TC02720

Appeal number: TC/2012/9096 & TC/2012/8431

INCOME TAX – daily penalties for late filing - whether statutory requirements for decision to be made by HMRC met – yes - whether statutory requirements for advance notice met – no - whether reasonable excuse – no in either case – whether special circumstances where taxpayer effectively invited to complete paper return – yes – appeals against daily penalties allowed - Mr Donaldson's appeal against late filing and six month late filing penalties dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT MORGAN **Appellant**

- and -

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

KEITH DONALDSON **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
RICHARD THOMAS

Sitting in public at Bedford Square on 7 January, 19 & 20 March 2013

Mr C McIntyre, of Barcant Beardon LLP ACCA, for Mr Morgan

There was no appearance by or on behalf of Mr Donaldson

Mrs G Orimoloye, HMRC officer, for the Respondents at both hearings on 7 January;

Mr R Vallat, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents at the hearing on 19 & 20 March 2013

DECISION

1. The appeals in these two cases were originally separately listed on 7 January 2013. On the day, after we had part heard Mr Morgan's case, HMRC made an application for the hearing to be adjourned. We allowed this on condition that HMRC paid Mr Morgan's costs of attending on 7 January. We did not hear Mr Donaldson's case at all on 7 January as HMRC applied at the outset for it to be adjourned and, as the appellant had not appeared, we allowed this adjournment too. The re-hearings of both appeals were joined and took place on 19 & 20 March 2013.

2. At issue in both cases was the new daily penalty regime. In each case the same question arose: were the penalties properly imposed in accordance with the legislation? It was for this reason the continuation of the hearings of the two appeals was joined in March. We deal with our decision on this aspect of the appeals below. As each case also raised questions specific to the facts of the individual cases, and in the case of Mr Donaldson, other penalties, we deal with these matters separately, after dealing with the issue of whether the daily penalties were properly imposed, which applies in both cases.

Background to daily penalties issue

3. Mr Morgan was assessed to two penalties under Schedule 55 Finance Act 2009 for late filing: a £100 penalty for late filing (Sch 55 paragraph 3) and £870 in daily penalties for late filing (Sch 55 paragraph 4). He was also assessed to a £277 late payment penalty but HMRC have accepted the £277 penalty should not have been levied and have discharged it. Mr Morgan has paid the £100 late filing penalty and makes no appeal in respect of it. The appeal before this tribunal is only in respect of the £870 daily penalties for late filing.

4. Mr Donaldson was assessed to three penalties under Schedule 55: £100 penalty for late filing (Sch 55 paragraph 3); £900 daily penalties for late filing (Sch 55 paragraph 4) and £300 for filing more than 6 months late (Sch 55 paragraph 5). The total of the penalties under appeal for Mr Donaldson was therefore £1200.

Evidence

5. Evidence was given by Mr Delnon, an officer of HMRC, and Mr Morgan. Mr Donaldson did not appear at the re-hearing, although he did give evidence in his Notice of Appeal form, and we deal with that in the section on his particular circumstances at the end of this decision notice.

6. Mr Delnon gave evidence, in summary, about three matters:

   (1) HMRC's policy on the implementation of the daily penalty regime;

   (2) How the penalties were actually imposed on taxpayers;

(3) The various letters and notices sent to, and facts in relation to, the particular taxpayers in this appeal.

7. HMRC's policy was that the imposition of all late filing penalties (bar those for returns more than a year late) should be computer generated and automatic due to the very high number of taxpayers filing late. HMRC also told Parliament in January 2012 that HMRC would repeatedly contact taxpayers with outstanding tax returns urging them to avoid incurring daily penalties.

8. HMRC's policy, while background which explained Mr Delnon's evidence of what HMRC actually did when imposing penalties under paragraph 4, was not, of course, relevant to the question of the interpretation of the legislation.

9. We find from his evidence that warnings about the risk of incurring daily penalties were on the blank paper tax return issued to taxpayers, including the two taxpayers in this appeal, in the April of 2011 and a single reminder to each taxpayer (including the two taxpayers in this appeal) was issued in batches between 18 December 2011 and 6 January 2012.

10. We discuss Mr Delnon's evidence below (paragraphs 51-55) on the two documents which HMRC issued which it considered to be statutory notice of the imposition of the daily penalties.

11. It was also his evidence that a section of HMRC, 'Debt Management and Banking' had sent three further warning letters to all taxpayers who had been sent the £100 penalty notice. The first of these three letters specifically warned taxpayers not to file a paper return as this would give them liability to daily penalties but advised them instead to file online to avoid daily penalties. This evidence was only relevant to Mr Morgan's appeal and we make our findings on it in paragraphs 98-104 below.

Applicable law

12. It was accepted in Mr Morgan's case and we find in Mr Donaldson's case that on the first page of the paper return that HMRC sent to both taxpayers was a notice within s 8 Taxes Management Act 1970 ("TMA") requiring a self-assessment return to be made for the tax year 2010/11 and that the due date for filing that return would have been 31 October 2011 if filed on paper and 31 January 2012 if filed online.

13. <u>The £100 penalties:</u> As we have said, penalties were imposed on both taxpayers under Schedule 55 of the Finance Act 2009 for failing to make these returns by the due dates. This Schedule provides:

> "**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…on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out –
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.

(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, 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)

….."

14. It is not disputed and we find that the self-assessment return which both appellants were required to make was one of the returns to which Schedule 55 applied.

15. It was also not disputed and we find that neither appellant delivered a return by the later of the two possible filing dates. Paragraph 3 of Schedule 55 simply provided:

3. P is liable to a penalty under this paragraph of £100.

Combined with paragraph 1(1) & (4) set out above, this meant the appellants were each prima facie liable to a £100 penalty because they did not deliver a return by the filing date. In both cases the filing date was 31 October 2011 because both taxpayers eventually delivered a paper return.

16. As we have said Mr Morgan accepted his liability to this £100 penalty. Mr Donaldson maintains that he has a reasonable excuse in respect of it. We deal with this issue at the end of the decision where we look at the question of reasonable excuse/special circumstances in respect of each taxpayer.

17. <u>The daily penalties:</u> The reason for the adjournment of the hearings was the issue of the appellants' liability to daily penalties. These penalties were imposed by paragraph 4 of Schedule 55 which provided as follows:

"**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)."

18. At the original hearing on 7 January HMRC did not produce any evidence that a notice had been given to the appellants under paragraph 4(1)(c) and, when the Tribunal raised this at the hearing, HMRC requested the adjournment in order to produce it.

19. The Tribunal also indicated that it required to be satisfied that the requirement of paragraph 4(1)(b) for a decision by HMRC had also been met. We consider these two matters in turn below starting at paragraph 23.

20. The six month penalty: this penalty was imposed on Mr Donaldson (who filed after 30 April 2012) but not Mr Morgan (who filed before 1 May 2012). We set out the legislation below in paragraph 25. Mr Donaldson does not dispute that his return was more than six months' late but claims, as with the £100 penalty and daily penalties, that he has a reasonable excuse for his late filing. We deal with this below in the section starting at paragraph 147 which looks at the facts of Mr Donaldson's particular case.

21. We now consider whether the statutory requirements for daily penalties to be imposed by HMRC were met in the case of both taxpayers.

Requirement in paragraph 4(1)(a) – more than three months late

22. Neither Mr Morgan nor Mr Donaldson disputed that their failure to submit their returns continued for more than 3 months after the due date of filing of the returns. As they both submitted paper returns, the due date of filing was 31 October 2011 and Mr Morgan did not file his return until 27 April 2012 and Mr Donaldson until 1 May 2012.

Requirement paragraph 4(1)(b) – a decision by HMRC

23. "HMRC" must "decide" that a penalty is payable for paragraph 4(1)(b) to be satisfied. Mr Delnon's evidence, which we accept, was that the only decisions which HMRC made were:

(a) A high level policy decision that all taxpayers more than 3 months late filing their SA returns should automatically be charged daily penalties;

(b) An individual "decision" by a computer, programmed in accordance with the above high level policy decision, to identify taxpayers meeting the parameters and to issue a penalty assessment to the two appellants (and a great many other taxpayers).

24. It is HMRC's case that either or both of these is sufficient for paragraph 4(1)(b).

25. There is a contrast with paragraph 3 and the other penalties chargeable under Sch 55. The taxpayer becomes liable to the first £100 penalty simply by not filing on

the due date. As set out above, paragraph 3 simply states "P is liable to a penalty". Paragraph 5 imposes a penalty where the taxpayer has failed to file for 6 months from the due date and provides:

> "**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."

As with paragraph 3, P is liable to a penalty irrespective of any action taken or not taken by HMRC. We note in passing that Mr Donaldson was prima facie correctly assessed with liability under this section as his paper return was not filed until 1 May 2012, so the only question with respect to this £300 penalty is whether he had a reasonable excuse or special circumstances and we deal with this issue at the end of this decision notice.

26. Similarly with the £100 and six month penalties, liability to the penalty imposed after 12 months of failure to file is automatic. Paragraph 6 provides:

> **"6.** (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date."

27. The daily penalty regime is quite different because it requires action by HMRC without which the taxpayer cannot be liable to daily penalties. It is HMRC's case, of course, that it undertook this necessary action.

Meaning of "HMRC decide"

28. In particular, it is HMRC's case that the requirement for "HMRC" to "decide" was met. It says this for a number of reasons.

29. <u>Decision by authorised officer not required:</u> Firstly, it contrasts it with the requirement for any particular officer to make a decision. For instance, certain penalties can only be imposed by an officer of the Board authorised by the Board for the purpose. The most obvious example is in s 100(1) TMA which provides:

> "….an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."

Subsection (2) contains exceptions to this rule. As s 100C(1) makes clear, any penalty within the exception could only be imposed by an officer of the Board with the permission of this Tribunal. So penalties under the Taxes Acts require a decision of an authorised officer.

30. We mention that this provision does not apply to Schedule 55 penalties but only because s 103ZA TMA specifically states this. (If it were not for s 103ZA, s 100(1) or 100C(1) would apply because Schedule 55 is part of a 'Taxes Act'. This is because 'Taxes Acts' are defined in the TMA s118(1) as "…this Act and – (a) the Tax Acts….." The Tax Acts are defined in the Interpretation Act 1978 Schedule 1 as

"…the Income Tax Acts and the Corporation Tax Acts." The "Income Tax Acts" are defined in the same schedule as:

> "…all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax."

Finance Act 2009 (which includes Schedule 55) clearly relates to income tax. Not only that, but Schedule 55 itself clearly relates to income tax in that it relates to a failure to make returns of income for the purposes of income tax.)

31. HMRC's point is therefore that the legislation specifically provided that *none* of the penalties under Schedule 55 required an authorised officer to impose them. But nevertheless, we note that Schedule 55 drew a distinction between penalties which arise automatically on a default and the daily penalties which require "HMRC" to "decide" that such a penalty is payable.

32. Decision not required to be decision of individual officer in individual case: Mr Vallat's second point was that if the conclusion reached by this Tribunal was that a "decision" did not include an action taken by HMRC's computer authorised by a general decision of HMRC to charge penalties in all cases where certain parameters were met, then none of the penalties charged under Schedule 55 (and no doubt many other charging provisions) would be valid. This is because Paragraph 20 only gives a right of appeal against a "decision of HMRC":

> **"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."

33. We agree with HMRC (and no one contended otherwise) that paragraph 20 was intended to give a taxpayer the right to appeal against any of the Schedule 55 penalties. Yet on their face the day 1, month 6 and month 12 penalties do not require a decision to be made by HMRC, let alone any particular officer of HMRC.

34. Yet a closer reading of Schedule 55 shows that all penalties within the schedule require an assessment to establish a debt and the date for payment of it. It is only where a penalty is *assessed* that there can be an appeal. Paragraph 18 provides:

> "**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."

While it is perhaps odd that paragraph 20 refers to a *decision* rather than an *assessment*, paragraph 20 is clearly meant to refer back to paragraph 18. A taxpayer has no right to appeal to the Tribunal merely because he is *liable* to a penalty. He can only have the right to appeal once a penalty has been assessed under paragraph 18.

35. However, putting aside the oddity that paragraph 20 refers to a decision rather than an assessment, in reality there is no distinction between them. *Assessing* the penalty under paragraph 18 must be the same as deciding that a penalty is payable under paragraph 20.

36. And HMRC's point is that in many cases the assessment under paragraph 18 will be an assessment by HMRC's computer. For instance, the assessment to £100 in both Mr Morgan's and Mr Donaldson's case was issued by a computer. No individual HMRC officer was involved in deciding that Mr Morgan or Mr Donaldson was liable to the £100 penalty.

37. HMRC's case is that not only would it be impractical to require an HMRC officer to make each individual assessment (it seems there were over 1,000,000 late returns in 2012), the legislation does not require this.

38. Therefore, follows HMRC's argument, if an individual HMRC officer does not need to make each individual assessment for paragraph 18, it follows that an individual officer does not need to make the decision required in paragraph 4 to impose daily penalties.

39. Conclusion of Tribunal: This conclusion records the decision of the Tribunal by casting vote of the Judge: Mr Thomas considers, for the reasons set out in an appendix to this decision, that HMRC have failed to show that paragraph 4(1)(b) was met. Otherwise the decision of the Tribunal was unanimous.

40. I find it difficult to resist the logic in paragraphs 31-38. While I am not satisfied that an action by HMRC's computer is a decision by HMRC, I do find that a high-level decision taken by an officer or officers of HMRC, that all taxpayers meeting certain parameters should be assessed under paragraph 18 or have daily penalties imposed under paragraph 4, is a decision by HMRC sufficient for both those paragraphs if it was put into effect whether by programming a computer to issue the notices or assessments or otherwise.

41. In reaching this conclusion I considered the 'principle against doubtful penalisation'. My view was that there was no doubtful penalisation here: Parliament clearly intended to levy penalties on persons filing late and, because Parliament did not specifically require the decision to be taken by an individual HMRC officer and (in this day and age) must be taken to be aware that HMRC would rely on a computer for making large volumes of assessments, I considered that the meaning of "HMRC decide" would encompass a high level decision taken by HMRC officers and implemented by computer programme.

42. While it was clear that Parliament intended a distinction between daily penalties and the other penalties within Sch 55 in that only the former requires an HMRC decision to be taken giving notice the penalty will be levied, that distinction was met if a high level decision was taken to impose daily penalties on taxpayers meeting certain parameters. Such a prior decision was not required for the other penalties: for

them all HMRC would have to show would be a high level decision implemented by computer that certain taxpayers would be assessed.

43. I also took into account s 93(3) TMA. This was the section under which daily penalties could formerly be charged and which paragraph 4 was intended to replace with some very different provisions which would make it much easier for HMRC to charge daily penalties. Under s 93(3) an application had to be made to this Tribunal before a person become liable to daily penalties: that requirement does not appear in paragraph 4. The application under s 93(3) had to be made by "an officer of the Board". But again, that requirement has disappeared and been replaced with a reference to "if…HMRC decide….". Parliament could have retained the reference to an officer of HMRC but chose not to do so. This reinforces my view that Parliament did not expect an individual decision to be taken by an individual officer in respect of each individual taxpayer in default; and therefore a high-level decision by HMRC officers to charge all taxpayers in default meeting certain parameters daily penalties is within paragraph 4.

44. Decision on facts: I was satisfied on the basis of Mr Delnon's evidence that such a high-level decision had been taken by HMRC in respect of paragraph 4 some time around June 2010. That decision was to impose daily penalties with effect from the first possible date they could be imposed (ie three months after the penalty date). On the basis of his evidence, no later decision was taken by HMRC, although obviously the computer programme did not run and issue the notices until 2012.

45. It was not noted at the hearing but pointed out by Mr Thomas afterwards that this high-level decision pre-dated the date the legislation came into force on 6 April 2011 (article 2 of the Finance Act 2009, Schedules 55 and 56 (Income Tax Self-Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order 2011 SI No 702).

46. We have chosen not to ask for the parties' submissions in respect of this timing issue as our decision on it either way would not affect the outcome of the appeal, as we decide for other reasons, explained below, that the daily penalties were not imposed in accordance with the legislation.

47. My views, which are therefore inevitably without the benefit of submissions, is that, while "HMRC decide" is present tense and on its face would not apply to a decision that had already been made before the legislation became law, nevertheless the Interpretation Act 1978 is in point:

> "**13 Anticipatory exercise of powers**
>
> Where an Act (or any provision of which) does not come into force immediately on its passing confers power to make subordinate legislation, or to make appointments, give notices, prescribe forms or do any other thing for the purposes of the Act, then, unless the contrary intention appears, the power may be exercised, and any instrument made thereunder may be made so as to come into force, at any time after the passing of the Act so far as may be necessary or expedient for the purpose –

> (a) of bringing the Act or any provision of the Act into force; or
>
> (b) of giving full effect to the Act or any such provision at or after the time when it comes into force."

48. I do not think that there is anything in Schedule 55 which would suggest a contrary intention, so it seems to me that this does enable HMRC to exercise their power to make a decision under paragraph 4(1)(b) at any time after the Act was passed and before it came into force as long as it was either necessary or expedient to so do.

49. It is for HMRC to show that the penalty was validly imposed and therefore for HMRC to show that the "decision" under paragraph 4(1)(b) was valid. The point was not at issue in the hearing but nevertheless Mr Delnon's evidence tended to suggest that it was expedient for HMRC to take the decision as to who would be charged daily penalties at an early stage as it was part of a long term overhaul of the daily penalty system requiring a new computer process and automated letters to large numbers of taxpayers. The appellant did not suggest that decision was not valid (the point was not raised). In my view, prima facie the decision was valid under s 13 and therefore in the absence of a challenge, the Tribunal's finding is that it was not made too early to be effective.

50. In conclusion, the decision of the Tribunal (from which Mr Thomas dissents) is that the June 2010 decision was sufficient for paragraph 4(1)(b).

Requirement in paragraph 4(1)(c) – notice of daily penalties

51. The last matter for which the original hearing was adjourned was the lack of evidence that HMRC gave Mr Morgan or Mr Donaldson notice specifying the date from which the penalty is payable. The requirement in the legislation is that:

> "HMRC give notice to P specifying the date from which the penalty is payable."

52. At the re-convened hearing, it was HMRC's case that this notice was contained within two notifications to Mr Morgan and Mr Donaldson. The earliest was the "Self Assessment – Tax return and payment reminder" ("the SA Reminder") and the second was notice of their respective liability to the £100 fixed penalty under paragraph 3 (the form SA326D).

53. The middle paragraph of the front page of the SA Reminder read as follows:

> "If we still haven't received your online tax return by 30 April (31 January if you're filing a paper one) a £10 daily penalty will be charged every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days, starting from 1 February for paper tax returns or 1 May for online tax returns."

None of the rest of the text on either side of the notice related to daily penalties.

54. The later notice of assessment of the £100 penalty, the SA326D, read as follows:

> **Your tax return for the year ended 5 April 2011 was not sent in on time.**
>
> **Because of this a penalty of £100 is payable.**
>
> This is in accordance with paragraph 3 of Schedule 55 to the Finance Act 2009.
>
> **What to do next**
>
> - If you still haven't sent us your tax return please do so now to avoid further penalties.
>
> - If your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding.
>
> - Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns.
>
> - Please pay this penalty within 30 days of the date shown on this notice.

55. There was also text on the reverse side of it. None of this related to daily penalties. The left hand side was about filing online but said nothing about the due date for filing online returns and nothing about daily penalties. The right hand side dealt with the £100 penalty: what to do if the recipient thought the penalty had been improperly imposed and/or wished to appeal against it. It was stamped in red that appeals could be made up to 31 March 2012. We were told this was because so many SA326Ds were issued, they were sent out in batches and HMRC would not record the date on which any individual's SA326D was actually sent to them. As the last batches might not go out until the end of February, so all recipients were given 30 days from the end of February to appeal.

56. Are either of these forms notice under paragraph 4(1)(c)? There are a number of reasons why they might not be:

> (a) They might not amount to notice at all within the meaning of the legislation.
>
> (b) Or if they do, the date from which the penalty is payable might not be specified as required by the legislation.

Interpretation of the legislation

57. We think this legislation should be interpreted purposively. It seems obvious that the purpose of small, *daily* penalties was to encourage compliance by making it more expensive each day the taxpayer delays in filing his return. This is particularly the case when the legislation provides for the taxpayer to be given notice of the date

from which the daily penalties would start. We also take into account that the penalty is significantly greater (£900 if charged for the full 90 days) than the first one-off penalty and larger than the minimum six month penalty (of £300), which again suggests that Parliament intended taxpayers to be given notice *before* the daily penalties started accruing so that they would be encouraged to file in order to avoid this very substantial liability.

58. We take into account that paragraph 4(3)(a) permits HMRC to specify a commencement date earlier than the date of the notice. Does this mean that Parliament intended HMRC could in all or a significant percentage of cases exercise their discretion such that the commencement date specified would precede the giving of the notice so that the taxpayer would have incurred liability before he was warned about it? And if so, does this mean that our conclusions in the immediately preceding paragraph are wrong?

59. We think not. If paragraph 4 had been intended as a revenue generating measure or even as a one-off penalty like the £100 in paragraph 3, the provisions would have been quite different. HMRC would not have been required to give a warning and the penalty would have been one-off and not accruing on a daily basis. On the contrary, paragraph 4 is clearly intended primarily as a measure to incentivise compliance rather than merely to punish non-compliance. And as we explain below, paragraph 4(3)(a) was intended to have only limited application.

60. Further, the explanatory notes to the legislation itself read as follows:

> *"Amount of penalty: occasional returns and annual returns*
>
> …..
>
> 10. Paragraph 4(3) provides for the date specified in the notice from which the penalty is payable to be earlier than the date on which the notice is given. This is because HMRC will be unaware of certain returns for taxes such as SDLT and IHT until they are received. The date specified in the notice may not be earlier than the end of the period of three months after the filing date."

This clearly indicates that Parliament intended the power to back-date a notice to be limited to cases where HMRC would not know the date the tax return was due.

61. It therefore follows that paragraph 4(3)(a) must have been intended as an exception to a general expectation that notices would be given on or before the commencement date. HMRC have a discretion to impose daily penalties, and a discretion when doing so to backdate the commencement date: but it seems to us that HMRC could only have been intended by Parliament to do so in an exceptional case as to do otherwise would defeat the object of paragraph 4.

62. Applying this purposive construction, we consider that when Parliament said HMRC must "give notice specifying the date from which the penalty is payable" they intended that the taxpayer (1) should be given clear warning of the (in general) future imposition of a penalty charged each day he failed to file and (2) clear notice of the date from which such daily penalties would run.

Is the date specified?

63. Both documents said by HMRC to be notices under paragraph 4(1)(c) specified *two* dates from which daily penalties would be payable, depending on whether the returns were filed by post or over the internet. Could specifying two dates possibly comply with paragraph 4(1)(c)?

64. It was impossible for HMRC to specify a single date earlier than 1 May from which penalties would run. This was because the first day from which daily penalties could run would be three months from the penalty date (see paragraph 4(3)(b) combined with paragraph 4(1)(a)). The penalty date was the day after the filing date (paragraph 1(4)). The filing dates were different for postal and online returns. The earliest date from which daily penalties could run on a paper return would be 1 February; the earliest date from which daily penalties could run on an online return would be 1 May. As at 1 February it could not be known how the taxpayer who had not yet made a return would choose to file that return. So HMRC could not specify a single date between 1 February and 1 May because if they did, and the taxpayer later filed online, the notice would be invalid under paragraph 4(3)(b) and doing so would open them to criticism for issuing invalid notices.

65. Therefore, although the legislation requires a date to be specified from which the penalty "is" payable, HMRC are asking us to interpret this to mean they need only specify a date from which the penalty would be payable depending on the type of return ultimately filed.

66. As we have said above, legislation should normally have a purposive interpretation and we have construed paragraph 4(1)(c) accordingly so that we think Parliament intended taxpayers to be given an unequivocal prior warning of the risk they ran of daily penalties if they continued to fail to file their return. But looking at the provisions in the TMA relating to income returns, Parliament also clearly intended to make a distinction between online and paper returns, and in particular to discriminate in favour of taxpayers filing online by giving them later filing dates and later penalty dates than taxpayers filing on paper. It would run contrary to that intention to interpret paragraph 4(1)(c) as requiring a single date to be specified because it would prevent HMRC specifying a date before 1 May for taxpayers filing by post. This would put such taxpayers in the same position as electronic filers, yet Parliament clearly did not intend postal filers to have the same penalty dates as electronic filers. So we will not interpret paragraph 4(1)(c) as requiring this.

67. Therefore, we consider that paragraph 4(1)(c) must be interpreted as allowing HMRC to specify in a single notice two dates from which the daily penalties would run, depending on whether paper or electronic returns were filed. It inevitably follows that this would need to be clearly expressed in the notice or it would fail to be notice at all.

68. We move on to consider whether either of the two documents claimed by HMRC to amount to notice under 4(1)(c) were in fact notice as intended by Parliament.

Was the SA326D notice under paragraph 4(1)(c)?

69. HMRC's primary case was that the SA326D was notice. But so far as the SA326D is concerned, by itself the sentence "If your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding" is not notice within paragraph 4(1)(c) as no date is specified. The next sentence "Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns" by itself is not notice either because it uses the word "can" rather than "will". It could simply be read as a warning: daily penalties could be so charged: it does not mean that they will be so charged.

70. But do the two sentences combined amount to notice of a specified date from which daily penalties will run? The first sentence uses the verb "will" but only refers to "outstanding" returns and the second sentence, although more specific on date, merely says "can". There is a clear difference in meaning between the "will" in one sentence and "can" in the other, so we find the notice is ambiguous.

71. Further we take account of the context of these two sentences. The reader's attention was not drawn to them. There was no heading or bold text that related specifically to daily penalties. Relegated to small print, we consider their natural interpretation is as a warning that HMRC had power to charge daily penalties rather than notice that HMRC would be charging daily penalties.

72. We find that that the two sentences alone or combined in the context of the SA326D did not amount to "notice" within paragraph 4(1)(c) as intended by Parliament. Parliament intended taxpayers to be given clear warning that they would be liable to daily penalties from a specified date. The SA326D failed to do this as in the context of the whole document as the warning was in the small print and the actual wording was ambiguous over whether HMRC were telling the taxpayer that daily penalties would be charged or merely could be charged.

Was the ' Self Assessment – tax return and payment reminder' notice under paragraph 4(1)(c)?

73. For much the same reasons we consider that no notice sufficient for paragraph 4(1)(c) was contained in this document either. The 'notice' was in the small print without any heading or bold text to draw attention to it. Most of the text related to other matters such as other penalties and how to file online. We consider it was not made clear whether HMRC were saying daily penalties could be charged from one of the two specified dates or would be so charged. It fell short of being the clear and unambiguous statement we consider Parliament had in mind when it required "notice" to be given to taxpayers before daily penalties could be charged.

74. The conclusion that neither of these two documents comprised notice is bolstered by the reflection that "notice" within the meaning of paragraph 4(1)(c) need only be given once, yet even HMRC appeared not to have decided which of the two documents amounted to notice, and the documents were (in so far as they related to daily penalties) very similarly worded. We consider that they were intended by

HMRC as warnings, and this would explain why they were given twice. Neither was a notice within paragraph 4(1)(c).

75. That decision is sufficient to dispose of both appeals against daily penalties (but not Mr Donaldson's appeals against the £100 and £300 penalty which we address at the end of this decision notice). But we go on to consider all matters in case this goes on appeal.

Should the actions be consecutive?

76. We briefly considered whether the order of the pre-conditions in paragraph 4(1) were meant to be consecutive so that the 3 months (condition 4(1)(a)) had to have expired before HMRC decided to impose the penalty (condition 4(1)(b)) and notice was given (condition 4(1)(c)).

77. In these cases the order of events was (b), (a) and (c). This was because the high-level HMRC decision to impose the penalty was taken long before the appellants were in default; the next event was the expiry of the three months on 31 January 2012 and lastly the issue of the purported notice in February 2012. If either appellant had ultimately filed an online return, the order of events would have been (b), (c) and then (a).

78. We saw no reason why the pre-conditions should have been intended to occur consecutively in the order (a), (b), (c). It was clearly intended that notice could be backdated in some limited cases (paragraph 4(3)(a)) and therefore it seems there was nothing to prevent notice being given before the expiry of the 3 months as long as (in such a case) the notice was prospective (paragraph 4(3)(b)). We saw nothing to prevent HMRC giving notice in February to take effect on 1 May.

Did HMRC exercise their discretion unlawfully?

79. This was a point which was not raised at the hearing and one on which we would have directed submissions were it not for the fact that it is unnecessary to our decision. We have determined that neither the SA Reminder nor the SA326D amounted to "notice" within the meaning of paragraph 4(1)(c).

80. If we had determined that the SA326D was notice but the SA Reminder was not then this issue of lawfulness would arise. As the point is irrelevant to our decision we cover it briefly: the SA326D was issued with a retrospective commencement date for anyone who ultimately filed a paper return in that the date of issue in late February post-dated the date daily penalties commenced on 1 February. This issue does not arise on the SA Reminder which at the latest was issued on 6 January.

81. Backdated notification is prima facie effective because of paragraph 4(3)(a). Were it not for this provision, we consider backdated notifications would be ineffective because paragraph 4(1)(c) uses the present tense "is" and the obvious purpose of daily penalties is, as we have said, to encourage compliance prospectively rather than punish non-compliance retrospectively.

82. As we have discussed, we consider that this power to backdate was intended as an exception to the general rule that notice would not be later than the start date of the daily penalties and Parliament did not intend it to be used for returns where the due date was known to HMRC. Was this a lawful exercise of HMRC's discretion? And even if it is lawful for HMRC to use the exception to backdate a large percentage of the notices, would it be lawful for them to exercise their discretion in a way which might have indirectly discriminated against a section of the population, say, on grounds of age, if it was shown that older persons tend to file by post rather than online, and that therefore it was older persons who had the retrospective notifications?

83. Assuming the conclusion on this was that in such circumstances retrospective notice was unlawful, it seems arguable to us that HMRC would be unable to rely on it in order to claim that they had validly imposed a penalty: *Wandsworth London BC v Winder* [1994] 3 All ER 976, [1985] AC 461.

84. However, other than recognising that there might be an issue here, we make no preliminary conclusions as it is irrelevant to our decision as we have determined that the SA326D and SA Reminder were *not* notices within the meaning of paragraph 4(1)(c).

Conclusions

85. Our conclusion in paragraph s 73-75 is sufficient to dispose of both appeals in respect of the daily penalties in favour of the taxpayers. They were not given notice within the meaning of paragraph 4(1)(c) and therefore daily penalties could not be imposed.

86. However, that is not the end of the matter for Mr Donaldson as we need to consider his liability to the £100 and £300 penalties. So far as Mr Morgan is concerned, it disposes of the appeal in his favour. But in case this matter goes on appeal, we deal with all aspects raised in Mr Morgan's defence. So the rest of this decision in respect of Mr Morgan is on the basis that our above decision on paragraphs 4(1)(c) is wrong. On this assumption, were HMRC right to levy the daily penalties?

Mr Morgan – findings of fact

87. HMRC did not challenge the veracity of Mr Morgan's evidence and we find he was an honest witness. In particular, he readily accepted that he was at fault for not filing on time and accepted his previous relaxed attitude to his filing duties rendered him liable to penalties. His reason (although not put forward as an excuse) for this relaxed attitude was that he was in a demanding job which he prioritised over filing his returns. He points out that at no time was tax outstanding: he was only required to render a return because he was a director of a non-profit making company but this appointment carried no income. All his income from employment was taxed under PAYE.

88. We consider that Mr Morgan's memory was not entirely reliable. His initial grounds of appeal included that HMRC had previously accepted letters from him in lieu of tax returns, but he later accepted that although it had been his practice to lodge letters with HMRC with a statement of his income, HMRC had always insisted on tax returns being filed.

89. He accepted that he did receive his tax return at the proper time and that he received various reminders and the SA329D. He had no record of receiving the SA Reminder.

90. We accept his evidence that, had he understood he was liable to daily penalties of £10 a day, he would have filed his tax return immediately to avoid further penalties and that had he understood he could have avoided them altogether by filing online, then he would have done so. He had no objection to filing online and later did so in respect of a different tax year.

91. On 21 February 2012 Mr Morgan wrote to HMRC setting out his income for the tax year 2010/11. We find that he wrote this letter hoping that HMRC would consider it sufficient notification of his income and not require him to file a full tax return. It was probably written in response to a PAYE coding notice or in response to the penalty assessment for the £100 (the SA329D). Mr Morgan paid the £100 penalty electronically at about this time.

92. On 14 March 2012 Mr Morgan telephoned HMRC in response to the SA326D. His recollection was that he specifically asked the HMRC officer to whom he spoke whether he had paid all the penalties to which he was liable and that he was told that he had.

93. HMRC's note of the conversation records that Mr Morgan was told his "statement [was] up to date". HMRC's case is that, strictly, this was an accurate answer. At that point only the £100 penalty had been assessed (and paid). Daily penalties had not been assessed. But if the SA326D had been notice within paragraph 4(1)(c), then because Mr Morgan subsequently filed by post daily penalties were at this point *accruing* and had been accruing since 31 January 2012. He was not told this.

94. Mr Morgan also complains that he was not told in this phone call that he could, by filing online before 1 May 2012, avoid the daily penalties which were already accruing if he filed by post.

95. On 15 March 2012 HMRC wrote to Mr Morgan in response to his letter of 21 February. This letter notified him that he was required to complete a tax return and enclosed two paper returns for the two outstanding years 09/10 and 10/11. The final paragraph was:

> "Enclosed are 2009/10 and 2010/11 tax returns for your completion."

96. On 27 April and, we find, in response to this letter Mr Morgan filed his 2010/11 tax return by post.

The debt management letters

97. There was a dispute over whether he received the three letters from HMRC's 'Debt Management & Banking' section mentioned in paragraph 11 above. This question is relevant because the first of these three letters dated to March 2013 contained a specific warning to file online to avoid daily penalties.

98. Mr Morgan's evidence given to the Tribunal on 19 March was that he had no recollection of receiving the letters but that he would double check his files overnight. On 20 March it was his evidence that he had checked and he had no record of receiving them.

99. Mr Delnon's evidence on this was hearsay. He spoke to someone in the 'Debt Management & Banking' section of HMRC and was told that the circular letters were issued to all taxpayers in default and in particular to Mr Morgan respectively on 4 March, 24 March and 31 March 2012. Mr Delnon was not given or shown a computer log recording the sending of these letters to Mr Morgan and all he could say is that they were sent from a separate computer system to the one he used. While we entirely accept that Mr Delnon's account of what he was told was accurate, he was only repeating what he had been told by an unnamed HMRC officer who was not called to give evidence.

100. We found Mr Morgan to be an honest witness who has kept letters sent to him by HMRC (even if he did not always action them). Although his recollection of events was shown not always to be accurate, in the case of these three letters he made a contemporaneous check of his files and did not find any of them.

101. We are faced with a conflict of evidence. While we are sure that Debt Management & Banking did send out the three letters to some taxpayers, without the log we have no means of testing whether they were actually sent to Mr Morgan, or whether a mistake was made. We found Mr Morgan to be honest and we are reluctant to reject Mr Morgan's own rejection of counsel's suggestion that he received and lost these three letters. And further, as we have said, we accept Mr Morgan's evidence that had he understood that paper filing would lay him open to daily penalties, he would have filed online. This suggests he never read the letter of 4 March which indicates he may not have received it.

102. All in all this is one of those rare cases where we consider the evidence to be finely balanced. It is HMRC's case that these particular three letters were sent and therefore it is for HMRC to prove that the letters were sent and received rather than for the appellant to prove that he did not receive them. As we consider it is equally likely that they were received as not received, our finding of fact is that HMRC have failed to prove on the balance of probability that they were received by Mr Morgan.

103. We will therefore not refer to them again as our finding is that, whatever information they contained, their contents was not known to Mr Morgan as he did not receive them.

Reasonable excuse?

104. Paragraph 23 of Schedule 55 provides:

> "**Reasonable excuse**
>
> (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."

105. It was Mr Morgan's primary case that he had a reasonable excuse for the failure to submit his return on time. However, we consider that to be a reasonable excuse, by definition the excuse must be both reasonable and causative. It cannot be an excuse for a default at all if it was not the cause of the default. Mr Morgan's default occurred on 31 October 2011 when he failed to make the paper return which he ultimately made on 27 April 2012.

106. He proffered nothing as a good reason for failing to make the return by 31 October 2011 (or even 31 January 2012, the deadline for online returns). At best it seems that he had a relaxed attitude to filing in view of his demanding job, the knowledge that he would have no tax to pay, and having only had to pay penalties of £100 in previous years. He did not suggest, and we do not find, that this amounts to a reasonable excuse. He has paid the £100 late filing penalty and withdrawn his appeal in respect of it.

107. He objects to what he sees as HMRC's failure to warn him in February and March 2012 that he could only avoid further penalties by filing online. In particular, he complains he was not given this warning in the phone conversation of 14 March or letter of 15 March. Whether or not we think HMRC are at fault for failing to give the warning, it is clear that their failure to do so in February/March 2012 could not have *caused* Mr Morgan's failure to file back in October 2011. Therefore, it is impossible for this failure by HMRC to be a reasonable excuse.

108. A reason which might explain and excuse late filing but which only arises *after* the due date of filing fails to explain why the filing was late in the first place, however much it might explain why it continued to be late, and on the terms of the legislation such a reason cannot be a reasonable excuse even in so far as the later non-filing penalties are concerned. If it was a 'reasonable excuse' it would apply as much to the

first £100 penalty as to the later daily penalties. But Mr Morgan had no reasonable excuse as at 1 November 2011 (or even 1 February 2012) and so he has no reasonable excuse for the daily penalties.

Special circumstances?

109. Paragraph 16 provides as follows:

> "**Special reduction**
>
> **16**
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> ….."

Paragraph 22 provides in respect of appeals to this tribunal:

> **"22**
>
> …
>
> (2) On an appeal …the tribunal may –
>
> …
>
> (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."

In other words, a penalty may be reduced by HMRC on the grounds of 'special circumstances'. HMRC did not reduce Mr Morgan's penalty. But on appeal this tribunal may also reduce Mr Morgan's penalty on the grounds of 'special circumstances' but *only* if HMRC's decision not to do so was flawed in the public law sense.

Flawed?

110. 'Flawed' in the light of the principles applicable in proceedings for judicial review is well understood. It means that HMRC's decision is flawed if it failed to consider the exercise of its discretion at all; and if it did exercise its discretion, its exercise of it would be flawed if HMRC considered something relevant which was irrelevant, if it failed to consider something relevant, or came to a decision it could not reasonably have reached.

111. When should HMRC consider special circumstances? There is an issue over whether HMRC considered the exercise of its discretion at all. It is accepted that the daily penalties were assessed without any consideration of special circumstances. As counsel for HMRC explained, this is inevitable in respect of the imposition of all late filing penalties bar the one for returns more than a year late. HMRC simply assess late filing penalties when returns are late: they do not first seek the taxpayers' representations on whether they have a reasonable excuse or whether special circumstances apply. As we have already reported, the assessments are issued by computer. Does this therefore mean that in all cases HMRC's decision to impose penalties is flawed because HMRC have failed to consider whether special circumstances apply before the assessment is raised?

112. This has been considered in a number of cases. In *White* [2012] UKFTT 364 (TC) and *Algarve Granite Ltd* (2012) UKFTT 463 (TC) the Tribunal considered that the scheme of the legislation was that special circumstances should be considered before the penalty was assessed and a failure to do so resulted in a flawed decision. However, in those cases it seems that special circumstances were not considered at any stage by HMRC so the issue whether special circumstances had to be considered before or after the assessment was not critical.

113. In *Agar* [2011] UKFTT 773 (TC) the Tribunal came to the opposite conclusion.

114. There is a tension here: as the Tribunal in *Algarve* pointed out in paragraph [53], the legislation is drafted on the assumption that special circumstances (and reasonable excuse) would be considered before the penalty is assessed. But HMRC automate the imposition of penalties. No doubt in view of the numbers concerned, individual assessment of each case is impractical. Special circumstances, like reasonable excuse, are only considered on a review once a taxpayer lodges an appeal.

115. As a question of purposive interpretation, we are inclined to support the view expressed in *Agar*. By limiting the Tribunal's ability to consider special circumstances only to those decisions of HMRC which are flawed, it was clearly not Parliament's intent that *all* decisions should be seen as flawed. And therefore the legislation should not be interpreted as meaning all penalty decisions are flawed simply because the assessments are issued automatically, when, as we have said, automation must have been intended as there is no requirement for an individual officer to issue the assessment to a penalty, in contrast to other assessments.

116. Where a review is requested: But in any event, it seems to us that the answer is even more straightforward in any case where HMRC offer and the taxpayer accepts a review of HMRC's decision. The structure of the appeals procedure in s 49A to s 49H TMA is that in any case where an appeal is lodged, HMRC may offer a review (s 49A(2)(b)). If HMRC offer a review, they must state their "view". The review can lead to that view being upheld, varied or cancelled (s 49E(5)) and it is implicit that the appeal is against that reviewed decision on the view, because a failure to appeal it results in it being treated as a s 54 TMA agreement (s 49F(2)).

117. Therefore, where a review is carried out, the question is whether the *review* decision is flawed. It does not matter if the original decision to assess was flawed. As long as HMRC consider special circumstances on a review, in our opinion the decision cannot be flawed simply because special circumstances were not considered before the assessment.

118. Where there is no review: Mr Morgan's is a case where a review was requested and undertaken. We note here that for the reasons explained below, Mr Donaldson's case was one where the taxpayer opted to appeal to this Tribunal without first requiring a review at least in respect of the daily penalties and six months penalty. In Mr Donaldson's case, the decision under appeal is the original assessment and that assessment would have been raised without consideration of special circumstances. Does that make it flawed?

119. Our view, for the reasons expressed in paragraph 116, is that even where the appeal is against an unreviewed decision, it is not flawed if consideration were given to special circumstances on notification of the appeal to HMRC. On the other hand if special circumstances are not considered until the hearing, then that is too late because it is clear that Parliament intended special circumstances to be considered by HMRC before the taxpayer lodged an appeal with the Tribunal.

120. Application to facts in Mr Morgan's case: In Mr Morgan's case he requested a review. HMRC's decision on that review was dated 10 September 2012. In this case the officer specifically rejects a claim for reasonable excuse. Special circumstances are not mentioned.

121. We therefore conclude that HMRC's decision on paragraph 16 was flawed in this case because they failed to consider the matter on review. The effect is that under paragraph 22(3)(b) the Tribunal may substitute its own decision on special circumstances.

122. We deal with Mr Donaldson's case in paragraphs 147-169 below.

Special circumstances?

123. Principles to be applied: There have been a number of cases in which 'special circumstances' have been considered. HMRC relied on the Tribunal's decision in *St John Patrick Publishers Ltd* [2012] UKFTT 20 (TC) (which was itself relying on the Tribunal's decision in *Dina Foods Ltd* [2011] UKFTT 709 (TC)) that:

> "[20] …..
>
> (3) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC;

> (4) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances."

124. We agree that ordinarily there is no obligation on HMRC to issue warnings to defaulting taxpayers that they have or are about to incur penalties, or, at least, that failure by HMRC to do so does not amount to special circumstances.

125. In *St John Patrick Publishers Ltd* the taxpayer was in regular contact with HMRC seeking time to pay. It was occasionally told that penalties "may" apply. It was not told that it had already incurred penalties and further defaults would incur more. The Tribunal considered that this did not amount to special circumstances, although we note it said that where "an appellant has sought to engage in good faith with HMRC, together with other relevant circumstances, might in combination amount to a reasonable excuse or special circumstances…"

126. In *Algarve* (above) the Tribunal rejected the claim to special circumstances because the appellant's case was that it was unaware of the change in penalty regime and was facing economic recession. It cited, as did HMRC in this case, the decision of the Court of Appeal in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H:

> "…to be special the event must be something out of the ordinary, something uncommon; …"

127. In *Warren* [2012] UKFTT 57 (TC) the Tribunal said of "special circumstances":

> "[53.] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.
>
> [54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

128. As in the later case of *Algarve,* the Tribunal rejected HMRC's failure to issue warnings as special circumstances. We think it right that that taxpayers who are knowingly in default of their obligations to file should take it upon themselves to find out to what penalties they lay themselves open to by their actions. HMRC's failure to warn them cannot in general be special circumstances.

129. But each case must be considered on its own merits. The factors which we consider relevant to special circumstances in this case are:

(a) Mr Morgan was in default;

(b) Mr Morgan knew he was in default;

(c) Mr Morgan was unaware of the daily penalty regime;

(d) Mr Morgan tried in good faith to engage with HMRC and wrote to them on 21 February to attempt to regularise his affairs and telephoned them on 14 March to sort out his position on penalties;

(e) HMRC had issued a number of general warnings about daily penalties and Mr Morgan accepts that he received them;

(f) In the phone conversation of 14 March 2012, in reply to a specific question about liability to penalties, the HMRC officer gave correct if misleading advice in saying that Mr Morgan had no outstanding liability to penalties; no other penalties had been *assessed* on Mr Morgan but at that date daily penalties were *accruing* as (in HMRC's view but not ours) notice of daily penalties had been given with effect from 1 February;

(g) In the letter of 15 March 2012, HMRC in effect invited Mr Morgan to submit paper returns at a time when it was very much against his interests to file on paper;

(h) On the face of them, the returns enclosed with that letter contained a warning about daily penalties.

130. HMRC's case is that Mr Morgan should have paid more attention to what the circulars and tax return said and less attention to what individual officers had told him when he had had direct contact with HMRC by telephone and in the personal letter. And in any event he wasn't actually given wrong information.

131. We note that our reason for considering that SA Reminder and the SA326D were not notice under paragraph 4(1)(c) was the ambiguity and lack of prominence given to the matter so that they were warnings and not notice. If we are wrong on this, then for the same reasons we would say it was a reasonable response to them to do as Mr Morgan did and ring HMRC to find out what was his liability on penalties, and then to rely on what he was told.

132. HMRC's case is that even putting aside the earlier warnings, the tax returns sent to him with the letter of 15 March on their face contained a warning that should have put him on notice that he was already in the daily penalty regime if he submitted them. This is because on the first page it said in a red box:

> "We must receive your tax return by these dates:
>
> - If you are using a paper return – by 31 October 2011 (or 3 months after the date of this notice if that's later), or
> - If you are filing a return online – by 31 January 2012 (or 3 months after the date of this notice if that's later).

> If your return is late you will be charged a £100 penalty. If your return is more than 3 months late you will be charged daily penalties of £10 a day.
>
> …."

133. We note that this falls short of a clear statement that daily penalties would be due if the taxpayer made a paper filing rather than an online filing, particularly as it refers to 31 October *or* the "date of this notice".

134. Mr Morgan's case was that he completed the paper returns because that is what the letter accompanying them had asked him to do. He did not suggest that he had either read this above warning or been misled by it.

135. We think that Mr Morgan is to be criticised. If he had read the numerous warnings about daily penalties which he accepts he received from HMRC, no doubt he would have specifically asked about it when he telephoned the HMRC adviser. However, although he did not mention daily penalties in that call, he did ask if there were penalties other than the £100 penalty to which he was liable.

136. However, we think Mr Morgan does have the right to feel aggrieved despite his failure to read the warnings sent to him. This is not a case where he has entirely ignored warnings, because he did ring HMRC to ask. Nor is it a case of a taxpayer in default failing to inform himself of to what penalties he has rendered himself liable: he phoned HMRC up and asked them about it. Further he tried to do what HMRC appeared to require of him: he completed and returned the forms sent to him. We find those forms did not have what would have been a clear warning to a taxpayer; and the significant fact is that HMRC had invited him to complete them, which he did.

137. We consider that overall there were special circumstances in this case. It is crucial to our finding that Mr Morgan attempted to resolve his default but that in direct contact with HMRC he was given misleading or at least less than complete information on the telephone and then received a letter from HMRC which in effect invited him to submit paper returns when it was not in his interests to so do.

138. This entirely distinguishes this case from the cases mentioned above where the taxpayer was simply unaware of the penalty regime. Here we find Mr Morgan relied on misleading advice from HMRC.

139. We mention one last point which is that HMRC criticised Mr Morgan for taking from 15 March (the date of the letter from HMRC enclosing the tax returns) to 27 April to file his returns. He did not seek to excuse this: he cannot remember if he was away over the Easter period nor the date that HMRC's letter was actually received by him. It certainly seems to us that he could have acted more promptly in response to HMRC's letter of 15 March: however, had HMRC's letter of 15 March explained the difference between online filing and postal filing, we consider he would have filed online and on a date no later than the date of his postal filing which would have been before daily penalties would have been incurred.

140. Therefore, while we consider that Mr Morgan is to be criticised for the dilatoriness with which he has addressed his liability to submit a return, nevertheless we consider the immediate cause of his liability to daily penalties was the misleading advice from HMRC in the phone call and the letter. We consider that that amounts to "special circumstances" although not to a reasonable excuse (on the technical grounds it post-dated the failure).

141. Having found that there were special circumstances, we need to consider what effect that should have on the penalty levied. Under paragraph 16 we can reduce the penalty or stay the penalty. Staying the penalty is not appropriate; this is not a case where future events could have any impact on the special circumstances. The question is whether it should be reduced and if so by how much.

142. We find that, had Mr Morgan been given full advice in the phone conversation which was that daily penalties were already accruing if he did a postal return but not an online return; and if the letter to him had invited him to submit either an online or paper return and pointed out the different dates from which the notice for daily penalties commenced depending on online or paper returns, then he would have submitted an online return at about the time that he actually submitted a paper return.

143. We take into account that Mr Morgan has no reasonable excuse for failing to file his return on the due date: but Parliament has established that the penalty for so failing is in the first instance £100. Mr Morgan paid this. We are looking at liability to the daily penalties, and we consider that had he been correctly advised by HMRC he would have filed online and avoided liability for them.

144. In other words, we think the 'special circumstances' are such that Mr Morgan would have put himself in a position where no daily penalties would have been incurred at all, were it not for the less than complete information provided by HMRC. Therefore, the appropriate reduction in this case is to 0%.

145. That would determine the appeal in Mr Morgan's favour, but for the fact we have already determined it in his favour on other grounds.

Mr Donaldson

Findings of fact

146. Mr Donaldson's notice of appeal to HMRC dated 20 March 2012 against the £100 penalty (imposed on 15 February 2012) stated that when he received the £100 penalty letter he called his accountant, Mr Paul Wilson, who told him that he would call Mr Donaldson back and sort it out but, says Mr Donaldson, Mr Wilson did not do this.

147. At no point in any of the correspondence does Mr Donaldson explain why he took no further action and in particular to chase his accountant who, even on his version of events, failed to call him back as promised.

148. Mr Donaldson then appealed to HMRC.

149. HMRC's reply dated 18 April 2012 to Mr Donaldson's appeal was that HMRC could not consider his appeal until he submitted his outstanding tax return. It asked him to submit it within 30 days. The letter warned Mr Donaldson about potential liability to daily penalties.

150. Presumably in response to this letter, Mr Donaldson filed his tax return by post on 1 May 2012. No explanation was given at any time of why Mr Donaldson took no action in between learning in approximately mid-February that his accountant had let him down and filing his return on 1 May 2012.

151. The £900 daily penalties and the £300 6 months late penalty were assessed and notified to Mr Donaldson around 29 May 2012.

152. HMRC wrote again to Mr Donaldson on 20 June 2012 to say that HMRC refused his appeal because HMRC did not consider that the failings of his agent, Mr Wilson, amounted to a reasonable excuse.

153. Mr Donaldson asked for this decision to be reviewed. The review decision was dated 14 August and upheld the rejection of the appeal against the £100 penalty. Mr Donaldson appealed to this Tribunal on 10 September 2012 against this decision and against the imposition of the daily penalties and £300 6 month late filing penalty.

154. No record was produced to the Tribunal of an appeal being lodged with HMRC by Mr Donaldson against the daily penalties or the 6 months penalty. In accordance with this Tribunal's normal practice, as it was clear that the Notice of Appeal to the Tribunal covered all 3 penalties, we treated the Notice of Appeal (which the Tribunal copied to HMRC) as notice to HMRC under s 49A TMA. Therefore the appeal against all three penalties was properly lodged (albeit out of time in respect of the later two penalties) and this Tribunal has jurisdiction to hear it. As HMRC raised no issue on the timing point, we extend time.

155. The Notice of Appeal stated:

> "I employed an agent named Paul Wilson in 2011 and submitted all my papers to him by December 2011 to file online. You will see from my records that I have used him to submit my returns for a number of years quite successfully."

156. However, we find that Mr Donaldson filed his tax returns for the two previous tax years more than 6 months late and that two late filing penalties were imposed in respect of each year (the immediate penalty and the six month penalty). Returns for these years were still outstanding at the date of Mr Delnon's witness statement on 19 February 2013.

Reasonable excuse?

157. Paragraph 23 of Schedule 55 provides:

"**Reasonable excuse**

(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) Fro 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."

158. It is apparent from paragraph 23(2)(b) that reliance on an agent could be a reasonable excuse if the taxpayer took reasonable care to avoid the failure. However, in this case, even if reliance on Mr Wilson could have been a reasonable excuse, we consider that such a reasonable excuse came to an end no later than when Mr Donaldson knew that Mr Wilson had not filed his return which was around mid-February 2012.

159. Paragraph 23(2)(c) permits an extension of the reasonable excuse as long as the taxpayer remedies the failure without unreasonable delay after the excuse ceased. Mr Donaldson, however, did not file his return until 1 May 2012 so, although we acknowledge this was within the 30 days of HMRC's letter dated 18 April, we do not consider it was "without unreasonable delay" since the notification he received around mid-February of Mr Wilson's failure to file. No explanation of why it took him so long to remedy the failure was given and so we dismiss his claim that Mr Wilson's failure was a reasonable excuse.

160. We note that in any event we would not have considered Mr Wilson's failure to be a reasonable excuse. For it to be a reasonable excuse, Mr Donaldson would have to show that he took reasonable care to avoid the failure. Yet it is his case that he used Mr Wilson for previous years and we find that he knew he had incurred late filing penalties in previous years. In these circumstances, we find he failed to show that he took reasonable care to avoid the default because he did not explain why he continued to employ an agent he knew had filed late returns before.

Special circumstances?

161. We have already recorded our decision that in principle that where there is a review, HMRC's decision can only be flawed if it does not consider special circumstances at the time of the review. Where the decision is not reviewed, we think that the decision is not flawed as long as special circumstances were considered when HMRC were notified of the appeal.

162. In Mr Donaldson's case no consideration was given to special circumstances at any time by HMRC in respect of any of the penalties until after HMRC lodged their statement of case.

163. As the assessment of the £100 was reviewed and no consideration was given at this time to special circumstances, we find that decision was flawed.

164. However with respect to the other two penalties, as we have already commented the first HMRC knew of the appeal was when it would have received notification from the Tribunal. In these circumstances its failure to consider special circumstances any earlier cannot in our view make their decision flawed.

165. Nevertheless, we need to go on to consider whether their subsequent decision that there were no special circumstances was flawed in the sense of irrational and to do that we need to consider whether there are special circumstances.

166. There are superficial similarities with Mr Morgan's case in that Mr Donaldson was asked to file his tax return. However, the advice from HMRC was quite different. The letter from HMRC dated 18 April 2012 which invited him to file his return within 30 days said:

> "….Please send us your 2010-11 tax return within the next 30 days so that I can consider your appeal….
>
> **Daily penalties**
>
> If your tax return is more than three month late, we will charge you a penalty of £10 for each day it remains outstanding. So daily penalties may already be building up. To reduce the amount of daily penalties that we may charge you, you can file your tax return online…."

167. In these circumstances, we do not consider that there is anything in the facts of Mr Donaldson's case which disclose special circumstances in respect of the daily penalties or the other penalties. So even to the extent HMRC's decision on special circumstances was flawed because it failed to consider the matter at all, we cannot reduce the penalty under paragraph 22 because we do not consider that there are any special circumstances. To the extent HMRC did consider special circumstances, their decision that there were none is not flawed: it was an entirely reasonable decision.

168. The result is that Mr Donaldson's appeal against the daily penalties of £900 is upheld because notice was not properly given by HMRC. His appeal against the immediate penalty of £100 and the 6 months late penalty of £300 (totalling £400) is dismissed as there were no reasonable excuse or special circumstances.

169. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 22 May 2013

APPENDIX

Reasons for dissent by Mr Richard Thomas

170. A reference in this Appendix to "paragraph" without more is to a paragraph of Schedule 55 FA 2009.

171. As paragraph 43 of Judge Mosedale's decision states, I agree with everything in the decision apart from her holding on paragraph 4(1)(b). It follows that I agree with the disposition of the appeals in these cases. But if, as seems likely, these cases go further, it may be of some help to the Upper Tribunal if I state my reasons for dissent.

172. HMRC put forward two propositions in support of the argument that the condition in paragraph 4(1)(b) had been met: that a decision by a computer is sufficient, or, alternatively, that a policy decision that penalties be imposed where the time limit in paragraph 4 is breached is sufficient.

173. I agree with Judge Mosedale about the first of these propositions (paragraph 39, second sentence of the decision). I would add that Mr Delnon's evidence about this (paragraph 23(b) of the decision), that the computer identified cases and issued notices of assessment does not seem to me to be relevant in relation to paragraph 4(1)(b). Issuing the notice is something required by paragraph 18 and cannot be part of a paragraph 4(1)(b) decision. And identifying cases is a paragraph 4(1)(a) matter.

174. I do not accept HMRC's alternative proposition that a policy decision taken in June 2010 can amount to HMRC's making a decision within the meaning of paragraph 4(1)(b), for the following reasons.

175. Firstly, I do not accept the logic of HMRC's proposition set out in paragraph 38 of the decision. I agree with Judge Mosedale that the use of the term "decision" in paragraph 20 is odd, because it is clear that an appeal lies against an assessment under paragraph 18. The oddity is reinforced to my mind by the fact that s 30A(3) TMA (made applicable to penalty assessments by paragraph 18(3)(a)) requires a notice of assessment to state "the time within which any appeal **against the assessment** [*my emphasis*] may be made". It is because of this looseness of language that I do not think it follows that the decision required of HMRC in paragraph 4(1)(b) need not be that of an individual officer. An appeal against a "decision" in paragraph 20 encompasses an appeal against both an automatically issued assessment under paragraphs 3 to 5 and an assessment under paragraph 6 which clearly requires a decision by an individual officer of HMRC based on the facts of the case and the behaviour of the person liable. Because the term "decision" in paragraph 20 is a

portmanteau word covering a variety of procedures, I do not think that it is a safe guide to construing paragraph 4(1)(b).

176. Nor do I think that in the case of paragraph 18 was there any "high level" decision by anyone in HMRC. Paragraph 18(1) is clear that if a person is liable to a penalty (because they meet the conditions in any of paragraphs 3 to 6) "HMRC must … assess the penalty". No one at a high level has to decide whether or not to assess either generally or in a particular case.

177. Secondly, I find it extremely difficult to see the point of paragraph 4(1)(b) if the decision need not be that of an individual officer having conduct or oversight of a person's affairs, but can be a single policy decision taken before the start of the operation of Schedule 55. If the policy of HMRC was that all those who were three months late filing returns were to be automatically charged a penalty (as Mr Delnon's witness statement says), then paragraphs 3(1)(a) and 18(1) are sufficient to achieve that, just as paragraphs 3 and 5(1) taken with paragraph 18(1) are sufficient for those automatic penalties. The undoubted contrast that the Tribunal has noted between paragraph 4 on the one hand and paragraphs 3, 5 and 6 on the other must have some significance, and it cannot be said that paragraph 4(1)(c), the other significant difference, could not work without paragraph 4(1)(b). So in my view paragraph 4(1)(b) must have some work to do beyond a blanket application of paragraph 4 in all cases.

178. Mr Delnon's evidence was that "…on 16 June 2010, the Project Board ratified the decision to charge all taxpayers filing more than 3 months late, computer generated automatic daily penalties." This can be interpreted quite simply as a statement that HMRC had decided that, as with paragraph 3, penalty assessments would be made automatically if the paragraph 3(1)(a) deadline had passed. We were not shown the decision, or evidence of its ratification by the Project Board, so we were not able to see the precise terms in which the decision was made or whether it referred to paragraph 4 Schedule 55. Nor were we told whether similar decisions were made in relation to paragraph 3 or 5: if they were, it might cast doubt on whether making the policy decision in relation to paragraph 4 was a paragraph 4(1)(b) decision.

179. Thirdly, if I am wrong about the validity of a policy decision as a paragraph 4(1)(b) decision, I do not think that the policy decision in this case made in or before June 2010 is saved by s 13 Interpretation Act 1978. For that section to apply the Act has to confer a power (in this case it would be a power to "do any … thing for the purposes of the Act") and it has to be necessary or expedient to exercise it before commencement to give full effect to the Act. I have difficulty in seeing making the decision mentioned in paragraph 4(1)(b) as the exercise of a power conferred on HMRC, or, if it is, why it was necessary or expedient to exercise it before 6 April 2011 to allow Schedule 55 to operate.

180. Fourthly, I think the use of the present tense in each of paragraphs (a) and (b) of paragraph 4(1) is significant. If a once and for all high level decision was all that was

required, whether before or after commencement, it would have been more natural to have used the past tense in paragraph 4(1)(b).

181. Finally I also consider it relevant that "HMRC decide" is a phrase found only once in Schedule 55 and that that one use in paragraph 4(1)(b) is the only one in all tax legislation, direct or indirect, relating to penalties for infringements of tax law. But it is however used in relation to acts of HMRC in paragraph 26 Schedule 7 Counter-Terrorism Act 2008 ('CTA'):

> "Imposition of penalty by HMRC: procedure
>
> 26(1) This paragraph applies where HMRC decide to impose a penalty under paragraph 25 on a person.
>
> (2) HMRC must give the person notice of—
>
> (a) their decision to impose the penalty and its amount,
>
> (b) the reasons for imposing the penalty,
>
> (c) the right to a review under paragraph 26A, and
>
> (d) the right to appeal under this paragraph.
>
> (3) The person may appeal to the tribunal against the decision in accordance with paragraph 26F.
>
> (4) On the appeal the tribunal may—
>
> (a) set aside the decision appealed against, and
>
> (b) impose any penalty that could have been imposed by HMRC or remit the matter to HMRC.
>
> Paragraph 25 of Schedule 7 CTA (see paragraph 26(1)) provides, relevantly:
>
> 25—(1) An enforcement authority may impose a penalty of such amount as it considers appropriate on a person who fails to comply with a requirement imposed—
>
> (a) by a direction under this Schedule, or
>
> (b) by a condition of a licence under paragraph 17.
>
> For this purpose "appropriate" means effective, proportionate and dissuasive.
>
> (2) No such penalty is to be imposed if the authority is satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.
>
> (3) In deciding whether to impose a penalty for failure to comply with a requirement, an enforcement authority must consider whether the person followed any relevant guidance which was at the time—
>
> (a) issued by a supervisory authority or any other appropriate body,
>
> (b) approved by the Treasury, and

> (c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

182. It is clear from paragraph 25 of Schedule 7 that the decision of HMRC in paragraph 26(1) must involve an individual officer. No high level policy decision, let alone a computer, could possibly carry out the consideration in sub-paragraphs (1) and (3) or be satisfied as in sub-paragraph (2). There are differences of course as there is no separate assessment procedure, and it could be said that the context is completely different. But the closeness of the dates of the two pieces of legislation (the CTA was given Royal Assent on 26 November 2008, the same month that a draft of what became Schedule 55 was published), and the similarities in the structure suggest to me that "HMRC decide" should have the same meaning in both.

183. I would also add that "HMRC decide" is also used in several of the provisions about reviews of decisions in indirect taxes (e.g. s 83G Value Added Tax Act 1994) where it clearly relates to a decision of an individual officer. The provisions concerned also date from late 2008 as they were inserted into the relevant indirect tax statutes by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order, SI 2009 No. 56 made on 18 January 2009.

184. In summary, I think that a construction that does not make paragraph 4(1)(b) redundant is to be preferred, and I would hold that, as with the other uses of "HMRC decide", the paragraph requires the intervention of an individual officer of HMRC applying their mind to the facts of the case.