TC07168

INCOME TAX – late filing penalties – whether HMRC had given notice to file – no - whether taxpayer had reasonable excuse for late filing of tax return – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00349

BETWEEN

KAREN DAVILA **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
RICHARD LAW

Sitting in public at Reading ET, 5th Floor, 30-31 Friar Street, Reading RG1 1DY on 17 May 2019

The Appellant appeared in person

Miss Mackoon, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Miss Davila is appealing against penalties for late filing of her tax return for the tax year 2016-2017 which have been imposed:

(1) under paragraph 3 of Schedule 55 Finance Act 2009 ("Schedule 55") – a fixed penalty of £100 for the failure to file a self-assessment return in respect of the relevant tax year before the date when it was required to be filed (the "filing date");

(2) under paragraph 4 of Schedule 55 – a daily penalty of £10 for each day for a period of ninety days after the date falling three months and one day after the filing date that the return remained unfiled; and

(3) under paragraph 5 of Schedule 55 – a penalty of £300 for the failure to file the self-assessment return before the date falling six months and one day after the filing date.

2. In this case, these penalties amount to £100, £900 and £300 respectively.

BACKGROUND

3. We had before us a bundle prepared by HMRC and Miss Davila gave evidence as to the events which had occurred. That bundle contained relevant legislation and cases (as was directed) but the only additional information therein is outlined in [4] to [8] below. We find as a fact that this is what the documents say; we draw inferences from them later.

4. We had a copy of various HMRC computer-generated records as follows:

(a) "Return Summary" which states that notice to file was issued on 18 May 2017, with a paper return due date of 31 October 2017 and an online return due date of 31 January 2018. That summary shows the return was received on 22 October 2018;

(b) "View/Cancel penalties" generated on 20 February 2019 which states that a late filing penalty was issued on 13 February 2018 for £100, a daily penalty was issued on 31 July 2018 for £900 and a 6 month late filing penalty was issued on 10 August 2018 for £300;

(c) Tax calculation for the tax year 2016-2017;

(d) Copy of Miss Davila's tax return, which Miss Davila confirmed at the hearing at been submitted as a paper copy albeit appears to have been scanned onto HMRC's systems;

(e) Two pages of "SA Notes" setting out various contacts between HMRC and Miss Davila during the period from 11 May 2017 to 13 February 2019. The substance of these is considered below, suffice to note that these entries include both automatic ones and those entered manually by individuals working at HMRC;

(f) Statements of amounts due as at 8 March 2018, 13 September 2018, 4 December 2018, 3 January 2019 and 20 February 2019, each of which was generated on 20 February 2019; and

(g) Taxpayer address history

5. There was a set of pro forma HMRC forms, namely:

(1) CWF1 Self Assessment and National Insurance contributions registration;

(2) Self Assessment Tax return and payment reminder;

(3) Self Assessment: Payment reminder – for the tax year 2011-2012;

(4) Self Assessment Tax return and payment reminder – for the tax year 2011-2012;

(5) Self Assessment: Late tax return Notice of penalty assessment in respect of the £100 penalty – for the tax year 2010-2011;

(6) Self Assessment: Late tax return Daily penalty reminder, setting out that the minimum is already over £300 - for the tax year 2010-2011;

(7) Self Assessment: Late tax return Daily penalty reminder, setting out that the minimum is already over £600 - for the tax year 2010-2011; and

(8) Self Assessment Notice of penalty assessment, setting out that penalties now total £1,200 – for the tax year 2010-2011.

6. We also had a witness statement from Georgina Mitchell, an officer of HMRC, dated 23 October 2018 describing the process for printing and issue of late payment and late filing penalty notices.

7. On 6 December 2018 HMRC wrote to Miss Davila in response to her appeal to HMRC. That letter states that they do not agree that she has a reasonable excuse for late filing because it remains the responsibility of the taxpayer to file returns online even if a third party acts for them - reliance on a third party is not a reasonable excuse. Ms Davila was made aware a return was needed in March and the return was not filed until October. That letter then sets out the appeal rights, noting that they include appealing to the Tribunal by 5 January 2019.

8. On 15 January 2019 Ms Davila gave Notice of Appeal to the Tribunal. That notice specifies the penalty in issue as £2,956.09. At the hearing Ms Davila confirmed that amount was not correct, and that the appeal was in respect of the penalties only. HMRC agreed that this was the case.

(1) The reason for late appeal is:

> "The reason that I did not do my tax return on time is because during the time of my employment I was completely unaware that I needed to file a tax return as I thought that my boss would be doing this, as my previous employers have done before, also as that is what I understood in my contract was that she would be doing my taxes. I have never had to go through this process and it has been very confusing and overwhelming. I just recently last week managed to get a job of 12hrs per week as I am a full time student. I kindly ask for you to take this into consideration and please try to understand the circumstances that lead for me to file a late payment."

(2) The grounds for appeal are:

> "As I previously have mentioned I was completely unaware that I had to file a tax return as all my previous jobs I've never had to do this, not only this but when I signed my contract with my previous employer it stated that she would be dealing with my taxes as result of this I was under the impression that I did not have to do anything. I never had the deliberate intention of not sending my tax return if I had known I would of done it. Since September I have not been working I just started this month of January under a 12hr contract as I cannot do more because I am a full time student at university."

PRELIMINARY ISSUE

9. At the hearing HMRC informed the Tribunal that they objected to Miss Davila's late appeal to HMRC against the penalties. Miss Mackoon drew our attention to a print-out generated by HMRC on 20 February 2019 which set out the date on which penalties were assessed as 13 February 2018 (for the late filing penalty), 31 July 2018 (for the daily penalties) and 10 August 2018 for the six month late filing penalty. She drew our attention to the SA notes which contained an entry at 5 December 2018 which recorded 22 October 2018 as the date of receipt of the taxpayer's appeal against late filing penalties. HMRC's position was that Miss Davila's appeal had been more than 30 days after notice of these penalties and was out of time.

10. The Tribunal noted that HMRC had not produced copies of the penalty notices which had been issued (in line with HMRC's position that these are automatically generated and copies are not retained) and had not produced a copy of Miss Davila's letter of appeal to HMRC. The bundle did include HMRC's letter of 6 December 2018 in which they refuse the appeal. That letter:

(1) states "I've considered your appeal against the following penalties...";

(2) concludes that Miss Davila does not have a reasonable excuse because it remains the responsibility of the taxpayer to file returns online even if a third party acts for them;

(3) does not contain any mention of Miss Davila's appeal to HMRC against any or all of the penalties being late and therefore does not contain any objection to such late notice; and

(4) sets out the appeal/review rights which apply where HMRC has rejected an appeal.

11. Further, the SA notes to which Miss Mackoon referred indicated that "Appeal resisted because reliance on 3rd party not RE." They did not record a rejection of the appeal for being late.

12. The Tribunal considered that, whilst it was unhelpful that Miss Davila's letter of appeal to HMRC was not available, HMRC's letter of 6 December 2018 demonstrated that HMRC had agreed to accept the late appeal for the purposes of s49(2)(a) TMA 1970 and it was not now open to HMRC to withdraw that agreement. Such agreement by HMRC having been found to have been given, it was not necessary to consider whether we should give permission for late notice to be given to HMRC – the pre-condition in s49(2)(b) had not been satisfied.

13. The Tribunal noted that Miss Davila's Notice of Appeal to the Tribunal was also late by 10 days. However, HMRC confirmed that they did not object to the Tribunal accepting this late Notice.

14. We decided based on rules 2 and 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to accept this late Notice of Appeal to the Tribunal and that the hearing should proceed.

RELEVANT LEGISLATION

15. The power to impose penalties for the late filing of a tax return in respect of which a notice to file was given pursuant to s8 Taxes Management Act 1970 ("TMA 1970") is set out in paragraph 1 to Schedule 55. Paragraphs 3 to 6 of that Schedule set out the levels of the penalties. Those provisions, so far as relevant, are set out in the Appendix to this decision.

APPELLANT'S SUBMISSIONS

16. Miss Davila explained that she had been hired as a travel nanny through an agency in early 2016. This was the first time she had been self-employed. She recalled that the contract stated that the employer would be taking care of her taxes.

17. In mid-2017 she received a letter from HMRC. She was not able to recall what this looked like. The Tribunal drew her attention to two of the pro forma included in the bundle – Miss Davila confirmed that it might have been the CWF1, which looked familiar to Miss Davila, or something which looked like a Self Assessment Tax return and payment reminder.

18. Having received that letter, she contacted HMRC that same month. She explained to HMRC that her employer was sorting out her taxes.

19. She received another letter from HMRC in April or May 2018 which stated that she was late filing her tax return. She called HMRC to find out what was going on. She was told that her employer had not filed a tax return for her, and so she proceeded to try to find out how the process works. HMRC tried to explain what to do and told her to file her return online. Miss Davila tried to do this, but experienced difficulties logging in and did not receive the codes she needed to do this. She chased HMRC for the access codes. This was not successful and eventually they told her to complete a paper return and that is what she did. During this period of a few weeks where she was trying to complete a tax return Miss Davila was receiving various statements from HMRC setting out amounts due.

20. Miss Davila sent a paper copy of her tax return to HMRC in October 2018, at the same time as her letter appealing against the late filing penalties. She sent her employment contract to HMRC at this time (and did not keep a copy).

21. In response to questions from both HMRC and the Tribunal as to the delay between mid-2018 when she acknowledged she knew she needed to file a tax return and October 2018 when she did complete her return, Miss Davila responded that she found the process difficult, and had struggled to get reference codes. The only person she sought help from was HMRC during this time – she did not ask her employer for help, nor anyone else she knew.

HMRC'S SUBMISSIONS

22. Miss Mackoon referred to the Return Summary and alleged that the Notice to File was issued to Miss Davila on 18 May 2017. HMRC do not have a copy of any of the computer-generated notices which are sent automatically to taxpayers. She referred to the witness statement of Ms Mitchell outlining the process for printing and sending out notices.

23. Referring to s8(1) TMA 1970, Miss Mackoon accepted that there was no evidence on that Return Summary that the Notice to File had been issued by an "officer of the Board", ie a specific named individual within HMRC. She submitted that this was not necessary or possible when hundreds of notices are generated each year.

24. Similarly, Miss Mackoon referred to the Statement dated 13 September 2018 to set out the penalties which had been imposed on Miss Davila and the pro forma notices which were included in the bundle. There were no copies of the penalty notices which had been issued.

25. As to whether Miss Davila had a reasonable excuse for late filing, Miss Mackoon submitted that:

(1) reliance on a third party such as an employer is not a reasonable excuse, and

(2) in any event, Miss Davila had been aware by 24 March 2018 (referring to a call from Miss Davila to HMRC, that is noted in the SA notes) that this had not been done, and that this delay was not reasonable.

26. Miss Mackoon also referred to the SA notes which record that on 2 August 2018 Miss Davila telephoned HMRC with a query about the penalties for the tax year 2016-2017 and was advised that she had to file her return and told how to enrol for online services. At that time, Miss Davila was aware that her return had not been filed and that penalties were accruing, yet the tax return was not received until 22 October 2018.

27. The reason given for this delay is the difficulty Miss Davila experienced in completing the return, but Miss Mackoon submitted that it is not particularly difficult to complete a tax return online and that resources are available to help taxpayers.

28. Given that Miss Davila ultimately completed a paper return, Miss Mackoon was asked by the Tribunal if there was any information as to when this paper return might have been provided by HMRC to Miss Davila to enable her to complete it. She suggested it might have been sent with the Notice to File (ie in May 2017 according to the Return Summary), or been available online, and did not have a record of it being sent to Miss Davila during 2018.

29. Miss Mackoon explained that HMRC did not have a record of receiving a copy of Miss Davila's contract with her employer. They did (in the SA notes) have a record of Miss Davila's letter appealing against the penalties received on 22 October 2018, but that record was silent as to whether any additional material had accompanied the letter.

DISCUSSION

30. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely balance of probabilities. One of those matters is whether a notice to file has been sent, because a taxpayer cannot be in breach of the requirement to file a self-assessment return unless he has been sent a notice to file such a return in accordance with the requirements of s8 TMA 1970. Paragraph 18 of Schedule 55 similarly sets out the requirements for assessing a penalty.

31. This principle was recently restated by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TC) where it said at [69]:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

32. The evidence before us comprised the bundle prepared by HMRC, the contents of which are outlined at [4] to [8] above, and Miss Davila's evidence at the hearing. We also had the witness statement of Ms Mitchell.

Validity of penalties

33. We address in turn both the requirements of s8 TMA 1970 and paragraph 18 of Schedule 55.

Notice to File

34. Section 8(1) provides that for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax in a year of assessment, and the amount payable by way of income tax, a person may be required "by a notice given to him by an officer of the Board" to prepare and deliver a tax return together with such documents relating to the information given in the return as may reasonably be required. Paragraph 1 of Schedule 55 then provides that a penalty is payable where a person fails to comply with this obligation.

35. Thus notice to file must be given before a taxpayer can be found to have filed late and become liable to penalties. This was in issue in the present appeal, as whilst there is some inconsistency in the Notice of Appeal between the reason for Miss Davila's late appeal and the grounds for appeal (in [8] above), the grounds include "I was completely unaware that I had to file a tax return as all my previous jobs I've never had to do this", as well as going on to refer to relying on her employer.

36. Before considering the evidence before us, we had regard to the recent decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

> "49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.
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> 50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
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> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
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> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
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> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
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> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
>
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."
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> 52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date

> appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.
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> 53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:
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> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."
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> 54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

37. The only evidence which HMRC can point to regarding a notice to file having been issued is the Return Summary, in which it is stated that Notice to File was issued on 18 May 2017 and the witness statement of Ms Mitchell describing the process for printing and issuing notices. There was no copy of the actual Notice to File which was alleged to have been produced by this process (either a copy of that actually sent to Miss Davila or a pro forma thereof).

38. We do accept that in principle HMRC could satisfy the burden of proof to the requisite standard even in the absence of a copy of the actual Notice to File sent in a particular instance. This could involve satisfying us that, on the balance of probabilities, the operation of the automatic system did result in Notice to File being generated, printed and sent out to the taxpayer at the address currently held on the system.

39. The bundle did include a witness statement from Ms Mitchell setting out her evidence as to the process of printing and issuing notices. It was not clear to us that the information as to process covered the time relevant in this appeal – the witness statement was dated 23 October 2018, and the introduction thereto states:

> "I visited Fujitsu our print provider in March 2016 and observed the transfer of data from HMRC and the process for printing and issuing notices. Our print provider changed on 1 July 2017 from Fujitsu to Communisis; I have assurance that the process witnessed in March 2016 remained the same process from 1 July 2007 and remains the same to the date of this witness statement."

40. We had concerns as to the nature and source of the assurance referred to and needed clarification of that dates mentioned above (given the discrepancy between 2017 and 2007). However, Ms Mitchell did not attend the hearing and given that she was not able to be cross-examined we concluded that we should place little weight on this evidence.

41. Given the scarcity of evidence produced by HMRC in support of a Notice to File having been issued, the evidence from Miss Davila was particularly relevant. We found her to be a credible witness, who sought to be helpful in answering questions put to her, but she was very vague on timing of events and what had been received at various times.

42. Miss Davila did recall receiving a communication from HMRC in 2017, and we considered whether this might have been the Notice to File. However, she was not able to confirm what that communication was. There was no pro forma Notice to File in the bundle to produce to her at the hearing with a view to obtaining evidence as to whether this was what she had received, and she was equivocal as to whether the communication she received might

have looked like a CWF1 or a Self Assessment Tax return and payment reminder (which the Tribunal notes do look quite different from each other).

43. Having regard to Miss Davila's evidence, which we accept, that upon receiving this communication from HMRC she contacted them "quite quickly" afterwards, which she confirmed to mean during that same month, we have also reviewed the contacts with the taxpayer which are recorded in HMRC's SA notes. The first entry in those notes is for 11 May 2017, which states that HMRC received and processed form CWF1. That is the only contact which those notes record with Miss Davila during 2017. The next entry is not until 24 March 2018, which records that Miss Davila contacted HMRC to explain that she thought her employer was completing the return, and she was advised that it was still outstanding.

44. Whilst Miss Davila's evidence as to timings is very imprecise, we do find that she did respond to communications received from HMRC – we reach this conclusion based not only on her own evidence but also by the correlation between the dates which HMRC state they issued notices and reminders and the occasions on which Miss Davila would then call HMRC to ask for assistance. In the light of this, we conclude on balance (and do so find) that the communication from HMRC in 2017 which Miss Davila recalls is the CWF1 and not a Notice to File. We base this conclusion largely on HMRC's SA Notes recording receipt of a completed CWF1 from Miss Davila on 11 May 2017.

45. We therefore conclude that HMRC have not satisfied us, on the balance of probabilities, that a Notice to File was given to Miss Davila within s8(1) TMA 1970. For that reason, the late filing penalties under paragraphs 3, 4 and 5 of Schedule 55 must be cancelled and Miss Davila's appeal must succeed.

Assessment of penalties

46. Furthermore, although in view of our conclusion above it is not necessary for us to decide this point, we are not satisfied that HMRC has demonstrated that the penalties were properly assessed in that the requirements of paragraph 18 of Schedule 55 were met.

47. Paragraph 18 requires that HMRC must (a) assess the penalty, (b) notify the taxpayer and (c) state in the notice the period in respect of which the penalty is assessed.

48. The computer-generated record headed "View/Cancel Penalties" does not provide us with any evidence that the penalty notices referred to were actually issued to Miss Davila, or as to the information they contained.

49. The question of the appropriate form for notices under Schedule 55 was at issue in the decision of the Court of Appeal in *Donaldson v HMRC* [2016] STC 2511. Following that decision, the Tribunal needs to consider whether:

> (1) in relation to the penalty imposed under paragraph 4 of Schedule 55, the requirement in paragraph 4(1)(c) of Schedule 55 – the obligation to specify the date from which the daily penalty was payable – has been met; and
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> (2) in relation to all three penalties – the requirements in paragraph 18(1)(b) and (c) of Schedule 55 – the obligation to notify the taxpayer of the penalty and state in the notice the period in respect of which the penalty is assessed - have been met and, if a notice to the taxpayer does not meet the requirements in paragraph 18(1)(c) of Schedule 55, whether the failure to meet those requirements is a matter of form and not substance such that the relevant penalty notice remains valid by virtue of the saving language in s114(1) TMA 1970 .

50. By way of evidence to support this, we only have the pro formas available to us, and the only ones that purport to assess a penalty are those described in [5(5)] and [5(8)] above.

Between them, they do seek to assess the penalties under paragraphs 3, 4 and 5 of Schedule 55, and contain the language which was found to be sufficient in *Donaldson*. However, both of these pro forma relate to the tax year 2010-2011, rather than the tax year in question of 2016-2017, and HMRC have not adduced any evidence at all to support these pro forma being the same as those which were used in the tax year under appeal. (For completeness, we note that this is not addressed in the witness statement of Ms Mitchell either.)

51. We therefore conclude that HMRC have not satisfied us, on the balance of probabilities, that penalty notices complying with the requirements of paragraph 18 of Schedule 55 were sent to Miss Davila.

Reasonable excuse

52. Miss Davila set out in her grounds of appeal that she was unaware that she needed to file a tax return as she thought her boss would be doing this, and she understood from her contract that her employer would be doing her taxes. As noted above, we found her to be a credible witness, and she sought to be helpful in her evidence. However, her evidence at the hearing was vague as to the basis on which she had concluded that her employer would file her tax return on her behalf. The grounds mention that her belief was based on the contract with the employer, but that was not produced – her explanation was that she sent it to HMRC when she wrote to them to appeal against the penalties. Miss Mackoon says that she did not have a record of that having been received by HMRC.

53. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?…
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

54. That this is the correct test has recently been confirmed by the Upper Tribunal in *Perrin*. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
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> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default. In doing so, the Tribunal should

take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the Tribunal should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

55. We concluded that Miss Davila's belief that her employer was dealing with everything related to her taxes and that she would not have to file a return herself was genuine and honest. However, we do not consider it to be reasonable – completing a tax return is a personal obligation, requiring detailed knowledge of an individual's finances (including, eg, as to any interest from bank accounts) and it is not reasonable without very clear, precise evidence to assume that an employer, who does not have access to any of this information, would take on this obligation and be able to complete the return. This is, of course, to be distinguished from what we surmise may have been the case in Miss Davila's previous employments, where we assume her employers withheld tax under the Pay-As-You-Earn (PAYE) Regulations and paid it to HMRC, along with the relevant PAYE returns. Whilst the PAYE system allows for tax to be paid on employment income as it arises, it is not, in itself, a substitute for a personal tax return.

SPECIAL CIRCUMSTANCES

56. 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.

57. 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). However, the Upper Tribunal in *Edwards* recently said at [72] that:

> "In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase."

58. The Upper Tribunal then agreed with this statement of the Tribunal in *Advanced Scaffolding*:

> "102. It is clear that, in enacting paragraph 16 of schedule 55 , Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

59. In the present appeal HMRC have not advanced any position on whether they have considered that there are special circumstances and we therefore infer that they have not done so. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55 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 only if they think HMRC's decision was "flawed when considered in the light of the principles applicable in proceedings for judicial review".

60. Whilst we conclude that failing to consider reducing the penalties under paragraph 16 was a flawed decision by HMRC, and therefore have power to substitute our own decision, we do not consider that in the present appeal there is anything special about the position which would make it right to reduce the penalties.

CONCLUSION

61. The penalties for late filing imposed under paragraphs 3, 4 and 5 of Schedule 55 are cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

APPENDIX – RELEVANT STATUTORY PROVISIONS

TAXES MANAGEMENT ACT 1970

8. Personal return

(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, 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.

(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.

(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]8 or charge for the period in respect of which the statement is made.

(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.

(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

(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–

(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.

(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.

(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.

114. Want of form or errors not to invalidate assessments, etc.

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—
(a) by reason of a mistake therein as to—
(i) the name or surname of a person liable, or
(ii) the description of any profits or property, or
(iii) the amount of the tax charged, or
(b) by reason of any variance between the notice and the assessment or determination.

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SCHEDULE 55 FINANCE ACT 2009
SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

Penalty for failure to make returns etc

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...
(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)).
(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 falling within any of items 1 to … in the Table, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

	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

2

Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to … in the Table.

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.

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.

Assessment

18

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,
(b) notify P, and
(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—
(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
(b) may be enforced as if it were an assessment to tax, and
(c) may be combined with an assessment to tax....

19

(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.
(2) Date A is—
(a) in the case of an assessment of a penalty under paragraph 6C, the last day of the period of 2 years beginning with the end of the tax month in respect of which the penalty is payable,
(b) in the case of an assessment of a penalty under paragraph 6D, the last day of the period of 2 years beginning with the filing date for the relevant extended failure (as defined in paragraph 6D(10)), and
(c) in any other case,
the last day of the period of 2 years beginning with the filing date.
(3) Date B is the last day of the period of 12 months beginning with—
(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return or returns (as the case may be in relation to penalties under section 6C or 6D), or
(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.
(4) In sub-paragraph (3)(a) "appeal period" means the period during which—
(a) an appeal could be brought, or
(b) an appeal that has been brought has not been determined or withdrawn.
(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 30 MAY 2019