



TC06108

Appeal number: TC/2017/04706

INCOME TAX – penalties for failure to file returns – Schedule 55 FA 2009 – whether failure to make return by due dates: yes – whether penalties properly imposed: yes, except daily penalties – Donaldson followed – whether reasonable excuse for failure: yes in relation to initial penalty, no for others as excuses ceased – whether special circumstances – yes: HMRC decision flawed – 6 month penalty reduced to £100.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NOEMI KLEIN

Appellant

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 8 September 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 6 June 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 July 2017.

1. This was the consideration on paper of appeals by Ms Noemi Klein (“the appellant”) against penalties imposed on her for failure to file her income tax return for 2011-12 on time. The appeals were made in 2013 but were stayed behind a case which was eventually finally determined in 2016 when the Supreme Court refused Mr Keith Donaldson leave to appeal against the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 (“*Donaldson*”).

2. The Tribunal’s decision is that the initial and daily penalties are cancelled and that the 6 month penalty is specially reduced to £100. That is the only amount that Ms Klein has to pay.

Facts

3. I find the facts below from the documents in the bundle sent to me.

4. Ms Noemi Klein (“the appellant”) was issued with a notice to file an income tax return for the tax year 2011-12 on 6 April 2012. That notice required the appellant to deliver the return by 31 October 2012 if filed in paper form or by 31 January 2013 if filed electronically (“the due date”).

5. On 19 February 2013 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

6. On 14 August 2013 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

7. Also on 14 August 2013 HMRC issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

8. The return was filed electronically on 13 November 2013.

9. On that day the appellant appealed to HMRC against penalties of £1,300.

10. On 28 November 2013 HMRC wrote to the appellant refusing to accept her appeals against the initial late filing and 6 month penalties because they said they were late. They informed the appellant that she could provide HMRC with the reason for the lateness or seek permission from the Tribunal to bring a late appeal to HMRC.

11. Also on 28 November 2013 HMRC wrote a further letter to the appellant about the daily penalty for 2011-12. HMRC said that she had shown no reasonable excuse for the late filing but because of the decision of this Tribunal in *Donaldson* they could not finalise the appeal yet. Once the outcome of the HMRC appeal to the Upper Tribunal was known they would give him a decision on the appeal.

12. On 2 December 2014 the outcome of Mr Donaldson’s appeal to the Upper Tribunal was published.

13. Nothing happened until 10 March 2017 when HMRC wrote to the appellant referring to their letter of 28 November 2013 about the daily penalties. They said that they considered that the appellant had no reasonable excuse for her failure to file on time and rejected her appeals.

14. On 28 March 2017 the appellant wrote to HMRC reiterating her excuse for her failure to file, as well as expressing shock at the revival of the appeals and she requested a review on Form SA 634.

15. On 8 May 2017 HMRC wrote to the appellant with the conclusion of the review. This conclusion was that the daily penalty for 2011-12 was upheld, on the basis that the appellant had shown no reasonable excuse for her failure to file on time.

16. On 6 June 2017 the appellant notified her appeal to the Tribunal.

The law in brief

17. The law imposing these penalties is in Schedule 55 Finance Act 2009 and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, and may only otherwise be reduced if HMRC's decision as to whether there are special circumstances was flawed.

The appeals

18. The position is that the appeals against the initial penalty and 6 month penalty were made late to HMRC and HMRC did not accept them ("the rejected appeals"). No application for permission to make them late was made to the Tribunal by any time before 6 June 2017 and none is included in the Notice of Appeal.

19. HMRC have taken no point on this and offered no objection to the determination of the rejected appeals, possibly because they accepted the appeal against the daily penalty which was also late. In those circumstances I give permission for the rejected appeals to be made to HMRC late and to be treated as notified to the Tribunal.

Grounds of appeal and HMRC view

20. The grounds of appeal are that:

- (1) at the time of filing she did not have access to her paperwork following a move,
- (2) the nature of the business would have made it difficult to estimate income without the paper work, and
- (3) the reviewing officer said that the fact that she filed on the deadline in 2010-11 and 2012-13 and after the deadline in 2013-14 and 2014-15 the failure to file until November could not be seen as an isolated incident. Those facts point out exactly that.

21. HMRC say in response that the appellant knew she was moving and should have taken appropriate measures to ensure she knew where her paperwork would be. She should have put in a return with estimates.

Reasons for my decision

22. In my view the appellant had a reasonable excuse for the failure to file the return by 31 January 2013. This is because she was told by HMRC on 25 January 2013 (as evidenced by the SA Notes in the bundle) that her filing date was "deferred"

to 27 February 2013 because she was awaiting an activation code. Despite the deferral, no one in HMRC told the computer about this, because an initial penalty was assessed on 19 February before the new deadline. The new deadline did not of course have statutory force.

23. But the reasonable excuse, the deferral of the filing date, ceased once that deferred date had passed.

24. I also think she had a reasonable excuse for the non-filing on 31 January in that she did not have access to her paperwork. Despite what HMRC say about making estimates, the appellant has explained why that would not have been possible.

25. But that excuse would itself have ceased once she did obtain her paperwork. She does not say when that was. She also does not say that she did not get any correspondence from HMRC and so I consider that when she received correspondence from HMRC indicating that she had not filed her return yet she should have explained to them why she still could not file.

26. Thus I think there is no reasonable excuse for the failure to remedy the situation as soon as reasonably practical. It follows that although the appellant had a reasonable excuse in relation to the initial penalty, she did not have one in relation to the daily and 6 month penalties.

27. But as to the daily penalties there is no “SA reminder” or “SA 326D” in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with. (See *Duncan v HMRC* [2017] UKFTT 340 (TC) (“*Duncan*”) (Judge Jonathan Richards)). I therefore cancel them.

28. The Statement of Case contains something I have not seen before in a case that was stayed behind *Donaldson*, whether by the Tribunal or by HMRC on their own initiative, as in this case.

29. It is a “Note to Tribunal” which explains that the “customer” (appellant, I assume is meant) is requested to provide a copy of HMRC’s decision that the appeal relates to and if the customer complies, HMRC includes the documentation in the bundle (this is my translation into literate English of what the note actually says).

30. I assume the reference to a request to provide the decision is a reference to the first entry in the document checklist in Part 12 of the Notice to Appeal (to the Tribunal). This in turn derives from Rule 20(2)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

31. Most appellants do comply with that requirement. But they do not often realise that by “decision” in Part 12 there is meant the notices of assessment of the penalties. That is not their fault as the Notice of Appeal does not make it plain at all, dealing as it has to with a multitude of “decisions” and with the word having different meaning in different places. Most appellants against direct tax penalties will include the reviewing officer’s decision or HMRC’s last letter as the Part 12 decision.

32. Why HMRC want the real decision to be included is so that the decision of Judge Richards in *Duncan* does not prevent the daily penalties from being applied. If the appellant files the SA326D for the initial penalty then that proves that they have been notified in accordance with paragraph 4(1)(c) Schedule 55 FA 2009.

33. The second paragraph of the Note to Tribunal refers to the fact that it is not practical or economic for HMRC to keep copies of the notice of assessment to penalties, and that the computer systems that HMRC have in place show a high probability that notices are posted. The record that HMRC does provide from their computer systems is I would say absolute proof that the assessment was made. But however high the probability that a notice was also sent, and the somewhat lower probability that it was sent to the right address, it does not matter in the individual case where the Court of Appeal has stressed the importance, in relation to the paragraph 4 Schedule 55 system with its extra safeguards included following responses to a major HMRC Consultation exercise, of notification of the daily penalties before assessment.

34. HMRC have addressed the question whether there were special circumstances, but have found none. They say they took into account that the appellant thought the lack of any correspondence from HMRC for over three years meant the appeal was accepted.

35. In my view HMRC give no reasons why that obviously uncommon and out of the ordinary happening is not a special circumstance. The decision is therefore flawed and I can remake it.

36. HMRC's letter of 28 November 2013 was intended to prevent the appellant exercising her right to ask for a review or to notify her appeal to the Tribunal. They told her that they would "finalise" (whatever that meant) the appeal when the outcome of *Donaldson* in the Upper Tribunal was known. That was in December 2014.

37. When HMRC contacted the appellant in March 2017 there was no explanation for their failure to keep their promise.

38. It is true that the out of the ordinary event, HMRC's failure to keep their promise and to remain silent for another two and a quarter years, did not lead to penalties being incurred when otherwise they would not have been (as happened in the case of Mr Morgan in *Morgan & another v HMRC* [2013] UKFTT 317 (TC)), but that it is not a limitation or condition for giving a special reduction.

39. I have also taken into account the understandable but mistaken view of the appellant that HMRC's silence for over two years after they promised to contact her meant that they had conceded her appeal.

40. I therefore substitute for the decision that the penalty for the 6 month failure is £300, a penalty of £100.

41. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 12 SEPTEMBER 2017

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