[2018] UKFTT 495 (TC)

TC06673

Appeal number: TC/2018/02091 & 01383

INCOME TAX – non-residents with rental income from UK land but no UK tax liability - penalties under Schedule 55 FA 2009 for failure to file returns – whether reasonable excuse for failure: no – whether Tribunal can make special reduction on account of difference in tax treatment of couples between Ireland and UK: no – whether paragraph 4 daily penalties meet* Donaldson *criteria: no – whether paragraph 5 and 6 penalties valid: no, as no officer determined penalty to best of information and belief – whether paragraph 17(3) would have reduced penalties to nil in any event: no, dissenting judgment in* Shaun C Long *preferred – appeals allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARIE MOONEY-HYNES & PADRAIC BRENNAN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeals on 8 August 2018 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 Notices of Appeal dated 8 February 2018 (with enclosures), HMRC's Statements of Case (with enclosures) acknowledged by the Tribunal on 18 May 2018 and the appellants' reply of 25 June 2018.

DECISION

Facts

1. I find as fact the matters set out in §§2 to 13 below. They are derived from the evidence in the bundles of papers I had.

2. Ms Marie Mooney-Haynes and Mr Padraic Brennan ("the appellants"), a married couple, were resident in Ireland and not resident in the United Kingdom for the tax year 2014-15. For that year and many previously they were in receipt of income in the form of rents from a property in Manchester and had been making UK tax returns for the years before 2014-15.

3. They were each issued with a notice to file an income tax return for the tax year 2014-15 on 6 April 2015. That notice required the appellants to deliver the returns by 31 October 2015 if filed in paper form or by 31 January 2016 if filed electronically ("the due date").

4. On 17 February 2016 HMRC issued a notice informing each of the appellants that a penalty of £100 had been assessed for their failure to file the return by the due date.

5. On 12 August 2016 HMRC issued a notice informing each of the appellants that a penalty of £900 had been assessed for their failure to file the return by a date 3 months after the due date.

6. Also on 12 August 2016 HMRC issued a notice informing each of the appellants that a penalty of £300 had been assessed for their failure to file the return by a date 6 months after the due date.

7. On 21 February 2017 HMRC issued a notice informing each of the appellants that a penalty of £300 had been assessed for their failure to file the return by a date 3 months after the due date.

8. The appellants' returns were filed electronically on 21 June 2017

9. On 14 August 2017 the appellants, acting through Moore Stephens (Ireland), Chartered Accountants, appealed to HMRC against the penalties.

10. On 19 September 2017 HMRC rejected the appeals as they said that the appellants had shown no reasonable excuse for their failures to file on time. HMRC informed them that they could request a review or notify their appeals to the Tribunal.

11. On 6 October 2017 the appellants requested a review.

12. On 16 November 2017 HMRC wrote to the appellants with the conclusion of the review. The conclusion was that the penalties were upheld

13. On 8 February 2018 the appellants notified their appeals to the Tribunal.

14. By direction of the Tribunal the appeals of the two appellants proceeded together. This decision therefore relates to both of them, with any differences between the cases (other than names) being indicated.

The law

15. The law imposing these penalties is in Schedule 55 Finance Act 2009. The main parts of it that are relevant to this appeal are:

> "**1**—(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.
>
> (2) Paragraphs 2 to 13 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.
>
> …
>
> (4) In this Schedule—
>
> "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, 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).
>
> (5) In the provisions of this Schedule which follow the Table—
>
> (a) any reference to a return includes a reference to any other document specified in the Table, and
>
> (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

> **3** P is liable to a penalty under this paragraph of £100.
>
> **4**—(1) P is liable to a penalty under this paragraph if (and only if)—
>
> (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)—

(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).

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.

6—(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—

(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—

(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—

(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—

(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%[2]

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

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

(b) £300.

…

SPECIAL REDUCTION

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

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

(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.

INTERACTION WITH OTHER PENALTIES AND LATE PAYMENT SURCHARGES

17—(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to "any other penalty" does not include—

(a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).

(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax.

(4) The relevant percentage is—

(a) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 3 information, 200%,

(b) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 2 information, 150%, and

(c) in all other cases, 100%.

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

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

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

(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.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

23—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(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.

DETERMINATION OF PENALTY GEARED TO TAX LIABILITY WHERE NO RETURN MADE

24—(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and

(b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).

…"

16. Thus the penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, and may only be reduced or cancelled if HMRC's decision as to whether there are special circumstances was flawed.

Late appeals

17. The position is that the appeals made by the appellants were notified to HMRC after the time allowed by law. That time expired in mid-March 2016, mid-September 2016 and mid-March 2017, some 17, 11 and 6 months respectively before the appeals were made.

18. HMRC did not in their initial response to the appeals make any objection to the appeals being so late, and so must have accepted that the appellants had a reasonable excuse for the lateness in terms of s 49 Taxes Management Act 1970 ("TMA"). Accordingly the appellants had no need to apply to this Tribunal for permission to appeal late to HMRC and did not do so.

19. However on 4 April 2018 the Tribunal wrote to the appellants and to HMRC saying that the Notice of Appeal included an application for permission to make a late appeal. The only documents in my bundles which seem to fulfil the function of a Notice of Appeal to the Tribunal is a letter from the appellants of 8 February 2018 to the Tribunal saying that they wished to appeal the HMRC review conclusions and enclosing various documents.

20. There follows in the bundle a letter from the appellants of 8 March 2018 to the Tribunal in which they seek to explain any lateness in the Notice of Appeal. From it I can see that the Tribunal would have noted that the review conclusions letters were dated 16 November 2017 and the Notice of Appeal was nearly three months later, and that the appellants explained why that was.

21. The lateness the Tribunal referred to is the failure to notify the Tribunal within 30 days of the date of the review conclusions letters as required by s 49G Taxes Management Act 1970 ("TMA"). HMRC say that they do not object to the application to make a late appeal, which I take to be a reference to the application to notify an appeal late after a review which is how the Tribunal saw the letter of 8 March 2018.

22. Despite HMRC's non-objection I think that the Tribunal should consider the application. Ordinarily I would seek to apply what are known as the three *Denton* stages[1]. But I do not think the appellants needed to apply for permission.

23. The appellants requested a review by using Form SA 634. This form is a request for a review under s 49B TMA. The next step following the request should be that HMRC must give, within the relevant period, their "view of the matter". The relevant period is the period of 30 days beginning with the day on which HMRC receive the SA 634. I can see nothing in the bundle which could amount to such a view given by any officer in HMRC (and I would assume that the relevant officer would normally be the one to whom the appeal was given).

24. Only after the view of the matter is given can a statutory review take place. Section 49E(6) and (7) TMA shows that the review is to be carried out and the conclusions notified within the 45 days (or such longer period as is agreed) *starting* with the day when HMRC notified the appellant of their view of the matter.

25. Notifying an appeal to the Tribunal is governed by s 49D TMA. Section 49D(2) provides that an appeal may be notified to the Tribunal and then the Tribunal must decide the matter. It gives no time by which this must be done. But s 49D(2) TMA is made subject to s 49G TMA which does give a time limit in two cases. The only potentially relevant case is that in s 49D(4)(a) which makes s 49D(2) subject to s 49G if HMRC have given a notification of their view of the matter under s 49B TMA.

26. Here they haven't so there is no time limit for notification.

27. Had I considered the *Denton* stages (on the basis that s 49G did apply) I would have held that the delay was serious, being itself more than 30 days. I would have held at stage 2 that there was a good explanation, namely that the appellants sought to point out to the review officer that she had not taken information they supplied into account, that they were litigants in person and non-residents only familiar with a similar but, in this regard, different tax system and that once they received a reply from HMRC the notifications were within 30 days of that reply.

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[1] See *Denton & others v T H White Ltd & others* [2014] EWCA Civ 906

28. The third stage is to weigh up all the circumstances, including the prejudice to the parties and the merits if they reveal a very strong case either way. I would have taken into account that:

(1) The seriousness of the delay is at the lower end of the spectrum.

(2) The reason given for the delay is understandable in the circumstances.

(3) The prejudice to HMRC is very limited. HMRC have prepared two comprehensive statements of case ("SoC") which would have needed to be considered if I had granted permission, but they would have done that anyway had the notification not been late. Thus there is little if any harm to the efficient conduct of litigation.

(4) The prejudice to the appellant is obviously that they would have to pay some £3,200 in penalties, a substantial amount.

(5) There is a "slam dunk" case in relation to the daily penalties which constitute £1,800 of the total.

29. Having considered these circumstances and bearing in mind the need to conduct litigation efficiently and the need to uphold time limits laid down for good reason, I would have given permission to notify the appeals late.

Grounds of appeal & HMRC's response

30. The grounds of appeal given to HMRC on 14 August 2017 by Moore Stephens Ireland were that that firm had been attempting to file the outstanding returns which took a considerable amount of time. The process to confirm them as agents (with I assume HMRC) took over seven months.

31. In the review application the appellants expanded on this. They said that:

(1) They had been compliant with their UK tax obligations for over 10 years up to 2014-15 and they had never had a tax liability.

(2) They had a change of agents from the one who had acted for them for many years and they thought the new ones (Moore Stephens) would be finalising and regularising the position.

(3) There was a short period of non-compliance but they are now up to date.

(4) The penalties in the circumstances are unfair and disproportionate. In Ireland married couples are treated as a single person for the purposes of making a return and it is unfair to charge two lots of a high penalty in respect of a single property.

32. HMRC in response put forward many arguments to counter grounds that the appellants had not advanced, such as that the fact that they had competed forms NRL1 to get rents paid to them without deduction of tax did not exempt them from filing a UK tax return: they have never said it did. But in relation to those that the appellants did put forward they said:

(1) Moore Stephens had contacted HMRC on 28 February 2017 chasing a 64-8 authorisation form that he had submitted online. This was over a year from the filing date. The appellants had made no contact with HMRC between 6 April 2015 and 31 January 2016.

(2) UK tax law treats each spouse as a separate and independent taxpayer and it would not be appropriate to discharge one of the liabilities on this ground.

33. In their response to HMRC's SoCs the appellants make further points.

34. It was about the time for filing the 2014-15 return that they changed agents.

35. There was no loss of revenue to the UK, so they did not see the relevance of HMRC saying that the purposes of the penalties is "not rewarding non-compliance".

36. HMRC state that there is no statutory definition of "reasonable excuse" nor any case law guidance. To fill this lacuna, HMRC had said in their response to the appeal that:

> "our view is that a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from sending your return on time. We will consider the facts in each case.
>
> There are some things that we will not normally accept as being a reasonable excuse, for example:
>
> - Pressure of work
> - Lack of information
> - We did not send a reminder.
> - Ignorance of basic law"

37. The underlining is the appellants'. They draw from this passage that any ambiguity in the legislation (or lack of case law guidance) should be interpreted in favour of the taxpayer particularly when the penalties are so punitive.

38. They say that the HMRC interpretation of reasonable excuse is one which is unduly favourable to HMRC and unduly unfavourable to the taxpayer. The language used by HMRC seeks to impose a standard not of "reasonable excuse" but of "exceptional excuse", and this is not the language of paragraph 23 Schedule 55 FA 2009.

39. They say it is instructive that, in their four examples of what they say is not a reasonable excuse, HMRC do not say that they never can be, but that they normally will not be, accepted. Thus as a matter of logic the four matters may constitute reasonable excuse. But it is manifestly unfair that no guidance is given as to when HMRC will so accept one of those four matters.

40. The circumstances given by them about the delay do, they say, constitute a reasonable excuse.

41. Furthermore the disproportionality in the penalties is a special circumstance justifying a reduction in the penalties.

Reasons for my decision

What is (or is not) a reasonable excuse?

42. In my opinion the appellants are quite justified in heavily criticising the letter of 19 September 2017 ("the initial response"). In *ETB (2014) Ltd v HMRC* [2016] UKUT 424 (TCC) (Judges Greg Sinfield and John Clark) the Upper Tribunal criticised an HMRC Factsheet CC/FS12 which used the formulation of what, in HMRC's view, can be a reasonable excuse that was used by HMRC in the initial response and indeed pointed out that the guidance given about reasonable excuse in HMRC's Compliance Handbook, among other places, is the correct one. Numerous cases in this Tribunal have made the same point since, and recently in *Perrin v HMRC* [2018] UKUT 156 (TCC) (Judges Tim Herrington and Kevin Poole) returned to the fray. At [83] they said:

> "It is regrettably still the case that HMRC sometimes continue to argue that the law requires any reasonable excuse to be based on some 'unforeseeable or inescapable' event, echoing the dissenting remarks of Scott LJ in *Commissioners for Customs and Excise v Steptoe* [1992] STC 757. It is quite clear that the concept of 'reasonable excuse' is far wider than those remarks implied might be the case. In an appropriate case where HMRC base their argument on this unsustainable position, the FTT may well consider it appropriate to exercise their jurisdiction to award costs against HMRC for unreasonable conduct of the appeal. Similar observations apply to the HMRC 'mantra' referred to at [109] of the 2014 Decision, to the effect that an "unexpected or unusual event" is required before there can be a reasonable excuse. The statutory phrase is "reasonable excuse", and those are the words that are to be applied by HMRC and the FTT, interpreted as set out above; the addition or substitution of other words beyond those used in the statute can very easily obscure rather than clarify the value judgment as to whether or not a taxpayer has a reasonable excuse, and should be avoided."

43. It is fair to point out that in the SoCs prepared on 1 May 2018 (before the Upper Tribunal decision in *Perrin* was released) HMRC say simply that there is no statutory definition of "reasonable excuse", and that whether or not a person had a reasonable excuse is an objective test and is "a matter to be considered in all the circumstances of the case" (citing *Rowland v HMRC* [2006] STC (SCD) 536). The SoCs then set out what is a reasonable summary of what has been said in a number of FTT and other cases about how an reasonable excuse should be judged.

44. The point remains however that by using in the initial response what has been called the "mantra" relating to unusual or unexpected, unforeseeable or inescapable events, HMRC may be depriving an appellant of the chance to put forward as a reasonable excuse something which is not in the mantra. Obviously in many cases appellants are undeterred by what HMRC say and put forward all manner of non-mantra excuses, but many may not. By the time they read an SoC in a paper case it is probably too late for them to resuscitate a reasonable excuse that they did have, especially where

as still happens, cases from 2010-11 or earlier are emerging. And that assumes that they read the SoC and understand that there is a change of view by HMRC.

45. In this case, though, the appellants, one of whom, Mr Brennan, is a solicitor in a large firm in Ireland, have put forward as their main ground for saying that they have a reasonable excuse a matter which is not within the mantra. So I do not think they have been disadvantaged by HMRC's unfortunate use of the mantra in the initial response, and they do not suggest they have been.

46. They also make a very good point about the HMRC list in the initial response of those four matters which HMRC say are not a reasonable excuse. "Normally" is a word much beloved of those in HMRC who write guidance and other materials, as it allows wriggle room for the exceptional case. So as the appellants point out, there must be some cases where the proffered reasonable excuse is one of the four matters, but where HMRC accept that it is a reasonable excuse. This is at odds with the mantra used in the initial response as it is difficult to see that "pressure of work", "lack of information", "failing to get a reminder" and, particularly, "ignorance of basic law" can be the result of an unforeseen etc event. The initial response does not cast the mantra in terms of what is "normally" acceptable: a reasonable excuse will "only apply" if there is an unforeseen etc event.

47. It is also worth noting that "ignorance of basic law" as possibly being a reasonable excuse was no longer part of HMRC's submissions in the SoCs. There it is a question of ignorance of the law, basic or not, not being an excuse.

48. However while I accept that the appellants have done a good demolition job on the initial response, that is all they have done. The question still remains: have the appellants shown that they had a reasonable excuse for their failure to file in time.

Reliance on an accountant

49. This is the appellant's primary argument. It was not addressed by HMRC in the initial responses or the review letters. And oddly it was not addressed by HMRC in the SoCs. But the position in law is straightforward. Reliance on a third party is not a reasonable excuse, unless the appellant took reasonable steps to avoid the failure. The law does not say what steps are reasonable, for the very good reason that it too must be judged in the light of all the circumstances, and it too must be an objective test but one that has regard to the particular circumstances of the appellant.

50. My problem with reliance on Moore Stephens relates to timing. The letter from Moore Stephens talks about it taking seven months to get authorisation, presumably to file the returns on behalf of the appellants. The returns were filed in June 2017. If I (generously) allow say two months to act once authorisation was given that takes us back to August 2016. That is more than six months after the filing date.

51. HMRC refer to the SA Notes for the appellants as showing that no contact was made by the appellants before 1 February 2016. But the Notes show more than that. They show on 24 March 2016 "Agent details removed. Agent code 'A****W'". They

also show on 11 April 2017 "New agent details received. Agent code 'J****P'. Form 64-8 received."

52. If the date of 24 March 2016 is correct, and I have nothing to show it is not, then on 31 January 2016 the appellants were still represented by the previous agent. They do not explain why that agent did not file the returns as they seem to have done successfully and on time in all previous years.

53. The crucial date for establishing a reasonable excuse is 31 January 2016. The appellants have not said that they relied on the old agent, so I cannot accept that they can seek to rely on a third party to establish a reasonable excuse for their failure, and especially not Moore Stephens.

54. It is likely that, had Moore Stephens taken somewhat less than seven months to obtain authorisation, the 12 month penalty would not have been assessed. This raises the question, which has not I think been authoritatively settled, whether, there having been no reasonable excuse for the failure to file by the due date, a reasonable excuse can be put forward for failure to file by one of the later deadlines. The obverse of this issue is whether, a reasonable excuse having been established for the failure to file on 31 January, that reasonable excuse would frank all subsequent penalties even if the excuse had ceased to exist. Paragraph 23(2)(c) Schedule 55 would seem to be pointless if it could. It therefore seems to me reasonable to say that if paragraph 23(2)(c) can cause a reasonable excuse to cease to have effect so as to enable later incurred penalties to be imposed, then a later reasonable excuse where none existed on 31 January ought also to be able to be taken into account.

55. But in this case that is a hypothetical issue which I do not have to determine.

56. I can deal with grounds (1) and (3) in §31 in short order. In the UK system an upper limit to the penalties for failure to file was abolished for 2010-11 onwards. However unfair it may seem it is the law in the UK (but see §§61 to 70). Nor does an exemplary record of compliance count for anything in this regard.

57. Thus in my view there is no reasonable excuse for the failure to file the returns by 31 January 2016.

Daily penalties

58. But as to the daily penalties there are no "SA reminders" or Forms SA 326D in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with. (See *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)). I therefore cancel those penalties.

6 and 12 month penalties

59. I also cancel the six month and 12 month penalties. This is because they were imposed before the returns had been filed, but HMRC have put forward no evidence to show that an officer of HMRC considered, as they were required to by paragraph 24 Schedule 55 FA 2009, what the penalty should be by reference to their best of

information and belief. See in this regard my decision in *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) at [82] to [94].

60. Had there been such evidence I have no doubt it would have shown that a penalty of £300, the minimum, was the amount that to the best of the officer's information and belief should be the amount. The appellants have said that they have never paid UK tax on the income from land in the UK that they receive and return. In these circumstances there cannot be a tax geared penalty.

61. However I would not have made any reduction to these penalties on account of what is provided for by paragraph 17(3). In *Shaun C Long v HMRC* [2018] UKFTT 348 (TC) ("*Long*"), the Presiding Member, Mr Peter Sheppard, decided that where there were penalties of £300 under each of paragraphs 5 and 6 Schedule 55 but no tax was payable on the basis of the return, paragraph 17(3) operated to reduce the penalties to nil. The member sitting with Mr Sheppard, Mr Julian Stafford dissented.

62. Paragraph 1(3) Schedule 55 says:

> "(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3))."

63. Paragraph 17(3) and (4) says:

> "(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax.
>
> (4) The relevant percentage is—
>
> (a) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 3 information, 200%,
>
> (b) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 2 information, 150%, and
>
> (c) in all other cases, 100%.

64. Mr Sheppard's decision makes the correct assumption that the paragraphs to which paragraph 17(3) applies include paragraphs 5 and 6 (it would also include paragraphs 6D, 10 and 11). He interprets the term "a penalty … which is determined by reference to a liability to tax" as applying to the penalties in paragraph 5(2) and 6(5) whether or not the penalty actually applied is, as it is required to be, the greater of 5% of any liability to tax which would have been shown in the return in question, and £300.

65. In the second and third unnumbered paragraphs after [32] in *Long*, Mr Sheppard says:

> "In order to determine which is the greater it is necessary to consider what 5% of the tax liability is and compare that to £300. Therefore the penalty has to be determined by reference to the tax due.

> HMRC say the penalties were made without reference to tax liability. If that is so they have not applied the legislation properly because the terms of paragraphs 1(3) and 17 (3) have been ignored."

66. Mr Sheppard is in my view correct to say in the first of these that that is what HMRC ought to do. HMRC are correct to say that they do not do it, that is no officer compares £300 with 5% of the tax which they estimate will be on the return, where as usual it has not been filed when the penalties are assessed. But in my view it is not paragraph 1(3) and 17(3) which they ignore, but paragraph 24 (as to which see *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) at [82] to [94]).

67. But even if they had acted correctly and compared the two amounts, I agree with Mr Stafford that having done that comparison and determining that the penalty was £300, HMRC were not determining that £300 was the correct penalty "by reference to" a liability to tax. They were determining the penalty at £300 after having compared that figure with 5% of the tax liability.

68. I also agree with Mr Stafford that there is no evidence that Parliament intended the result Mr Sheppard argues for. If Parliament had intended that the effect of s 93(7) TMA (which limited the penalties under s 93, the predecessor to Schedule 55 FA 2009, so that did not exceed the tax payable) should be retained it went about it in an odd way. Why charge a person £1,000 in penalties irrespective of their tax liability in initial and daily penalties and then offer a respite from further penalties where the delay is more serious? And offer that respite only when they then incur both the paragraph 5 and 6 penalties, and not just the paragraph 5 penalties. I agree with HMRC's arguments in *Long* that that is a perverse incentive to delay once the daily penalties have been incurred.

69. Paragraph 17(3) in fact seems to be of use only in very limited circumstances. In the normal case where tax liability is greater than £6,000 the paragraph 5 and 6 penalties together will be 10% of that figure. They can only exceed 100% (or 150% or 200% where relevant) if the deliberate and concealed behaviour penalty in paragraph 6(3) applies. Even then that penalty would have to be more than 95% to which would be added the 5% penalty under paragraph 5(2)(a). So it seems to be a solution without a problem.

Special circumstances

70. The appellants' arguments that the penalties are disproportionate because they are husband and wife holding the land in joint ownership and are charged double the penalties that a single owner of the land would be charged, and by comparison in Ireland they are taxed as one person, are not arguments that could found a reasonable excuse for the failure to file. They are essentially about mitigation and if any reduction could be made on that score then it would have to be way of a special reduction under paragraph 16 Schedule 55.

71. In their SoCs HMRC have addressed the question whether there were special circumstances but have found none. They say that they took into account the appellants' request that the income from one jointly let property be taxed as one joint income, but considered that is was not a special circumstance. In considering

reasonable excuse they also pointed out that married couples are taxed independently in the UK and it would not be appropriate to discharge one of the liabilities. I cannot say that this decision was flawed. It was one which it was clearly reasonable for HMRC to come to. For what it is worth I would have come to the same view.

Decision

72. I confirm the penalties of £100 each for the failure to file a return.

73. I cancel the penalties of £1,500 each for the continuing failure to file a return.

74. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 AUGUST 2018