 November 2012, that is on 1 February 2013 and accruing from 1 November 2012. Nonetheless HMRC have imposed daily penalties from 1 February 2013 for 76 days, that is until 17 April 2013 when the paper return was received

25 64. 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 taxpayer aware of his or her obligations to file. The Tribunal therefore finds that the daily penalties have been properly charged by HMRC in accordance with legislation there having been no continuing reasonable excuse for the Appellant's failure to file her tax return on time. The £760 penalty payable for late submission of the Appellant's tax 2011-12 return is therefore confirmed.

30 65. 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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MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 17 MAY 2017

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