[2015] UKFTT 0612 (TC)

TC04753

Appeal number: TC/2015/00643

INCOME TAX – self-assessment – 5% late filing penalty – whether "criminal charge" for purposes of Article 6 ECHR – on assumption that this the case, whether Article 6 engaged – no – challenge to proportionality of penalty – held, not disproportionate – challenge on grounds of fairness – held, outside Tribunal's jurisdiction – whether penalty affected by prior payment of tax – no – whether reasonable excuse – no – whether special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD LISSACK **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 21 October 2015

The Appellant was not present and was not represented

Neil Nagle, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Lissack appeals against a six month late filing penalty imposed on him by the Respondents ("HMRC") under paragraph 5 of Schedule 55 to the Finance Act 2009. (I refer in this decision to that Schedule as "Sch 55", and to that Act as "FA 2009".)

2. In a letter to HM Courts and Tribunals Service ("HMCTS") dated 12 October 2015, Mr Lissack's accountants stated:

> "It appears that the appellant and any representative may not be in attendance at the hearing scheduled for Wednesday 21 October 2015."

(They enclosed a bundle of documentation relating to the appeal for consideration by the Tribunal.)

3. At the appointed time of the hearing, neither Mr Lissack nor his accountants were present. I decided that the hearing should not begin without allowing for the possibility that either Mr Lissack or his accountants, or both, might after all be attending. I therefore delayed the start of the hearing by 15 minutes.

4. After that period had expired, I concluded that there would be no attendance on the part of Mr Lissack or his accountants. I determined under Rule 33 of the Tribunal Rules that it was in the interests of justice to proceed with the hearing, as clearly Mr Lissack and his accountants were fully aware of the date and time for the hearing, and had indicated that they might not be present.

The background facts

5. The evidence consisted of a main bundle of documents produced by HMRC, together with a supplementary bundle, as well as the bundle sent by Mr Lissack's accountants with their letter dated 12 October 2015. There was no oral evidence. From the evidence I find the following background facts.

6. On 6 April 2013 HMRC issued to Mr Lissack a tax return; this amounted to a notice to make and deliver a self-assessment tax return for the year 2012-13. The due date for filing that self-assessment on line was 31 January 2014.

7. As shown by HMRC's records, Mr Lissack's 2012-13 return was received by HMRC on 5 September 2014, the method of capture being by internet.

8. Mr Lissack had been in partnership with his wife, the business being a livery. According to the records held by HMRC, this partnership ceased trading on 7 September 2012.

9. On 18 February 2014, HMRC issued to Mr Lissack a £100 late filing penalty for the late submission of his 2012-13 self-assessment return.

10. On the same date, HMRC issued to Mr Lissack a £100 late filing penalty for the late submission of the 2012-13 partnership tax return.

11. On 3 June 2014, HMRC issued to Mr Lissack 30 day penalty reminders for both the late submission of his individual and partnership self-assessment returns for 2012-13.

12. On 1 July 2014, HMRC issued to Mr Lissack 60 day penalty reminders for the late submission of both those returns.

13. On 18 August 2014 HMRC issued to Mr Lissack a six month late filing penalty totalling £300 for the late submission of his individual self-assessment return for 2012-13.

14. Following receipt by HMRC on 5 September 2014 of Mr Lissack's completed individual 2012-13 self-assessment return, on 9 September 2014 HMRC issued to him a further six month late filing penalty totalling £46,193.00.

15. Mr Lissack's accountants, Fawcetts, appealed on his behalf against that penalty on 7 October 2014.

16. HMRC responded to that appeal on 24 October 2014. They rejected the appeal on the grounds that they did not consider Mr Lissack to have had a reasonable excuse for the late submission of the return. (I consider this at a later point in this decision.)

17. On 20 November 2014, Fawcetts wrote on behalf of Mr Lissack to request an independent review.

18. On 2 January 2015 Mrs Pearson, the HMRC Review Officer dealing with the matter, wrote to Mr Lissack with the results of her review. Her conclusion was that the decision to charge the six month penalty was correct. (I consider other elements of her review letter below.)

19. On 29 January 2015 Mr Lissack gave Notice of Appeal to HMCTS.

Arguments for Mr Lissack

20. The following arguments are derived from the correspondence and the Notice of Appeal.

21. Fawcetts argued on Mr Lissack's behalf that the penalty was fundamentally unjust, as it was disproportionate to the offence. They asked for the penalty to be reconsidered. The completion of the return had been delayed due to complications arising in connection with the calculation of capital gains. These were in respect of land and property sales, which had required careful consideration and calculation in view of the proportions sold as compared with the original purchases.

22. There were also mitigating circumstances in that their client was in the midst of divorce proceedings; these had become very complicated bearing in mind that there were significant assets that needed to be considered with regard to any settlement.

23. In addition, and of fundamental relevance to Mr Lissack's appeal, his tax liability for 2012-13 had been fully settled as at 31 January 2014. This demonstrated that there had been no intention to delay the payment of tax due. Fawcetts' records indicated that Mr Lissack had overpaid his 2012-13 tax liability by £26,078. Any delay in submission of the return had simply been due to the factors already mentioned.

24. The review letter had not addressed adequately or fairly the lack of justice in charging a penalty of this size despite all the related tax having been paid on time. The penalty was completely disproportionate.

25. In Mr Lissack's Grounds of Appeal, it was indicated that reference would also be made to Article 6 of the European Convention on Human Rights ("ECHR"). (No further representations on this subject have been received either from Mr Lissack or Fawcetts.)

26. In the bundle provided by Fawcetts, reference was made to the HMRC publication "HMRC Penalties: a Discussion Document", published on 2 February 2015 and with the closing date for comments 11 May 2015. This showed HMRC's current thinking, before any legislative changes. They commented on five principles set out in the document at paragraph 5.3 relating to the role of penalties, and set out responses to each of these points taking into account Mr Lissack's circumstances.

Arguments for HMRC

27. Mr Nagle stated that Mr Lissack's return should have been submitted by 31 January 2014; the date of submission had been 5 September 2014, which was over seven months after the due date.

28. HMRC contended that Mr Lissack had not demonstrated that there was any reasonable excuse or special circumstances for the delay in submitting his self-assessment return for 2012-13.

29. Mr Nagle referred to various sections of the Taxes Management Act 1970 ("TMA 1970"). Under s 8(1D)(b) TMA 1970, an electronic return for a year of assessment was required to be delivered to HMRC no or before 31 January in the year following the year of assessment.

30. Under para 5(1) Sch 55, the taxpayer was liable to a penalty if (and only if) his failure continued after the end of the period of six months commencing with the penalty date. The amount of the penalty was specified in para 5(2) of Sch 55 as the greater of five per cent of any liability to tax which would have been shown in the return in question, and £300.

31. HMRC's records showed that the return had been submitted electronically on 5 September 2014, and so was over six months late.

32. The amount of the tax liability shown in Mr Lissack's tax calculation for 2012-13 was £929,877.45. In HMRC's submission, five per cent of this amount less the £300 penalty previously charged equated to a penalty of £46,193. In HMRC's' submission, the penalty had been correctly calculated, correctly notified to Mr Lissack and the penalty notice had stated the period to which the penalty related.

33. The subject of special reduction because of special circumstances was dealt with by para 16 Sch 55. HMRC contended that for a special reduction to be considered, there must have been special circumstances such as the occurrence of an uncommon or exceptional event.

34. In HMRC's submission, there were no special circumstances in Mr Lissack's case and Mr Lissack had not provided any evidence to HMRC of any circumstance which he considered as being either uncommon or exceptional so as to enable them to reconsider their stance in relation to special circumstances.

35. In relation to the question of reasonable excuse, Mr Lissack had not provided any evidence or information in relation to his divorce proceedings, such as when these had begun and whether they were ongoing, so as to suggest that this was a reasonable excuse for the late submission of the 2012-13 return.

36. Mr Nagle referred to *Melvin Jeffrey Crump v Revenue and Customs Commissioners* [2011] UKFTT 552 (TC), TC01397, at [16]-[17] concerning generalised statements about divorce proceedings. He submitted that the fact of Mr Lissack going through a divorce did not amount to a reasonable excuse in his particular case. As he had been within the self-assessment system since October 1996, Mr Lissack would have been aware that the deadline for filing his return was 31 January 2014.

37. The Capital Gains computations submitted with Mr Lissack's return showed that the disposals had taken place in the period from 7 September 2012 to 2 November 2012. IN HMRC's submission, with the 31 January 2014 deadline for filing the return, this would have given Mr Lissack more than an ample amount of time to ensure that the return was filed by the due date.

38. Mr Nagle referred to the guidance given in HMRC's Self-Assessment Manual SAM10090 on the subject of reasonable excuse. This provided details of what would be accepted as a reasonable excuse and what would not. It stated that difficulty in completing a tax return or lack of information for its preparation should not be accepted as grounds for reasonable excuse.

39. The Tax Return Guide showed at page TRG27 indicated that taxpayers should not miss the filing deadline because of waiting for final figures; instead, provisional figures should be supplied and the taxpayer should send in the final figures as soon as this could be done. Mr Nagle commented that where this was done, the taxpayer

should provide HMRC with details in the "any other information" box in the return to indicate when the finalised figures would be provided.

40. If Mr Lissack had submitted a return with provisional figures by 31 January 2014, this would have meant not only that he had filed his return on time, but also that he would have avoided the imposition of late filing penalties.

41. Mr Nagle referred to s 9ZA TMA 1970. If Mr Lissack had submitted his return with provisional figures by the filing date, then as a result of that section he would have had 12 months from that date to amend his return to the correct figures.

42. The penalty had been charged under para 1 Sch 55 for the late filing of the return. This penalty was separate from the penalties charged under Sch 56 FA 2009 for late payment of a tax liability.

43. The fact that Mr Lissack made payment of his liabilities in full before the return was filed was immaterial, in that he would have been due to make payments on account during the year on 31 July and 31 January regardless of him filing his return late. If payments had not been made on those dates, he would also have been subject to late payment penalties charged under Sch 56 FA 2009.

44. In relation to the question whether the penalty had been unjustly charged or was disproportionate, Mr Nagle submitted that there was existing authority both in the First-tier Tribunal and the Upper Tribunal dealing with these issues. He referred to *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) and to *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TCC) at [36] and [41]. He also referred to *Charlotte Gaynor v Revenue and Customs Commissioners* [2013] UKFTT 619 (TC), TC03006 at [27], and to *Patrick Wall v Revenue and Customs Commissioners* at [14].

45. He argued that HMRC only charged a penalty where it was legally due and on amounts that were legally due. The size of the penalty was based purely on the liability to tax which was due as a result of the submission of the return in question. The penalty was a set percentage and was proportionate to what was owed. The legislation in Sch 55 applied to "one and all". If a taxpayer did not abide by the legislative filing obligations, then a penalty was charged.

46. In HMRC's view, the level of the penalty imposed on Mr Lissack was not contrary to the clear compliance intention of the penalty law.

47. The issue of whether a penalty was to be considered punitive did not in itself determine whether it was subject to Article 6 ECHR. This applied only to penalties that were "criminal" in nature. Whether a penalty was punitive was only one of the criteria to be considered in determining whether a penalty was "criminal" in this context.

48. HMRC accepted that penalties of 70 per cent or more were "criminal" in nature for the purposes of Article 6 ECHR only, following the outcome of *Customs and*

Excise Commissioners v Han and another and related appeals [2001] STC 1188, [2001] 4 All ER 687, generally referred to as "*Han and Yau*".

49. Mr Nagle referred to the three criteria specified in *Engel v the Netherlands (No 1*) (1976) 1 EHRR 647 at [39] for determining whether a criminal charge had been imposed, namely the domestic classification of the offence (which was only a starting point, and not determinative), the nature of the offence, and the nature and degree of severity of the penalty that the person might incur (as referred to in *Han and Yau*).

50. In HMRC's submission, on the following grounds the penalty charged on Mr Lissack under para 5 Sch 55 did not amount to a criminal charge:

(1) The proceedings were classified as civil for domestic purposes.

(2) The nature of the offence did not involve proof of any qualitative misconduct on the part of the taxpayer. Unlike the provisions in question in *Han and Yau* and *King v Walden*, there was no question of proving that the taxpayer was guilty of any fraudulent or negligent misconduct. It was merely necessary to establish for the purposes of the relevant part of Sch 55 that the taxpayer did not file his return on time, and that he did not have a reasonable excuse or that there were no special circumstances.

(3) Unlike the penalties in *Han and Yau* and *King v Walden*, the penalty under para 5 Sch 55 was limited to a maximum of only five per cent.

51. The penalties charged under Sch 55 were not criminal in nature. Mr Nagle referred to *Wayne Pendle v Revenue and Customs Commissioners* [2015] UKFTT 27 (TC), TC04240, at [56] and [85].

52. Mr Nagle contended that the penalty was not punitive or criminal; in any event, in HMRC's submission they had complied fully with Article 6 ECHR in their administration of the penalty regime. In this respect, they had made clear to Mr Lissack the nature and cause of the accusation against him, they had informed him promptly, in a language and manner that he understood, and they had dealt with the matter without unreasonable delay.

53. HMRC requested the Tribunal to find as fact that:

(1) The penalty charged in the amount of £46,193 had been correctly charged;

(2) Mr Lissack did not have a reasonable excuse for the late filing of his 2012-13 return.

54. HMRC asked that the Tribunal should dismiss Mr Lissack's appeal.

Discussion and conclusions

Article 6 ECHR

55. Although the exact nature of the issue which Mr Lissack and his accountants intended to raise under Article 6 ECHR has not been specified, I deal first with the potential questions under Article 6.

56. Following the decisions of the European Court of Human Rights ("ECtHR") in *Ferrazini v Italy* [2001] STC 1314 and later cases, the provisions of Article 6(1) of the Convention relating to "civil rights and obligations" do not apply to tax disputes other than in certain limited categories of case. The present penalty does not fall within any of those categories.

57. Thus Article 6 will only be engaged if the imposition of the penalty amounts to a "criminal charge". I consider this in the light of the authorities, both European and domestic.

58. Mr Nagle referred to the criteria set out by the ECtHR in *Engel* at [82], as listed by Potter LJ in *Han and Yau* at [26]:

> "There are effectively three criteria applied by the Strasbourg court in order to determine whether a criminal charge has been imposed (see *Engel* and, more recently, *AP, MP and TP v Switzerland* (1997) 26 EHRR 541 at 558, para 39). They are: (a) the classification of the proceedings in domestic law; (b) the nature of the offence; and (c) the nature and degree of severity of the penalty that the person concerned risked incurring. The Strasbourg court does not in practice treat these three requirements as analytically distinct or as a 'three stage test', but as factors together to be weighed in seeking to decide whether, taken cumulatively, the relevant measure should be treated as 'criminal'. When coming to such decision in the course of the court's 'autonomous' approach, factors (b) and (c) carry substantially greater weight than factor (a)."

59. The ECtHR commented further on these criteria in *Janosevic v Sweden* [2002] ECHR 34619/97 at [67], emphasising that the second and third criteria were alternative and not cumulative.

60. Although it is of lesser importance, I accept Mr Nagle's submission that the penalty does not amount to a criminal charge in UK law; it is clear that the proceedings in respect of the penalty are classified as civil for domestic purposes, as confirmed by the Tribunal (Judge Ann Redston) in *Wayne Pendle*.

61. In relation to factor (b), the nature of the offence, the penalty is for non-compliance with a filing obligation. This is comparable in nature to the penalty under consideration in *Wayne Pendle*, which was a £100 penalty for failure by the appellant to file his self-assessment return by the due date. The Tribunal in that case considered *Engel*, *Öztürk v Germany* ([1984] ECHR 8544/79) and *Jussila v Finland* ([2006] A/73053/01, [2009] STC 29), and also referred to the approach being followed in other judgments, the most recent being *Glantz v Finland* (Application no. 37394/11),

[2014] STC 2263. In the light of those cases, the Tribunal's view was that the minor nature of the penalty did not prevent it being "criminal" under the ECHR. The Tribunal also found that the penalty was deterrent and punitive in nature, and of general application to all those submitting self-assessment returns. It concluded that the penalty was ""criminal" in nature within the meaning of Article 6 ECHR.

62. Mr Nagle relied on the Tribunal's comments in *Wayne Pendle* at [56]. However, these concerned the position of Sch 55 penalties under UK law. The Tribunal followed these comments at [57] with the following statement:

> "This answer is not changed by the fact that the penalties are criminal under the Convention."

Thus the Tribunal was not detracting from its previous conclusion that the penalty was "criminal" for Article 6 purposes.

63. The remaining criterion specified in *Han and Yau* is the nature and degree of severity of the penalty. In Mr Lissack's case, the penalty is 5 per cent of the tax due; the actual amount of the penalty is relatively substantial because of the level of his tax liability as shown in the return which he eventually filed.

64. In *Janosevic v Sweden*, the taxpayer had been made liable to surcharges in respect of a series of different taxation liabilities. These were at rates of 20 per cent or 40 per cent of the tax avoided. The ECtHR found at [69] that the criminal character of the taxpayer's offence was further evidenced by the severity of the potential and actual penalty; the surcharges had no upper limit and might come to very large amounts. (It had already concluded at [68] that the penalties were both deterrent and punitive.)

65. The surcharge in *Jussila v Finland* was at the lower level of ten per cent. The amount of the penalty was approximately 300 Euros. The ECtHR commented at [31] that the relative lack of seriousness of the penalty could not divest an offence of its inherently criminal character.

66. In *Glantz*, the approximate level of the additional taxes and tax surcharges imposed on the taxpayer was five per cent. The ECtHR concluded, on the basis of the *Engel* criteria, that the proceedings in relation to the tax surcharges were criminal in nature.

67. As indicated in *Janosevic v Sweden*, criteria (b) and (c) (as referred to in *Han and Yau*) are alternative and not cumulative. In relation to the nature of the offence, the indication in *Wayne Pendle* is that a £100 late filing penalty amounts to a criminal charge. In my view the position requires greater clarification, since the authorities relied on by the Tribunal in that case relating to taxation concerned tax surcharges for misstatements of taxable amounts rather than penalties for conduct such as late filing of returns. The Tribunal did refer at [49] to the comments of the ECtHR in *Öztürk v Germany* [1984] at [53] that the minor nature of the offence in question did not take it outside the ambit of Article 6; taken on its own, this would appear to imply that all penalties for failure to comply with tax obligations, however minor, would fall within

Article 6. The Tribunal also found that the penalty was deterrent and punitive in nature. On the basis of the authorities referred to above, it appears that a penalty at a relatively low percentage rate may nonetheless be considered to amount to a criminal charge.

68. The six month late filing penalty is clearly designed to discourage significant delay by taxpayers in the filing of their returns, and so could be argued to be deterrent in nature. On the question whether it could be said to be punitive, the rate of five per cent is lower than the rates of surcharge in question in the ECtHR authorities referred to above, although (as I have already acknowledged) the actual amount of the penalty imposed on Mr Lissack is relatively substantial.

69. For the purposes of Mr Lissack's appeal, I make the assumption that the penalty in his case does amount to a criminal charge. I do not consider, in circumstances where no specific submissions in relation to Article 6 ECHR have been made by him or on his behalf, that it is appropriate to come to a firm conclusion on this question. Mr Nagle made some submissions concerning the issue, but not at a level of detail which would enable me to arrive at a firm decision on such an important matter of principle with implications far beyond those in the present case.

70. On the basis of that assumption, the question is whether Article 6 ECHR is engaged in Mr Lissack's case. In *Wayne Pendle* at [85]-[86], the Tribunal considered whether the requirement to make an appeal against a penalty by giving notice to HMRC was a breach of the taxpayer's rights under Article 6; it concluded that it was not.

71. Mr Nagle submitted that HMRC had complied with Article 6 in their administration of the penalty regime. On the basis of the correspondence included in the evidence before me, I am satisfied that HMRC have complied with the requirements set out in Article 6(3).

72. In relation to the presumption of innocence under Article 6(2), it is for HMRC to satisfy the Tribunal that the taxpayer has incurred a penalty; I consider the question below when reviewing the facts of Mr Lissack's case.

73. As to Article 6(1), I consider that Mr Lissack has been provided with a fair and public hearing. The choice made by him and his accountants not to attend the hearing does not in my view affect that conclusion; I have taken into account all the representations made by him or on his behalf in the materials before me. This decision is publicly available.

74. Thus Mr Lissack's position is not affected by Article 6 ECHR. The other matters raised by his appeal can now be considered.

Proportionality

75. The first of these is the question of proportionality; it is argued on his behalf that the penalty is disproportionate to the offence.

76. Mr Nagle referred to *Total Technology*, in which the Upper Tribunal considered the question of proportionality in relation to the VAT default surcharge regime, and referred to EU law in the light of the Principal VAT Directive and to decisions relating to human rights. In the context of penalties under Sch 56 FA 2009, imposed for failure to make payments on time, and thus closer in nature to the penalty in the present case, the Tribunal in *Dina Foods Limited* [2011] UKFTT 709 (TC), TC01546, considered whether the penalty imposed on the appellant company could be said to be disproportionate, and set out its views at [41]-[42]:

> 41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation, and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis."

77. Despite some differences between the penalty regime under Sch 56 FA 2009 and that under Sch 55 FA 2009 applicable to Mr Lissack, the same reasoning applies in relation to the Sch 55 penalty imposed on him. I do not accept the submission that the penalty is disproportionate.

78. Mr Nagle suggested in argument, by reference to *Hok* and *Total Technology*, that a challenge to a penalty on the basis of proportionality could only be made by way of judicial review and not in the course of an appeal before the First-tier Tax Tribunal. Although (as I consider below) this is the position for a challenge based on

lack of fairness, it does not follow that the First-tier Tribunal is precluded from considering questions of proportionality, as the Tribunal did in *Dina Foods Limited*.

Fairness

79. It is clear from the decision of the Upper Tribunal in *Hok* at [41] that the First-tier Tribunal dies not have any judicial review jurisdiction. Thus there is no basis on which questions as to whether a penalty has or has not been fairly imposed can be considered by the Tribunal.

Whether penalty affected by prior payment of tax

80. The penalty under appeal is for late submission of Mr Lissack's self-assessment return for 2012-13. The obligation to submit such a return arises under s 8 TMA 1970. Under para 1 Sch 55, a penalty is payable where a person who has been required under s 8 TMA 1970 to make and deliver a return fails to do so on or before the filing date.

81. The obligation to make payments on account of tax is imposed by s 59A TMA 1970, and the obligation to pay the balance due after taking into those payments [is placed on taxpayers by s 59B TMA 1970. As referred to above, penalties for late payment of tax are dealt with under Sch 56 FA 2009. Thus payment of tax and the making of tax returns are entirely separate obligations, each giving rise to penalties in the event of non-compliance with the statutory requirements.

82. It follows that prior payment of tax can have no effect on a penalty imposed for late submission of a return. To escape liability to any penalties, compliance is required both with the obligation to file the return on time and to make payments on time. Fawcetts' argument that it was iniquitous for HMRC to charge the penalty when the tax had already been paid must therefore be rejected, as must the related argument that the penalty was disproportionate given that the tax had been paid in full, and had in fact been overpaid.

Whether penalty incurred

83. As I have indicated, it is for HMRC to prove that Mr Lissack is liable to a penalty. I therefore consider the evidence.

84. Mr Nagle referred to HMRC's "Return Summary", which was a print-out dated 28 April 2015 of HMRC's computer record for Mr Lissack in respect of 2012-13. This showed that the return had been issued on 6 April 2013, the due date being 31 January 2014, or 31 October 2013 if submitted in paper form. The return was recorded as having been captured on 5 September 2014.

85. Taken together with the correspondence explaining the reasons for the late submission of the return, I am satisfied that the return was filed on 5 September 2014, and that the due date for filing the return was 31 January 2014. I find that Mr Lissack

was liable to the six month late filing penalty, subject to the other questions of reasonable excuse and "special circumstances".

Reasonable excuse

86. Under para 23 Sch 55, liability to a penalty does not arise in relation to a failure to make a return if the taxpayer satisfies the Tribunal on appeal that there is a reasonable excuse for the failure. This language does not precisely follow that in para 1 Sch 55, ". . . fails to make or deliver a return . . . on or before the filing date", but in practical terms para 23 must be construed as applying equally to cases where a return is filed late and to cases where no return is filed, provided that the taxpayer can show reasonable excuse based on the particular circumstances.

87. In their letter to HMRC dated 8 October 2014, Fawcetts referred to the completion of Mr Lissack's return having been delayed due to complications arising concerning the calculation of capital gains. Separately, they referred to mitigating circumstances in that Mr Lissack was in the midst of divorce proceedings, which had become very complicated because there were significant assets that needed to be considered in relation to any settlement of those proceedings.

88. They did not specifically refer to these matters as constituting a reasonable excuse for the late filing of the return. However, HMRC indicated, in their letter to Mr Lissack dated 24 October 2014, that they did not accept that the complications in relation to the calculation of capital gains amounted to a reasonable excuse. Although HMRC referred to the information given by Fawcetts concerning the divorce proceedings, they did not specifically comment on this in the context of their statement that Mr Lissack did not have a reasonable excuse for the late submission of his return.

89. I deal first with the question of delay due to the complications in computing the capital gains figures. Although I understand the concern to provide accurate figures, I accept Mr Nagle's submission that the return should not have been delayed for this reason, as it was clear from the Tax Return Guide at TRG 27 that provisional figures could have been supplied. It states:

> "Do not miss the filing deadline because you are waiting for final figures. Instead provide provisional figures and make sure you send the final figures as soon as you can. You could be charged a penalty if you did not have good reasons for supplying provisional figures or you provided unreasonable ones."

90. It appears to me that in the circumstances, it would have been perfectly justifiable for Mr Lissack to provide provisional figures. As Mr Nagle submitted, this would then have allowed Mr Lissack 12 months from the filing date to provide final figures. Given that the return containing final figures was submitted in September 2014, he could have amended his return under s 9 ZA TMA 1970 well within the permitted period.

91. Thus the capital gains computation difficulties do not amount to a reasonable excuse in these circumstances.

92. The question whether involvement in divorce proceedings could amount to a reasonable excuse was considered in *Melvyn Jeffrey Crump*. The Tribunal emphasised at [12] that the burden was on the appellant to establish circumstances that would amount to a reasonable excuse, and at [13] indicated its understanding of what in the circumstances was referred to by that expression. At [14], while acknowledging that a divorce could be a traumatic experience, the Tribunal did not accept that a divorce of itself rendered it not reasonably possible for a person to comply with their obligations to pay income tax on time. It did not rule out the possibility that on the particular facts of a specific case, divorce proceedings might be such as to amount to a reasonable excuse for late payment of tax.

93. It emphasised that such specific facts would need to be established by evidence; it would not be sufficient for the appellant to establish merely that he was going through divorce proceedings at the time. After commenting on the lack of particulars of specific circumstances affecting the appellant's ability to pay the tax through the period of default, the Tribunal said at [16]:

> "The Tribunal finds that such generalised statements, unsupported by documentary evidence, are insufficient to establish a reasonable excuse."

94. These comments are equally applicable to Mr Lissack's case. Without further evidence, I am not satisfied that involvement in divorce proceedings constitutes a reasonable excuse for the late filing of his self-assessment return for 2012-13.

95. Accordingly, I find that there was no reasonable excuse for the late filing of that return.

Special circumstances

96. Under para 16 Sch 55, a penalty may be reduced if this is thought right because of special circumstances. In the correspondence before me, there is no reference to any consideration by HMRC of this issue. Appeals under Sch 55 are governed by paras 20-22 Sch 55. On one possible reading of para 22, the Tribunal may only deal with the question of special circumstances if it substitutes for HMRC's decision another decision that HMRC had power to make; if the Tribunal affirms HMRC's decision, there is no power to consider special circumstances.

97. A more practical reading of para 22 is that even if the Tribunal does not change the main decision in respect of the penalty, it may still substitute a decision incorporating a consideration or reconsideration of the question whether there are special circumstances justifying a reduction of the penalty. The precondition for doing so is that the Tribunal must be satisfied that HMRC's decision in respect of special circumstances is flawed.

98. The absence of any reference to special circumstances in the correspondence before me raises the question whether HMRC gave any consideration to that issue. If they did not, their decision is arguably flawed; see the discussion of this issue in *Algarve Granite Limited v Revenue and Customs Commissioners* [2012] UKFTT 463 (TC), [2012] SFTD 1354, and in particular the different views on this taken by Tribunals in various penalty appeals.

99. In that case, involving a penalty under Sch 56 FA 2009, the Tribunal considered that it did have power to consider the issue of special circumstances. This was despite its conclusion that the appellant had no reasonable excuse for its late payments of PAYE for the relevant period; this supports the more practical reading of para 22 Sch 55 referred to above. The Tribunal concluded on the facts of the case that there was nothing in the appellant's circumstances that seemed uncommon or out of the ordinary, or which otherwise would have made it unfair for the appellant to bear the whole penalty. It found that there were no special circumstances to justify a reduction in the penalty.

100. In the same way, I do not consider that there is anything in Mr Lissack's circumstances that could be regarded as uncommon or out of the ordinary; I have already considered those circumstances in the context of reasonable excuse. Thus I find that there are no special circumstances in relation to the delayed submission of Mr Lissack's return, and therefore there is no basis on which the penalty can be reduced.

Fawcetts' comments on principles in HMRC discussion document

101. I do not consider it necessary or appropriate to comment in detail on the matters raised in Fawcetts' responses based on the five principles listed. A number of these comments fail to recognise that the obligation to file the return on or before the filing date is entirely separate from the obligations in respect of payment of tax, as I have explained above. I have dealt with the questions of proportionality and fairness.

Result of the appeal

102. I find that the penalty charged in the amount of £46,193 was correctly charged, that Mr Lissack does not have a reasonable excuse for the late filing of his self-assessment return for 2012-13, and (to the extent that it is within my jurisdiction) that there are no special circumstances in his case to justify a reduction in the penalty. I therefore dismiss his appeal.

Right to apply for permission to appeal

103. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 27 NOVEMBER 2015