



TC05781

Appeal number: TC/2013/03553

***TAX RETURN- LATE AND DAILY PENALTIES- TAX RETURN LATE –
WHETHER LOST IN THE POST – WHETHER LATE – YES –
WHETHER INABILITY TO PAY IS A REASONABLE EXCUSE OR
SPECIAL CIRCUMSTANCE – NO – APPEAL DISMISSED***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIUTAURAS SKOROBOGATOVAS

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE IAN HYDE

The Tribunal determined the appeal on 6 April 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 May 2013 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 February 2017.

DECISION

5 1. This is an appeal against penalty notices issued under schedule 55 Finance Act 2009 for the late filing of the tax return for the year ending 5 April 2011.

2. By a direction of the Tribunal released on 10 September 2013 this appeal was stood over pending the decision of the Upper Tribunal in *Donaldson v Revenue and Customs Commissioners* which having been decided ([2014] UKUT 536 (TCC)) was then appealed to the Court of Appeal. The decision of the Court of Appeal has now
10 been released ([2016]EWCA Civ 761) and permission to appeal by the taxpayer to the Supreme Court refused and so this appeal was set down for determination.

Facts

3. On 28 July 2011 a notice to file a tax return for the year ending 5 April 2011 was issued by HMRC to the appellant.

15 4. On 14 February 2012, the return not having been filed by the filing date of 31 January 2012, HMRC issued a notice of penalty assessment under paragraph 3 of schedule 55 Finance Act 2009 in the amount of £100.

5. On 18 April 2012 a paper tax return for the year ending 5 April 2011 filed by the appellant was received by HMRC.

20 6. On 15 March 2012 the appellant appealed to HMRC against the late filing penalty.

7. On 24 April 2012 HMRC issued a notice of daily penalty assessment under paragraph 4 of schedule 55 Finance Act 2009 in the amount of £740.

25 8. On 14 November 2012 HMRC issued a decision to the appellant rejecting his appeal and offering a review.

9. On 21 December 2012 the appellant requested a review.

10. On 6 February 2013 HMRC notified the appellant of the outcome of the review upholding the penalties.

11. On 15 May 2013 the appellant appealed to the Tribunal against both penalties.

30 **The appellant's arguments**

12. In his notice of appeal and request for review the appellant objects to the penalties on two grounds.

13. First, the appellant argues that he must have sent the return but it was probably lost in the post. The appellant argues that he must have sent it because he helped his

mother complete her tax return at the same time. They sent them to HMRC together and his mother's return has been received but HMRC say his has not.

14. Second, the appellant says that he cannot afford to pay the penalty.

HMRC's arguments

5 15. On the question of the appellant's return being filed on time but being lost, HMRC argue that they have no record of receiving it until 18 April 2012 and the appellant has not produced any proof of posting.

10 16. On the argument that the appellant cannot afford to pay the penalties, HMRC say that that is not a defence whether as a reasonable excuse or a special circumstance.

Decision

15 17. I note as a preliminary point that, whilst this appeal was stood over pending the appeal in *Donaldson*, the appellant is not challenging the penalties on the grounds argued in *Donaldson*, that is to say HMRC's procedure for issuing automatic late filing penalties did not satisfy the conditions imposed by Schedule 55. In any event I note that the taxpayer's arguments were dismissed by the Court of Appeal in *Donaldson* and that decision is binding on me.

20 18. On the appellant's first argument that the return was filed but lost in the post, the appellant has not provided any evidence that it was posted. An appellant cannot succeed simply by making an assertion when HMRC records give a different account, in this case that the return was not received until 18 April 2012. Accordingly the appellant has not discharged the burden of proof on an appellant to show on a balance of probabilities that his account is correct.

25 19. On the appellant's second argument that he is unable to pay, Schedule 55 is very clear, and with one exception, inability to pay is neither a reasonable excuse nor a special circumstance.

20. Schedule 55 provides that a penalty may be reduced if there are "special circumstances". Paragraph 16 of Schedule 55 provides;

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

(2) in sub-paragraph (1) "special circumstances" does not include –

(a) ability to pay..."

21. Further, there is a defence to the imposition of penalties if there is a "reasonable excuse". Paragraph 23 provides;

“(1) liability to a penalty under any paragraph of this Schedule does not arise in relation to the failure to make a return if the person satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the failure

(2) for the purposes of sub-paragraph (1)-

5 (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person’s control...”

22. The appellant has just argued that he cannot afford to pay the penalties. There is no further explanation of the circumstances. Paragraph 20 does allow a reasonable excuse to exist where insufficiency of funds is “attributable to events outside the
10 persons control” but the appellant has not argued that this is the case. Parliament has specifically legislated for the appellant’s circumstances and I therefore have no jurisdiction to accept the appellant’s argument.

23. I therefore dismiss the appellant’s appeal.

24. This document contains full findings of fact and reasons for the decision. Any
15 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**IAN HYDE
TRIBUNAL JUDGE**

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