



TC06076

Appeal number: TC/2017/03550

*INCOME TAX – liability for penalties in relation to failure to file tax return
– appeal against penalty assessment dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAYNE DURRANT

Appellant

- and -

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

TRIBUNAL: JUDGE TONY BEARE

The Tribunal determined the appeal on 16 August 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 27 April 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 June 2017.

DECISION

1. This decision relates to an appeal by Mr Durrant against penalties issued under Schedule 55 of the Finance Act 2009 (the “FA 2009”) in relation to the late filing of his self-assessment tax return for the 2014/2015 tax year of assessment.

2. The penalties in question are:-

(a) a penalty of £100 imposed under paragraph 3 of Schedule 55 to the FA 2009;

(b) a penalty of £900 imposed under paragraph 4 of Schedule 55 to the FA 2009; and

(c) a penalty of £300 imposed under paragraph 5 of Schedule 55 to the FA 2009.

3. There is no dispute between the parties as to the fact that the tax return in question was not filed until 16 November 2016, which was more than 6 months after the date when it was due. As such, each of the penalties described in paragraph 2 above is, prime facie, applicable. However, Mr Durrant submits that he should not be liable to any of the penalties for reasons which may be summarised as follows:-

(a) by the end of the 2014/2015 tax year of assessment, he had been self-employed for only a few weeks and had earned only £380;

(b) it was the first time that he had been required to file a tax return and he found it difficult as he is not good with technology;

(c) as far as he was aware, he had completed and submitted the tax return on-line and realised that this was not the case only when he logged onto his on-line account to complete his tax return for the following tax year of assessment, when he noticed the penalties;

(d) he had not received any of the letters which HMRC alleges it had sent to him during the period in question; and

(e) he accepts that he made a mistake but states that the mistake was not intentional.

4. There are two possible bases on which the above arguments might justify a cancellation of, or a reduction in, the relevant penalties.

5. The first is paragraph 23 of Schedule 55 to the FA 2009, which provides that there shall be no liability to a penalty in relation to a failure to make a tax return if the taxpayer satisfies HMRC or (on appeal) the Tribunal that there is a reasonable excuse for his or her failure. In that regard, there is some guidance in paragraph 23 of Schedule 55 to the FA 2009 as to certain things which cannot amount to a reasonable excuse. There is also some guidance on the question in prior case law. Subject to those matters, the question of whether Mr Durrant has a reasonable excuse for his failure to file the relevant tax return prior to the date when he did so is a matter for me to determine.

6. The second is paragraph 16 of Schedule 55 to the FA 2009, which empowers HMRC to reduce the penalty under any paragraph of the Schedule because of “special circumstances”. If HMRC decides that particular circumstances do not amount to “special circumstances”, then I cannot substitute my own judgment in that regard unless HMRC’s decision was flawed in the judicial review sense, by which I mean that, in reaching its decision on that point, HMRC must have taken into account matters which it should not have taken into account or failed to take into account matters which it should have taken into account. So, in comparison to his reasonable excuse argument, there is a much higher threshold for Mr Durrant to surmount if he wishes to argue that his circumstances amount to “special circumstances” given that HMRC considers this not to be the case.

7. In addition, although Mr Durrant has not raised these arguments, I need to consider whether:-

(a) in relation to the daily penalty imposed under paragraph 4 of Schedule 55 to the FA 2009, HMRC has complied with its obligation under sub-paragraph 4(1)(c) of Schedule 55 to the FA 2009 – the obligation to give notice to Mr Durrant specifying the date from which the penalty is payable; and

(b) in relation to all three penalties, HMRC has complied with its obligation under sub-paragraph 18(1)(c) of Schedule 55 to the FA 2009 – the obligation to state in the penalty notice the period in respect of which the penalty is assessed – and, if it has not so complied, whether its failure to do so is a matter of form and not of substance such that, pursuant to the decision of the Court of Appeal in *Revenue and Customs Commissioners v Donaldson* [2016] STC 2511 (“*Donaldson*”), the relevant notice remains valid by virtue of sub-section 114(1) of the Taxes Management Act 1970.

8. Before considering the matters mentioned in paragraphs 4 to 7 above, I should mention that I have found HMRC’s statement of case in this matter to be somewhat confusing. Mr Durrant notified HMRC of his appeal on 2 January 2017, which was some time after the end of the 30 day period within which he was entitled to notify HMRC of his appeal. (The relevant assessments against which Mr Durrant was appealing were made on 17 February 2016, 12 August 2016 and 12 August 2016 respectively). In its response dated 28 February 2017, HMRC did not purport to dismiss Mr Durrant’s appeal on the basis of its substantive merits – i.e. that Mr Durrant had no reasonable excuse for the late filing of the relevant tax return and that there were no “special circumstances” which would justify a cancellation of, or a reduction in, the penalties - but instead purported to dismiss Mr Durrant’s appeal on the basis that the deadline for making the appeal to HMRC had passed and that Mr Durrant had no reasonable excuse for the late notice of his appeal. HMRC replied in precisely the same terms on 7 April 2017 in response to Mr Durrant’s request of 2 March 2017 to make a late appeal. So both of the letters from HMRC which preceded Mr Durrant’s notification of his appeal to the Tribunal purported to reject Mr Durrant’s appeal on the basis that Mr Durrant had no reasonable excuse for the late notice of his appeal to HMRC.

9. HMRC's letter to Mr Durrant of 7 April 2017 dismissing his appeal on the above ground stated that Mr Durrant could give notice of his appeal to the Tribunal by 7 May 2017. Mr Durrant lodged his notice of appeal to the Tribunal within that timeframe – on 27 April 2017 – and therefore did not, and did not need to, apply to
5 give that notice out of time. In light of that, I find the first three paragraphs of HMRC's statement of case somewhat confusing in that it states that the appeal includes an application by Mr Durrant to appeal out of time before recording that HMRC do not oppose the application.

10. The only late notice of appeal for which Mr Durrant requires HMRC's or the Tribunal's agreement is the notice given by Mr Durrant to HMRC. Mr Durrant does not need permission to give late notice of the appeal to the Tribunal because, contrary to the opening paragraphs of HMRC's statement of case, that notice was not late.

11. Nevertheless, the above means that, before I can consider whether Mr Durrant had a reasonable excuse for the late filing of his tax return or whether "special circumstances" falling within paragraph 16 of Schedule 55 to the FA 2009 would justify the cancellation of, or a reduction in, the relevant penalties or whether the relevant penalty notices complied with the requirements mentioned in paragraph 7 above, I need to consider whether permission should be given for late notice of Mr Durrant's appeal to HMRC, given that HMRC clearly do not agree to that late notice
20 (as set out in its letters of 28 February 2017 and 7 April 2017).

12. There is nothing in the facts described in paragraph 3 above which would appear to justify the delay in the late notification of the appeal to HMRC. For instance, even if Mr Durrant had not received any of the letters which HMRC alleges it had sent to him during 2015 and 2016, by his own admission, Mr Durrant must have realised when he filed the relevant tax return on 16 November 2016 that that tax return was late (because he says himself that it was noticing the existence of the penalties on his on-line account which led him to file the tax return). In the light of that, Mr Durrant's failure to notify HMRC of his appeal until 2 February 2017 is hard to explain. I believe that the taxpayer acting reasonably and prudently who became aware of the fact that penalties had been imposed for failing to file his tax return would have taken steps to notify HMRC of his appeal against those penalties considerably sooner than Mr Durrant did. In order for HMRC to carry out its obligation to collect taxation, it needs some degree of certainty as to when a decision that it has made may be subject to an appeal. In this case, HMRC consider that that period had expired by the time that Mr Durrant notified HMRC of his appeal and I agree with them. So I consider that there are insufficient grounds for me to give permission for the late notice of appeal to HMRC pursuant to my discretion under sub-section 49(2)(b) of the Taxes Management Act 1970.

13. On that basis, Mr Durrant's appeal necessarily fails. However, I would add that, even if I were to have given permission for the late notice of appeal to HMRC, I do not think that his appeal, to the extent that it relates to the penalty imposed under paragraph 3 of Schedule 55 to the FA 2009, would have succeeded for the reasons which follow.

14. First, I do not consider the circumstances described in paragraph 3 above to amount to a reasonable excuse for Mr Durrant's failure to file his tax return by the relevant time limits. I accept that Mr Durrant has not deliberately defaulted on his obligation to file his tax return. However, I think it was incumbent upon Mr Durrant
5 when he became self-employed to ensure that he complied with his statutory obligation in that regard. If he had reason to doubt his technological skills, then he should either have filed a paper return or taken steps to confirm that his attempt to make an earlier filing on-line had been successful.

15. I would add that I would reach this conclusion even if none of the letters which HMRC claim to have sent Mr Durrant over the period did not reach him for some
10 reason. This is because I agree with HMRC that it is incumbent on a taxpayer to ensure that he or she complies with his or her statutory obligations without the need for HMRC to provide reminders by mail or by telephone. However, I would say that, given that the address on HMRC's file for Mr Durrant is the correct address, it does
15 seem surprising that none of the letters which HMRC alleges to have been sent over the period in question arrived at that address.

16. For similar reasons, I agree with HMRC that the circumstances described in paragraph 3 above do not amount to "special circumstances" for the purposes of paragraph 16 of Schedule 55 to the FA 2009.

20 17. Finally, although HMRC's statement of case did not enclose a copy of the specific penalty notice that was issued to Mr Durrant on 17 February 2016 under paragraph 3 of Schedule 55 to the FA 2009, it did enclose a pro forma of the notice which HMRC sent to him and it is clear from that pro forma that the relevant notice would have complied with the requirements in sub-section 18(1)(c) of Schedule 55 to
25 the FA 2009.

18. The position in relation to the daily penalty under paragraph 4 of Schedule 55 to the FA 2009 and the penalty under paragraph 5 of Schedule 55 to the FA 2009 is slightly different because HMRC did not enclose with its statement of case either the specific penalty notices that were issued under those paragraphs to Mr Durrant on 12
30 August 2016 or pro formas of those notices. So, if I were to have given permission for the late notice of appeal to HMRC, I believe that I would have been unable to conclude that those penalty assessments complied with the requirements outlined in paragraph 7 above.

19. I consider that, on the basis of the decision of the Court of Appeal in
35 *Donaldson*, the form of the penalty notice that was issued under paragraph 3 of Schedule 55 to the FA 2009 was sufficient to mean that HMRC complied with sub-paragraph 4(1)(c) of Schedule 55 to the FA 2009 in relation to the penalty notice that was issued on 12 August 2016 under paragraph 4 of Schedule 55 to the FA 2009. But, in the absence of either the specific penalty notice in question or a pro forma of
40 that penalty notice, I am unable to determine whether or not the penalty notice which was issued under paragraph 4 of Schedule 55 to the FA 2009 complied with the requirements in sub-section 18(1)(c) of Schedule 55 to the FA 2009 or whether, even if it didn't, the relevant notice might still be upheld under sub-section 114(1) of the

5 Taxes Management Act 1970 on the basis that the failure in question was one of form and not substance, as was the case in *Donaldson*. So, if Mr Durrant had submitted his notice of appeal against the penalty notice under paragraph 4 of Schedule 55 to the FA 2009 to HMRC on time, I would have been bound to uphold his appeal in relation to that penalty.

10 20. A similar issue arises in relation to the penalty notice issued on 12 August 2016 under paragraph 5 of Schedule 55 to the FA 2009. In the absence of either the specific penalty notice in question or a pro forma of that penalty notice, I am unable to determine whether or not the penalty notice complied with the requirements in sub-section 18(1)(c) of Schedule 55 to the FA 2009 or whether, even if it didn't, the relevant notice might still be upheld on the basis that the failure in question was one of form and not substance, as was the case in *Donaldson*. Accordingly, if Mr Durrant had submitted his appeal against the relevant penalty notice on time, I would have been bound to uphold his appeal in relation to that penalty notice.

15 21. Accordingly, were it not for the fact that Mr Durrant has no reasonable excuse for the late notice of his appeal to HMRC, I would have been inclined to uphold his appeal to the extent that the appeal relates to the penalties under paragraphs 4 and 5 of Schedule 55 to the FA 2009. However, for the reasons outlined above, I do not think that it would be fair to the general body of taxpayers for me to give permission to Mr
20 Durrant for his late notice of appeal to HMRC on the basis of the facts in this case.

22. For the reasons set out above, I uphold the assessments in question.

25 23. 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.

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TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 21 AUGUST 2017

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