



TC06919

Appeal number: TC/2018/01995

Income tax - fixed and daily penalties for late filing of self-assessment returns for two years - application for permission to appeal out of time - Appellant became employed after a period of self-employment - provided his employers with a P46 and P45 notifying change of address - HMRC unaware of change and issued notice to file to wrong address - whether Appellant had shown reasonable excuse - yes - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OLIVER RALPH WINCOTT

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LESLIE HOWARD**

**Sitting in public at Lincoln County Court, 360 High Street, Lincoln on 29 August
2018**

The Appellant in person

Gary Busby, Officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal by Gary Busby ('the Appellant') against penalties totalling £3,100 imposed by the Respondents ('HMRC') under Paragraphs 3,4,5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of his self-assessment ('SA') tax returns for the tax year ending 5 April 2014 and 2015 ('the default years').

10 2. The Appellant's appeal was made outside the 30 day time limit within which penalties must be appealed. He therefore applies for permission to appeal out of time.

The Penalties appealed

3. The Appellant's returns, for 2013-14 and 2014-15, if filed electronically, were due no later than 31 January in the year following each tax year. The returns were filed in November 2017.

15 4. 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.
- 20 ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- 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.
- 25 iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

5. Penalties of £100, £900, £300, and £300 were imposed under (i), (ii) (iii) and (iv) above for each of the default years.

30 6. The Appellant's appeal is against all the penalties save for the £100 penalty for the 2013-14 tax year.

Penalty date

7. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date

35 *Reasonable excuse*

8. 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.

5 9. 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

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

10 10. 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).

15 11. HMRC's view is that 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.

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

Background

25 13. On 10 December 2010 the Appellant registered as a self-employed roofing labourer with HMRC for the CIS and Self-Assessment systems. He lived at 4 Nicholas Street, Lincoln which HMRC held as his 'base address'. He worked as a sub-contractor for a roofing company at 3 Elsham Crescent, Lincoln, which was the business address HMRC held on their system.

30 14. He completed his 2011-12 SA return by way of paper return on 16 September 2012.

35 15. The Appellant continued working as a self-employed subcontracted roofer until March 2013. He then started working for another roofing company, but that work ceased on 31 August 2013. He says that for the period April to 31 August 2013 he earned £4,920. After that, he was out of work and registered for Jobseeker's Allowance until November 2013.

16. He completed his 2012-13 SA return online on 1 November 2013.

17. In November 2013 he secured employment with The Greenstock Lamp Company, Hillcroft Business Park, Lincoln, working as a supervisor. As an employee he paid tax by PAYE. He completed form P46 on which there is a declaration by the individual stating whether they have previously had a job since 6 April in that year. There is also
5 a section that requires their address, which would at that date have been 4 Nicholas Street, Lincoln.

18. If the new employer does not have the details of an individual's pay and tax from a previous employer, they are unable to calculate the individual's tax on a 'cumulative' basis'. Instead, code 1185L will be applied, but only to consider the
10 proportion of the allowances and tax rate bands available to the employee for each particular pay period. The code does not take into account changes in an individual's income (or coding which may have happened earlier in the year) which means that their tax position may not be exactly right at the end of the year. Hence the need for a SA return in those circumstances.

15 19. HMRC have not raised any penalties in respect of underpaid income tax, although this does not necessarily mean that they were aware of the Appellant's income for 2013-14.

20. In February 2014 he moved address to 26 Orchard Way, Nettleham, Lincolnshire, which was his mother-in-law's address.

20 21. Also in February 2014 the Appellant had to contact HMRC to request a time to pay arrangement, as he was unable to pay tax that had fallen due in January 2014 for 2012-13.

22. HMRC issued a notice to file for 2013-14 on 6 April 2014, but the notice appears to have been delivered to the Appellant's previous business address at 3 Elsham Crescent, Lincoln and/or his previous base address at 4 Nicholas Street. The notice
25 appears to have been forwarded on to the Appellant but he says that he did not expect to have to complete a return, having secured employment with The Greenstock Lamp Company in November 2013. He also says that by completing a P46 and having given his new employer his address, due to 'Real Time Information' all of this information -
30 including having ceased to be self-employed and his change of address would have been communicated to HMRC.

23. He acknowledges that he had been self-employed from 6 April to 31 August 2013 and that his self-employed earnings had to be aggregated with his PAYE earnings. He now realises that this necessitated a SA return, but had assumed that any tax due
35 would be taken care of in his tax coding.

24. The Appellant says that following his move to 26 Orchard Way, Nettleham, he received documents such as his P60's at his new address and therefore assumed that HMRC were aware of his new address.

25. HMRC issued a fixed £100 late filing penalty in respect of the Appellant's 2013-
40 14 late return on 18 February 2015, which the Appellant recalls was posted on to him, presumably from the occupants of his previous address, 4 Nicholas Street. He says

that he did nothing about it because he was still of the view that he had no obligation to file a return for 2013-14. Nonetheless, he accepts liability for that penalty.

26. A notice to file for the year ending 5 April 2015 was issued by HMRC to the Appellant on 6 April 2015. The filing date was 31 October 2015 for a non-electronic return or 31 January 2016 for an electronic return. Again, the notice to file was sent to the Appellant's previous base address at 4 Nicholas Street and/or his previous business address at 3 Elsham Crescent, Lincoln. The Appellant says that he did not receive it.

27. On 18 June 2015, a RLS marker (returned letter to sender) was set by HMRC against the base address held by HMRC. From this point HMRC were on notice that the Appellant was no longer residing at 4 Nicholas Street. However the Appellant's business address was not unset until 26 September 2017.

28. In July 2016 the Appellant moved address from 26 Orchard Way Nettleham to 83 Washingborough Road, Heighington, Lincolnshire.

29. He continued working for The Greenstock Lamp Company until August 2017 when he started work for Lindab, a sheet metal contractor based in Dean Road, Lincoln, as a store supervisor, again on PAYE.

30. After starting to work for Lindab, he had to contact HMRC in September 2017 regarding his tax coding as he had been put onto emergency tax by his new employer. He provided his new address at 83 Washingborough Road having realised HMRC did not have his latest address.

31. On 19 September 2017, as the Appellant's 2013-14 return and 2014-15 return had not been received by the filing dates, HMRC issued notices of penalty assessments of £100, £900, £300 and £300 for each year to the Appellant unfortunately to his old, 3 Elsham Crescent, address even though HMRC appear to have had his new address at 83 Washingborough Road.

32. It appears from HMRC's records that they did not register the Appellant's new base address on their system until 26 September 2017, that is, after the penalty notices had been issued to the wrong address.

33. Section 31A TMA 1970 requires that appeals against a penalty are made within 30 days, but the notices had not been received by the Appellant.

34. Upon receiving a SA statement on 27 October 2017 (dated 18 October 2017) the Appellant says he immediately telephoned HMRC. He explained that he had been on PAYE since November 2013 and believed that the information he provided to his employers, including his then current address and a P46 which detailed his self-employed income to 31 August 2013, would have been shared with HMRC, which was the reason he had not completed a SA return. He was informed that he would be able to appeal the decision, but that first and foremost, he needed to complete both outstanding tax returns and send these back to the HMRC before he sent in the appeal.

35. The Appellant says that he then started to track down old information and documentation to support the tax returns.

36. On 5 November 2017 the Appellant filed his return for 2014-15. On 25 November 2017 he filed his return for 2013-14. Unfortunately some pages had not been completed and so HMRC sent the returns back to the Appellant on or around 20 December 2017 which he says he immediately completed and returned.

37. On 24 January 2018 the Appellant submitted a 'late' appeal to HMRC against the penalties, on the grounds that he was unaware he had to file a tax return due to being in full employment. He believed that completing a P46 form would have updated his records with HMRC, but all correspondence from HMRC had been sent to his previous address and not forwarded. If he knew anything was outstanding, he would have updated his records sooner. He believed that he owed no tax and therefore saw no reason to file a return for either 2013-14 or 2014 -15. He had also not received the penalty notices issued on 19 September 2017 which had been sent by HMRC to the wrong address at some time after 26 September 2017.

38. On 16 February 2018 HMRC wrote to the Appellant rejecting the late appeals because they were out of time. However, HMRC did not address the point that the Appellant had not received the penalty notices and had not become aware of them until he spoke to HMRC following receipt of a Statement of Account on 27 October 2017.

39. On 23 March 2018 the Appellant lodged an out of time appeal with the Tribunal. The grounds of appeal were:

"I first became aware of the penalties due in late October 2017 after receiving a self-assessment statement dated 18 October 2017 (I have since been advised by HMRC that they changed my address on their system on 26 September 2017). Upon receiving this statement, I rang the HMRC helpdesk immediately and spoke to an advisor who informed me that the priority was to get the missing returns filed. I was also informed that I could appeal the fines but it was not made clear to me that this was something that had a time delay on it. Also, I'm told that the penalty notices state that there is a time delay but as I will mention later on, I did not receive any of these. I have asked HMRC for copies but they have not been able to send me any.

Following this phone call the returns were completed and sent in, and then I focussed on preparing the appeal and this was sent in on 24 January 2018. I received the attached letter rejecting this appeal due to it being out of time dated 16 February 2018.

I was only self-employed for a small period in the 2013/14 tax year, after this I have only had a modest employment income and should have not been required to complete a self-assessment tax return. I am asking for the return and penalties for 14/15 to be withdrawn as I was not required to complete a self-assessment return.

I am also asking for the fines for 13/14, other than the first £100 late filing fine to be withdrawn as I did not receive any of the penalty notices or reminders to complete the self-assessment.

I am facing a series of fines for the years 13/14, 14/15 totalling £3,100.00 that seem totally out of proportion with the mistake I made in not updating HMRC with my address, and given that no tax was owed. My actions since becoming aware of the situation show that I have not deliberately tried to avoid completing my self-assessment returns.

I also think it is important that HMRC have confirmed they became aware that they did not have the correct address for me in June 2015 and a flag was put on their system. Therefore HMRC are aware that I did not receive the penalty notices that were sent in March 2015 and August 2016 nor the notice to complete a self-assessment return for 14/15 sent in April 2015.”

Relevant statutory provisions

Taxes Management Act 1970

40. Section 8 - Personal return- provides as follows:

(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
- 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 [day of the period of three months beginning with the day on which the notice is given]

(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
- (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.]

(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.

5 (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-

(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.

10 (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-

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

15 (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.

(1H) The Commissioners-

20 (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.

25 (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.

30 (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.

(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:

- 5 41. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.
42. Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.
43. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

10 44. 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)-

- 15 (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.

20 (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).

25 (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).

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

30 (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.

35 (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.

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

40 (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.

47. 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 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.

48. 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.

HMRC's Case

The Late appeal

49. The application for permission to bring a late appeal is made pursuant to rule 20(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

50. HMRC objects to the application. The Tribunal should not exercise its discretion in favour of allowing the Appellant's appeal out of time, because there has been a lengthy delay (97 days after the expiration of the 30 day period following the imposition of the penalties on 19 September 2017). The Appellant was advised of the appeals procedure on 27 October 2017 but still did not appeal the penalties until 24 January 2018. Even if 27 October 2017 is treated as the date the Appellant first became notified, this would create a deadline of 26 November 2017 for the Appellant to appeal the penalties, which would still be 63 days late.

51. Mr Justice Morgan in *Data Select Limited and the Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 187 (TCC) said [at paragraph 34]:

“As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? (5) what will be the consequences for the parties of a refusal to extend time?”

52. What is the purpose of the time limit? The purpose is to ensure that both the taxpayer and HMRC have finality and certainty.

53. How long was the delay? The length of the delay was 97 days. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UK I JT 254 (TCC), the Upper Tribunal refused permission for a late VAT appeal to proceed. At paragraph 96 the Tribunal noted:

“The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything, but serious and significant.

.. That permission to appeal out of time should only be granted exceptionally meaning that it should be the exception rather than the rule and not granted routinely.”

54. HMRC therefore submit that the Appellant's delay cannot be considered anything but serious and significant.

Substantive issues

55. HMRC address two main grounds raised by the Appellant:

i. He was not aware of the penalties until he received a SA Statement of Account dated 18 October 2017. He did not receive the Notices in March 2015, August 2016 or the SA Notice to file for 2014-15, sent 6 April 2015. He requested copies from HMRC but HMRC did not send these. From a call made to HMRC in late October 2017 he found that HMRC only updated his address on 26 September 2017. He refers to HMRC putting a system flag on the system in June 2015 which he says shows HMRC were aware that he had not received any of the Notices.

- ii. The penalties are out of proportion. As he owed no tax and did not receive any notices to complete a return, the penalties should be withdrawn.

56. HMRC address each of these issues:

The Appellant was unaware of need to file a SA return

- 5 i. The Appellant has been in the SA regime since 28 January 2011, and therefore would have been aware of his obligations to file SA tax returns by their due dates, the consequences of penalties if this was not fulfilled and his obligation to notify HMRC of any changes in his circumstances.
- 10 ii. The Appellant registered for SA. Once registered, he had an obligation to file returns once issued under s 8 TMA 1970. If the taxpayer has not filed their return by the relevant due date, then penalties under Schedule 55 FA 2009 must be charged.
- 15 iii. Having discussed the appeals process in the 27 October 2017 telephone call, the Appellant did not submit an appeal to HMRC until 24 January 2018.

This was considered in the Upper Tribunal case of *Perrin* [2018] BTC 513 (F178) where Judge Herrington and Judge Poole considered “reasonable delay” in paragraph 77:

“It seems to us that the concept of ‘unreasonable delay’ is just as much an objective concept as that of ‘reasonable excuse’, mainly because both concepts are explicitly based on the common underlying concept of ‘reasonableness’. It would also be extremely odd if the legislation required an objective test in relation to the existence of the initial reasonable excuse but then abandoned any requirement of objective reasonableness in relation to the deemed continuation of the initial reasonable excuse where there is a subsequent delay in remedying the failure after the initial reasonable excuse in fact ceases.”

This was also considered in the case in the Upper Tribunal of *Christopher Ryan v HMRC* [2012] UKUT 9 TCC, Judge Bishop states in paragraph 5 (F182):

“Even if there were a reasonable excuse for the initial failure to submit the return, the penalty would still be due if the failure was not remedied within a reasonable time after the excuse ceased to exist.”

57. The 2013-14 paper tax return was due by 31 October 2014. The return was filed on 25 November 2017 and processed 30 November 2017, being 1,126 days late from the paper return due date.

58. The 2014-15 paper tax return was due by 31 October 2015. The return was filed on 5 November 2017 and processed on 10 November 2017, being 761 days late from the paper return due date.

59. As a result, both are subject to the first late filing penalty, daily penalties of £10 a day to a maximum of 90 days, a 6 month late filing penalty and a 12 month late filing penalty.

5 60. Throughout the appeals both to HMRC and to the Tribunal, the Appellant has not disputed receiving the 2013-14 SA Notice to File issued on 6 April 2014. He also confirms that he received the first late filing penalty notice for that tax year which was issued 18 February 2015.

10 61. The Appellant is not appealing the first late filing penalty for 2013-14 tax year of £100. HMRC says that this is an acknowledgement by the Appellant that his return was late, but he still did not file this return until 30 November 2017.

62. The Appellant received the notice (which accompanied the £100 penalty) which pre-warns the taxpayer of potential penalties, including daily penalties.

63. The Appellant contends he did not receive the 2014-15 notice to file a SA return which was issued on 6 April 2015.

15 64. HMRC acknowledges that there was a RLS marker raised against the Appellant's base address on their system from 18 June 2015 to 26 September 2017 when it was updated. HMRC also acknowledge that the 30 day daily penalty reminder issued on 2 June 2015, the 2014-15 SA notice to file issued on 6 April 2014 and the LFPs were all issued to the Appellant's previous business address due to the RLS marker placed
20 against the Appellant's base address.

65. HMRC nonetheless contend that it is reasonable to conclude that the notices, having been sent to the Appellant's business address, would have been received by him. HMRC have no record of those penalty notices being returned. Under s 115 of TMA 1970 and s 7 of the Interpretation Act 1978, by serving the notices to the
25 notified address the notices are deemed to have been served. It is for the Appellant to demonstrate to the Tribunal that this is not the case.

66. The Appellant has not remedied his failure to file a return without further delay in respect of his SA returns after becoming aware of the default.

Proportionality

30 67. Late filing penalties are no longer linked to liability, and remain fixed even if there is no tax due. 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. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount
35 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.

68. In the Upper Tier case of *Revenue and Customs Commissioners v Hok Ltd* [2012] BTC 1711 in paragraph 36 (F193), Chamber President J Warren and Judge Colin Bishopp state:

5 “it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair.”

69. The Appellant also makes reference to no tax being owed for 2014-15. Whilst in the SA regime, the taxpayer has an obligation, until he notifies HMRC otherwise, to file returns, even if no tax is owing.

70. This is a view shared by Judge Mure QC, in *Tate* [2015] TC04327 UKFTT 0122 (TC) (F201), paragraph 6 of the decision, who concludes:

 “In fact Mrs R advised the Tribunal that no tax was in fact due for 2010/11. Nonetheless, there is a duty to file a tax return. The Appellant should have been aware of this.”

71. Late filing penalty notices under appeal were issued to the trade address of the Appellant, not the base address which the RLS marker was against. These were not returned to HMRC and therefore argue that the Appellant must have received these.

72. 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 tax returns were filed by the legislative date and payment of any tax due made on time.

73. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC’s website give plenty of warning about filing and payment deadlines. It is the customer’s responsibility to make sure they meet the deadlines.

74. The notice to file issued to the Appellant in each default year included information relating to the penalty regime to encourage customers to file their return on time and make payment. The information regarding penalties is also available on the HMRC Gov.UK website.

30 *Special Reduction*

75. 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.

76. 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).

5 77. 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'.

10 78. There are no special circumstances which would require the Tribunal to reduce the penalties. Therefore HMRC's decision not to reduce the penalties under paragraph 16 was not flawed.

Conclusion

15 79. The Appellant's appeal to the Tribunal was out of time. As HMRC say, the Tribunal should grant permission to appeal out of time only exceptionally and based on compelling reasons which show why an appeal could not have been made in time.

80. In considering whether to grant permission to appeal out of time, a number of factors are to be taken into consideration including those factors mentioned in *Data Select*.

20 81. Once he received the Statement of Account dated 18 October 2017, alerting him for the first time that penalties of £3,200 had been issued, he acted relatively quickly by contacting HMRC on 27 October 2017. He was told to deal with his outstanding SA returns as a matter of priority, which he did. Both returns were filed within four weeks of the telephone conversation. He had not received the penalty notices and it is
25 not clear from HMRC's note of the conversation that the 30 day appeal limit was ever explained to him. He had also asked for copies of the penalty notices which HMRC promised, but were never sent to him.

30 82. After the Appellant had filed the corrected 2014-15 return on 20 December 2017, 34 days elapsed before the Appellant submitted his appeal to the Tribunal. However at this stage the Appellant had still not received the copy penalty notices from HMRC.

83. In all the circumstances we allow the application to make a late appeal.

35 84. The Appellant says that he received documents such as P60's at his new address at 26 Orchard Way, Nettleham, being the address he had given to his employers when he moved. He therefore assumed, not unreasonably, that HMRC were aware of his new address.

85. The Appellant lived at 26 Orchard Way, Nettleham and worked for The Greenstock Lamp Company until September 2017. It was only when he started working for Lindab (handing in his P45 with his new address at 83 Washingborough

Road, Lincoln) that HMRC say they first became aware that he had no longer resided at 4 Nicholas Street, Lincoln.

5 86. A tax payer has a duty to notify HMRC of a change of address. The rule is primarily aimed at self-employed individuals, so that notices to file annual returns can be correctly issued. However a newly employed person, completing a P46 and advising their employer of their new address would lead them to believe that HMRC's records, including the employee's address, would be updated.

10 87. The Appellant therefore would not have known that he had to file a SA return either in 2013-14 or 2014-15. Equally HMRC would not have had the change of address details, but should have received them from the employer. Notices to file do not appear to have been returned to sender when undelivered. Notices were sent to the previous business address used by the Appellant up to November 2013, but the P46 details should have alerted HMRC to the fact that he had ceased self-employment and had become employed. At that stage, particularly after the Appellant started to receive P60's at 26 Orchard Way, the Appellant would have assumed, with good reason, that HMRC were aware of his new address.

20 88. 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. A reasonable excuse may be described as 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 they would have complied with. We think the Appellant's circumstances fall within this description.

25 89. It appears to us that the Appellant has a reasonable excuse for filing his 2013-14 and 2014-15 returns late and that he dealt with these timeously as soon as he became aware of the problem.

90. The appeal is allowed and the penalties discharged

30 91. 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.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

40 **RELEASE DATE: 5 January 2019**

