



TC06024

Appeal number: TC/2014/06258

INCOME TAX – penalty for taxpayer’s delay in filing tax return – paragraphs 3 and 4 of Schedule 55 of Finance Act 2009 – whether taxpayer had reasonable excuse for delay – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANN SHARP

Appellant

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 5 June 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the undated Notice of Appeal filed 18 November 2014 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 17 March 2017.

DECISION

Introduction

1. This appeal by Mrs Sharp is against HMRC's decision to issue her with a number of penalties in respect of her delay in filing her tax return for the tax year 2012/13. Those penalties are an initial penalty of £100 and daily penalties totalling £750, raised under paragraphs 3 and 4 respectively of Schedule 55 to the Finance Act 2009.

The Donaldson appeal and procedural background

2. Mrs Sharp filed her appeal to this Tribunal on 18 November 2014, just before the Upper Tribunal released its decision in HMRC's appeal against the First-tier Tribunal decision in *Donaldson v HMRC* [2013] UKFTT 317 (TC). The First-tier Tribunal decision had raised a number of questions about whether daily penalties imposed by HMRC had been imposed correctly or whether there were procedural irregularities which would invalidate them. As the outcome of HMRC's appeal could affect a number of other cases where daily penalties had been imposed, those cases (including the present appeal of Mrs Sharp) were put on hold until the *Donaldson* appeal was finally resolved.

3. The Upper Tribunal released its decision on 2 December 2014 (reported at [2014] UKUT 536 (TCC)), finding in favour of HMRC. There was then an appeal by Mr Donaldson to the Court of Appeal. The Court of Appeal released its judgment on 18 July 2016 (reported at [2016] EWCA Civ 761), also finding in favour of HMRC. On 21 December 2016 the Supreme Court refused to give Mr Donaldson permission to appeal further, resulting in the Court of Appeal Judgment becoming final.

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

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

6. On 15 March 2017 HMRC sent to the Tribunal, Mrs Sharp and her agent, a copy of their Statement of Case in respect of this appeal. I assume that was sent by second class post and so would be presumed to be received by Mrs Sharp and her agent four postal delivery days later, i.e. by 20 March 2017. On 17 March 2017 the Tribunal notified Mrs Sharp's agent that if Mrs Sharp wished to send a Reply to

HMRC's Statement of Case, or any further documents, it/they should be received by the Tribunal no less than 30 days after receipt of the Statement of Case. I calculate that date to be no later than 19 April 2017. As at the date of this paper hearing (5 June 2017) no Reply or further documents have been received from Mrs Sharp or her agent and so I proceed to hear this appeal on the basis of the documents specified above.

Chronology of Mrs Sharp's appeal

7. On 6 April 2013, HMRC issued Mrs Sharp with a return to file for the tax year 2012/13. The deadline for this return to be filed was 31 January 2012 if filed by electronic means or 31 October 2011 if filed as a paper return.

8. On 18 February 2014, HMRC issued a £100 penalty to Mrs Sharp as her tax return for 2012/13 had not been received by 31 January 2014.

9. On 14 July 2014 Mrs Sharp filed her tax return electronically.

10. On 15 July 2014, HMRC issued Mrs Sharp with an assessment to 75 daily penalties of £10 each in respect of the 75 days on which Mrs Sharp's tax return had been outstanding for more than three months.

11. On 28 July 2014 Mrs Sharp's agent appealed on her behalf against the late filing penalty and daily penalties imposed. On 13 August 2014 HMRC sent Mrs Sharp two letters in response: the first letter explained that HMRC would not consider Mrs Sharp's appeal against the late filing penalty as it was received out of time, and invited an explanation for the delay in appealing; the second letter rejected Mrs Sharp's appeal against the daily penalties on the basis that Mrs Sharp had not provided a reasonable excuse for her delay in filing her return, and offered a review.

12. On 4 September 2014, Mrs Sharp's agent asked HMRC to reconsider the decisions but did not provide reasons for Mrs Sharp's delay in appealing against the £100 late filing penalty. On 6 October 2014, HMRC referred Mrs Sharp's agent either to the HMRC review unit or to the Tribunal. On 18 November 2014, Mrs Sharp appealed to this Tribunal.

Mrs Sharp's late appeal to HMRC

13. There are two procedural issues which need to be determined before I can consider the substantive dispute. These are Mrs Sharp's late appeal to HMRC, and Mrs Sharp's late appeal to this Tribunal.

14. Although Mrs Sharp's appeal to the Tribunal is stated to be against HMRC's decision to impose the penalties described in paragraph 2 above, technically Mrs Sharp's Notice of Appeal contains:

- an appeal against HMRC's decision to impose daily penalties (confirmed in HMRC's second letter of 13 August 2014), and

· an application to extend time to appeal to HMRC against the imposition of the late filing penalty (as HMRC themselves refused to extend time, as set out in their first letter of 13 August 2014).

15. The reason that I consider there to be an application as well as an appeal is because HMRC's first letter of 13 August 2014 was a decision that Mrs Sharp was out of time to appeal to them against the imposition of the £100 late filing penalty. The late filing penalty was imposed on 18 February 2014 and any appeal against this penalty should have been made within 30 days (see Section 31A of the Taxes Management Act 1970). Mrs Sharp's appeal was made on 28 July 2014. HMRC considered that no explanation had been given for Mrs Sharp's delay in making that appeal, and so they refused to admit the appeal out of time.

16. Section 49 of the Taxes Management Act 1970 allows either HMRC or this Tribunal to extend the deadline for appealing to HMRC. If I am satisfied that Mrs Sharp had a reasonable excuse for her delay in appealing to HMRC then I can allow Mrs Sharp's application to appeal to HMRC out of time. The correct procedure is then to refer Mrs Sharp's appeal against the imposition of the £100 fixed penalty back to HMRC for them to consider whether Mrs Sharp had a reasonable excuse for the late filing of her tax return.

17. Therefore I consider whether Mrs Sharp had a reasonable excuse for her delay in appealing to HMRC against the late filing penalty. The relevant principles are set out in *Data Select v HMRC* [2012] UKUT 187 (TCC) and, applying those principles, I consider the reason for the deadline, the extent of the delay, the reason for the delay and the prejudice which would be caused to each side if I allowed, or refused, Mrs Sharp's application.

18. The 30 day deadline is there to give certainty to HMRC and to enable good administration. The deadline to appeal was 20 March 2014, and Mrs Sharp appealed on 28 July 2014, over four months after that deadline. No explicit reason appears to have been put forward for Mrs Sharp's delay in appealing against the late filing penalty but Mrs Sharp's agent noted that Mrs Sharp has no record of having received a document dated 27 March 2014. I assume, in Mrs Sharp's favour, it is the 18 February 2014 penalty notice that Mrs Sharp is arguing she had no record of receiving. HMRC note in their Statement of Case that none of their correspondence has been returned as undelivered, implying that the penalty notice was delivered.

19. Section 7 of the Interpretation Act 1978 provides as follows:

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

20. Therefore, unless the contrary is proved, Section 7 deems service of an item sent by post to have been effected at the time at which the letter would be delivered in the ordinary course of post. In this case, as it is Mrs Sharp who seeks to assert the contrary, the onus is upon Mrs Sharp to prove, on the balance of probabilities, that the penalty notice issued on 18 February 2014 was not received.

21. It is extremely difficult to prove a negative, and so to assess the likelihood of Mrs Sharp not having received the penalty notice, I have looked at the surrounding circumstances. All other post sent by HMRC appears to have been received by Mrs Sharp. No post has been returned to HMRC. There is no suggestion that Mrs Sharp's address has changed or that HMRC have the wrong address. The penalty notice was issued at a time when Mrs Sharp's business was struggling and, as Mrs Sharp's agent explained in later correspondence, Mrs Sharp was devoting her time to trying to turn the business around and "she lost track of her accounting requirements". In the circumstances I am not satisfied that Mrs Sharp has demonstrated, on the balance of probabilities, that service of the penalty notice issued on 18 February 2014 was not effected. Service of the penalty notice is deemed to have taken place at the time at which an item would be delivered in the ordinary course of post. For an item sent second class that would be four working days after it was posted.

22. HMRC also note that they issued penalty reminder letters to Mrs Sharp on 3 June 2014 and 1 July 2014. There does not seem to be any suggestion that these reminder letters were not received by Mrs Sharp. These reminder letters would have alerted Mrs Sharp to the fact that her return was outstanding and should have prompted her to contact HMRC to find out the position and whether a £100 late filing penalty had been incurred.

23. If I do not allow Mrs Sharp's application then she will lose the opportunity to challenge the imposition of the £100 late filing penalty, whereas there is no apparent prejudice to HMRC if I allow the application.

24. I have concluded that Mrs Sharp does not have a reasonable excuse for her delay in appealing to HMRC against the late filing penalty. It is in the interests of justice that deadlines should be respected. I have decided against extending time under Section 49. Therefore, as Mrs Sharp did not appeal to HMRC against the imposition of the £100 fixed penalty within time, that penalty is confirmed.

Late appeal to this Tribunal

25. The next procedural issue I need to decide is whether to admit Mrs Sharp's appeal against daily penalties to this Tribunal out of time.

26. HMRC's decision to reject Mrs Sharp's appeal is dated 13 August 2014. The deadline for filing an appeal against the imposition of Schedule 55 penalties is 30 days from the date of HMRC's decision. Mrs Sharp's appeal was received by the Tribunal on 18 November 2014, just over two months after the deadline for submitting an appeal. The Tribunal may exercise its discretion under Rule 5 of the

Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to grant an appellant an extension of time in which to appeal to this Tribunal.

27. Part of this delay appears to be as a result of Mrs Sharp's agent not appreciating that a request for a review should be sent to HMRC's appeals unit. A request for reconsideration was sent erroneously to the decision-maker. The remainder of the delay is due to Mrs Sharp's agent failing to include the relevant documents with Mrs Sharp's original appeal to the Tribunal.

28. Again I apply the principles in *Data Select v HMRC* [2012] UKUT 187 (TCC) to this matter. Although there has been a delay of more than two months, Mrs Sharp's agent was actively endeavouring to challenge HMRC's decision on behalf of Mrs Sharp throughout this period. Again, if I do not allow this application to extend time, Mrs Sharp will lose the opportunity to challenge the imposition of penalties. The consequences are more serious given the larger amount at stake. Again there is no apparent prejudice to HMRC who have already prepared their Statement of Case for this appeal.

29. Weighing all the relevant factors I have decided in these circumstances to grant Mrs Sharp an extension of time in which to file her appeal against the imposition of daily penalties to this Tribunal.

Findings of fact

30. On the basis of the papers available to me, I find the following facts:

- a) On 6 April 2013, HMRC issued Mrs Sharp with a return to file for the tax year 2012/13. From (at least) 2012/13 onwards Mrs Sharp's business was struggling financially.
- b) On 18 February 2014, HMRC issued a £100 late filing penalty to Mrs Sharp.
- c) On 3 June 2014 HMRC issued a 30 day daily penalties late filing reminder letter to Mrs Sharp.
- d) On 1 July 2014 HMRC issued a 60 day daily penalties late filing reminder letter to Mrs Sharp.
- e) On 14 July 2014 Mrs Sharp filed her tax return electronically. This return showed that Mrs Sharp's business made losses of £4,279 in 2012/13.
- f) On 15 July 2014, HMRC issued Mrs Sharp with an assessment to 75 daily penalties of £10 each in respect of the 75 days on which Mrs Sharp's tax return had been outstanding for more than three months.
- g) On 28 July 2014 Mrs Sharp's agent appealed against the imposition of penalties. By this date Mrs Sharp's business had ceased with losses of more than £25,000.

- h) In the letter of appeal to HMRC dated 28 July 2014, Mrs Sharp's agent stated:

5 Our client was under a mistaken impression that her return had been completed and submitted on time. It was only when she received the £750 penalty notice she queried it. As soon as that was received she brought her paperwork to us and her accounts and the tax return were completed immediately...

- 10 i) It is clear from inspection of the relevant dates, and from the fact that the assessment to daily penalties could be calculated only after the return had been received, that it cannot have been receipt of the 15 July 2014 penalty assessment which prompted Mrs Sharp to file her tax return on 14 July 2014. On the basis that receipt of a document from HMRC was the trigger for Mrs Sharp to file her return, I find on the balance of probabilities that Mrs Sharp was prompted by receipt of the 1 July 2014 reminder letter to take her documents to her agent. I find that at some point between 1 and 14 July 2014, Mrs Sharp took her accounts and other paperwork to her agent to seek assistance in filing her tax return for 2012/13.

Discussion and decision

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

25 Schedule 55

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

(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.

- 30 (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 ...;

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

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

34. The daily penalties imposed upon Mrs Sharp are imposed under paragraph 4, the relevant parts of which provide as follows:

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

- 5 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
- (b) HMRC decide that such a penalty should be payable, and
- (c) HMRC give notice to P specifying the date from which the penalty is payable.

10 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under subparagraph (1)(c).

15 35. So, if a person fails to file her return on time, and that failure continues for three months after the relevant filing date, then she is liable to daily penalties of £10 per day for each day (up to a maximum of 90 days) after the three months that the failure persists.

36. Having found that Mrs Sharp's tax return for 2012/13 was not received by HMRC until 14 July 2014, I am satisfied that Mrs Sharp has, on the face of it, incurred liability to 75 daily penalties of £10 each as imposed by HMRC under paragraph 4 of Schedule 55.

20 37. So, having found the relevant facts, I now turn to consider whether Mrs Sharp has a reasonable excuse for her delay.

Reasonable excuse

25 38. As noted above, the daily penalties imposed upon Mrs Sharp are imposed under Paragraph 4 of Schedule 55 to the Finance Act 2009. Sub-paragraph 23(1) of Schedule 55 provides that liability to any penalty imposed under Schedule 55 does not arise if there is a reasonable excuse for the failure for which the penalty has been imposed. "Reasonable excuse" is not defined but sub-paragraph 23(2) of Schedule 55 excludes certain matters from being a reasonable excuse. Sub-paragraph (2) provides:

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

- 30 (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.

Mrs Sharp's submissions on reasonable excuse

5 39. In a letter of 4 September 2014, Mrs Sharp's agent explains:

Mrs Sharp was running a business which was struggling and was devoting her time to try to turn the business around. While focusing on the business she lost track of her accounting requirements and was under the mistaken impression that the accounts for 2012/13 had already been done.

10 Since then the business has suffered further and has now in fact ceased operations, having incurred further losses. As a result of these losses Mrs Sharp is not in a financial position to pay any penalties. She simply can't afford them.

15 Given the level of her losses of over £25,000 when the business ceased we feel it is unfair to charge her with late submission penalties given her financial position and the fact that her 2012/13 tax return showed no tax payable in any event.

40. In the Notice of Appeal to this Tribunal Mrs Sharp's agent states:

20 She was very much under the impression that her return was done and was devoting all her time to her failing business. The business has now closed with losses of approximately £25,000. We feel that it would be unfair of HMRC to try to collect the penalties in these circumstances especially when no tax was due and our client just can't afford to pay.

Conclusions on reasonable excuse

25 41. There are essentially three points made in support of Mrs Sharp: that she understood her return had been filed, that no tax was due for the year in question and that Mrs Sharp cannot afford to pay late filing penalties. I take the view that only the first of these three points is put forward as an explanation for the delay, and that the latter two points must be pleas for the penalties to be reduced or removed.

30 42. I reach this conclusion because liability to late filing penalties is no longer linked to tax liability and so the fact that Mrs Sharp owed no tax in 2012/13 cannot be relevant to the question of whether Mrs Sharp had a reasonable excuse for her delay. Equally, the fact that Mrs Sharp is now unable to afford to pay penalties is not relevant to the issue of whether Mrs Sharp has incurred a liability to pay daily penalties.

35 43. Therefore I consider whether Mrs Sharp's misapprehension that her return had been filed can constitute a reasonable excuse for her delay in filing her return.

44. There is no citation of any particular factors that caused Mrs Sharp to mistakenly believe that her tax return for 2012/13 had been filed. It appears, from her agent's explanation, that it was simply oversight due to her preoccupation with running, and trying to rescue, her failing business. While that preoccupation might explain Mrs Sharp's delay, I do not consider that it can excuse it. Mrs Sharp continued to have an obligation to file her tax return and she should have been aware of whether or not that return had been filed. That is especially the case when, as here, a number of reminders were sent which should have alerted Mrs Sharp to her oversight. It was not until the beginning of July that Mrs Sharp took her paperwork to her agent to seek assistance in filing her tax return. If Mrs Sharp had taken that step when she received the earlier prompts, in particular when she received the late filing penalty notice in February 2014, then she could have avoided, or at least reduced, her liability to daily penalties.

45. I have looked carefully at all the circumstances of this case but I am afraid that I do not consider that Mrs Sharp has provided a reasonable excuse for her delay.

Special Reduction

46. Although it was not mentioned by Mrs Sharp, a penalty under Schedule 55 can also be reduced under the power in Paragraph 16. Sub-paragraph 16(1) of Schedule 55 to the Finance Act 2009 enables HMRC to reduce a penalty imposed under Schedule 55 in certain circumstances. Sub-paragraphs (1) and (2) provide:

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

(2) In subparagraph (1) "special circumstances" does not include-

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

47. I can only interfere with HMRC's conclusion on the grounds relevant to judicial review proceedings, that is to say, if I consider that HMRC's conclusion is one that no decision-maker, properly directed, could reach. Paragraph 16 was not considered by HMRC in their decision letters. However the point was considered by HMRC in their Statement of Case. Following the reasoning of the Tribunal (Judge Redston and Mr Speller) in *Bluu Solutions Limited v HMRC* [2015] UKFTT 95 (TC), which considered the similarly worded Schedule 56, it is open to HMRC to consider whether there are special circumstances at any time up until the conclusion of the hearing of an appeal, including in their Statement of Case. On that basis HMRC have not failed to consider the point.

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

Conclusion

49. For the reasons set out above, this appeal is dismissed. The late filing penalty and the 75 daily penalties of £10 each are confirmed.

50. A summary decision was issued to the parties on 12 June 2017. On 10 July
5 2017, within the time permitted, the Tribunal received a request from Mrs Sharp's agent for full findings of fact and reasons for the decision.

51. 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
10 than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 26 JULY 2017

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