



TC06298

Appeal number: TC/2015/02940

INCOME TAX – Late Filing Penalties - Late Payment Penalties - Schedules 55 and 56 Finance Act 2009 - Illness of taxpayer - Death of family member - Involvement in other Tribunal proceedings - Whether a reasonable excuse? - No - Whether HMRC's failure to consider special circumstances renders decisions to penalise flawed in the light of the principles applicable to judicial review? - No, John Dee v CCE applied - HMRC's decisions would inevitably have been the same - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR SPENCER MARCUS LUND
trading as 'FANNY'S ALE HOUSE'**

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR DEREK ROBERTSON JP**

**Sitting in public at Tribunals Centre, Phoenix House, Rushton Avenue, Bradford
BD3 7BH on 3 January 2018**

The Appellant appeared in person

Ms Joanna Bartup, an Officer of HMRC, appeared for the Respondents

DECISION

1. By his Notice of Appeal dated 27 April 2015, Mr Lund appeals against multiple penalties for late filing and late payment which HMRC has imposed on him under Schedules 55 and 56 of the Finance Act 2009. These are in relation:

(1) To his failure to submit tax returns for three successive years - 2010/11, 2011/12, and 2012/13 - on time; and

(2) To his failure to pay the tax due for each of those years on time.

The Late filings

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2. There are 19 separate penalties, amounting to £14,042 (excluding interest). The calculation of these penalties is not challenged.

3. The filing dates for the relevant years were as follows:

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(1) for the year ending 5 April 2011: 31 October 2011 for a non-electronic (paper) return and 31 January 2012 for an electronic return;

(2) for the year ending 5 April 2012: 31 October 2012 for a non-electronic (paper) return and 31 January 2013 for an electronic return;

(3) for the year ending 5 April 2013: 31 October 2013 for a non-electronic (paper) return and 31 January 2014 for an electronic return

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4. It is not in dispute that the appropriate returns were all filed on 18 November 2014. It is not in dispute that the returns were all filed late: 10 months late for 2012/13; 22 months late for 2011/12; and 34 months late for 2010/11.

The Late payments

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5. There are 12 separate penalties, amounting to £16,563 (excluding interest). The calculation of these penalties is not challenged.

6. Pursuant to section 59B(4) of the *Taxes Management Act 1970*, the payment dates for those years were as follows:

(1) for the year ending 5 April 2011 = on or before 31 January 2012;

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(2) for the year ending 5 April 2012 = on or before 31 January 2013;

(3) for the year ending 5 April 2013 = on or before 31 January 2014.

7. It is not in dispute that payments were made late. It is not in dispute that payments were, for each year, made more than 12 months late.

Late Appeals

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8. In relation to the 19 separate penalties imposed for late filings, HMRC had identified 7 in relation to which the appeal was, in its view (and on the footing that the

appeal had been made more than three months after the penalty had been issued) out of time.

9. HMRC formally objected to the Tribunal dealing with the appeal insofar as it related to these 7 penalties, and drew attention to the principles articulated by the Upper Tribunal (Judges Berner and Falk) in *Romasave (Property Services) Limited v HMRC [2015] UKUT 254 (TCC)*.

10. However, Ms Bartup did not pursue that position at the hearing. That was a sensible and pragmatic stance to have taken.

11. Firstly, this was not a case in which only a single penalty was being appealed, or in which all the penalties were being appealed out of time. As such, this was not a case where the issue of timing was potentially determinative of the whole appeal.

12. Secondly, the appeals against all the penalties were advanced on the same basis. As such, in the circumstances of this appeal, and as a matter of case management, determination of whether any particular penalties were being appealed out of time would not have resolved the appeal definitively one way or the other. Even if the Tribunal had ruled the appeals against some penalties as out of time, the Tribunal would still have needed to resolve the substantive issue in relation to the remaining - in-time - appeals.

13. So, and in furtherance of the overriding objective, the Tribunal extended the time for appealing against all the penalties to 27 April 2015.

Late evidence

14. On the morning of the hearing, HMRC produced a further clip of documents, coming to about 20 pages. For the most part, they are copies of letters passing between Mr Lund's accountants and HMRC. That is to say, they are documents which should already have been available to Mr Lund from his advisers. All the documents postdate the late filings and late payments.

15. Having canvassed the views of the parties, we decided to admit those documents into evidence.

The Grounds of Appeal

16. Mr Lund argues that he has a reasonable excuse for all the late filings and late payments.

17. In summary, his Grounds of Appeal are:

(1) Diagnosis with cancer in 2003, followed by several years screening and testing for further developments;

(2) Involvement in proceedings in the Employment Tribunal and the Employment Appeal Tribunal in 2011 for 18 months;

(3) Death of his mother.

18. Overall, the Appellant argued that the above events left him devastated and unable to attend to his tax affairs.

Findings of Fact

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19. We heard from Mr Lund, and we have considered all the documents placed before us.

20. On the basis of the information and materials before us, and applying the usual civil standard of proof (the balance of probabilities) we make the following findings of fact:

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(1) Since the mid 1990s, Mr Lund has owned and been the proprietor of a public house in Shipley known as '*Fanny's Ale House*' ('**the Pub**');

(2) On 6 April 2011, a tax return for 2010/11 was issued to Mr Lund;

(3) On 14 February 2012, a late filing penalty of £100 was imposed;

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(4) On 6 April 2012, a tax return for 2011/12 was issued to Mr Lund;

(5) On 7 August 2012, a late filing penalty of £300 was imposed;

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(6) On 5 September 2012, Mr Lund wrote to HMRC that he had an accountant filling in the returns on his behalf, which would be submitted as soon as possible. Whilst no copy of this letter was put before us in evidence, it is referred to in HMRC's contemporary self-assessment notes.

(7) Mr Lund's step-mother died on 18 February 2013;

(8) On 6 April 2013, a tax return for 2012/13 was issued to Mr Lund;

(9) On 21 May 2013, Mr Lund incorporated '*Fanny's Ale House Limited*', with the assistance of an accountant;

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(10) The tax due for 2010/11 was determined on 4 November 2014;

(11) The returns for 2010, 2011 and 2012 were all received by HMRC on 18 November 2014;

(12) Those returns were received on paper and not electronically. HMRC recorded the method of 'capture' as 'LDC', meaning 'local document capture';

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(13) Between 27 January 2015 and 16 June 2015, Mr Lund paid HMRC £151,000.

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21. Given that it is not in dispute that the filings were late, and that the payments were late, then, subject to any considerations of 'reasonable excuse' and 'special circumstances', we find that the penalties imposed are due and have been calculated correctly.

Reasonable Excuse

22. The question for the Tribunal is whether Mr Lund had a reasonable excuse for the late filings.

23. Although there is no definition of "reasonable excuse" in the statute, its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd QC stated (in the analogous context of VAT penalties):

10 “ It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

15 24. We apply that test here.

25. In terms of his cancer, Mr Lund told us that at the beginning of the hearing that he '*basically felt as though he was being crucified for a terminal illness*'.

26. Mr Lund was diagnosed with a malignant tumour in December 2001. There was no other independent or third-party evidence as to the reappearance of cancer, which Mr Lund wrote had been in 2009, its treatment after 2009, or the effect of that treatment on Mr Lund. His oral evidence was that he had been given the all-clear in January 2013.

27. HMRC acknowledged that a sudden diagnosis of illness shortly before a return date could perhaps amount to a reasonable excuse for a late filing where the period of delay is a short one.

28. But that was not the case here. We do not consider the 2009 diagnosis to be a reasonable excuse for a failure to timeously file and pay for 2010/11 (when the due dates were October 2011 and January 2012). And, by the time Mr Lund got the all-clear in January 2013, an electronic return for 2011/12 would still have been in time, and no return for 2012/13 had even fallen due.

29. HMRC acknowledged the distress which the death of a close relative can bring, and acknowledged that a family bereavement could perhaps amount to a reasonable excuse for a late filing where the period of delay is a short one.

30. But that was not the case here. Mr Lund's mother died suddenly in February 2013. That was over a year after the date for a 2010/11 paper filing. That is, that return was already more than a year late. After her death, it was still almost 2 years before he filed his returns.

31. Mr Lund's case was that these events caused him to suffer from depression. This was mentioned in his accountant's letter dated 23 November 2014. However, there was no other independent or third-party evidence that Mr Lund suffered from this

condition. He had not consulted his GP, or been prescribed any medication. He told us that he did not like taking medicine. But, even if this was true, he had not gone back (for example) to his cancer support services to seek counselling or 'talking' therapy. As such, there was simply no evidence that any depressive condition from which he was suffering had genuinely impaired his ability to file his tax returns on time, or pay the sums due on time.

32. Although Mr Lund suffers from psoriasis, which he showed to us, we do not regard that condition as a reasonable excuse for non-filing. There was no evidence as to when this condition first arose. It was first raised in his accountant's letter on 23 November 2014. There was no evidence that the condition genuinely impaired his ability to file his tax returns on time, or pay the sums due on time. The same reasoning applies to the broken bone which Mr Lund suffered in 2011 and which put him on crutches for 15 weeks.

33. We are bound to have regard to facts and matters which are known to have taken place during the period when Mr Lund was supposed to be making tax returns and paying tax.

34. Mr Lund argued that he had been so despondent that he had considered getting rid of the pub entirely. But he had ultimately decided not to do so. He kept the pub. It is not clear what active role Mr Lund played. He employed full-time managers for the pub, and the pub was obviously being effectively managed throughout the relevant period. The tax calculations for Mr Lund show that the pub was producing a significant annual gross income for Mr Lund during this period: £105,912 (2010/11); £83,161 (2011/12); £110,373 (2012/13).

35. The pub had the services of a self-employed book-keeper. Mr Lund also had an agent acting for him with HMRC: an authority to act (Form 64-8) was received on 4 May 2012, and updated on 11 July 2013. The agent details were not removed until October 2014. In short, Mr Lund had professional book-keeping and accountancy assistance available to him throughout the relevant period.

36. Consistently with this, Mr Lund wrote to HMRC in September 2012 that he had an accountant filling in his returns, and that they would be submitted 'as soon as possible'. Unfortunately, that letter was not put before us, although it was recorded in HMRC's Self-Assessment notes, and Mr Lund accepted that letter had been written. But Mr Lund was unable to tell us who his accountant had been in September 2012, or why, if his returns were, as he had told HMRC, being filled in in September 2012, they were not then filed until mid November 2014 - over two years later. Mr Lund told us that he 'did keep stuff' and had 5600 emails. But not a single email which could have shed light on the situation was placed before us.

37. We do not consider that Mr Lund's involvement in Employment Tribunal proceedings amounts to a reasonable excuse for any of the late filings and payment. The pub employed 2 full time staff and 6 part-time staff. Even if the whole Tribunal experience was, as he described, *'devastating and with the payments very very upsetting'*, this does not amount to a reasonable excuse. Such proceedings, if they

arise, are simply something which employers must deal with as part of the ordinary course of running a business.

38. Moreover, Mr Lund had actively engaged with those proceedings (as the Defendant at first instance, and as the appellant on appeal) with the assistance of legal professionals (at least a barrister, and perhaps also solicitors). Although Mr Lund could not tell us the precise dates, and there was no documentary material before us concerning the Tribunal proceedings. But if, as Mr Lund says, they started in 2011, and went on for 18 months, then they will have spanned a large part of the period during which returns and payments were falling due, penalties were being issued, and indeed during which Mr Lund had told HMRC that his accountant was finalising his returns.

39. In our view, Mr Lund's involvement and engagement with the Employment Tribunal proceedings is good evidence that he was not genuinely incapacitated and unable to attend to business and tax affairs during this period, whatever other events were happening in his life. He was fighting the Employment Tribunal case hard, including through to an appeal (and he also mentioned a second appeal to the High Court, which he ultimately decided not to pursue).

40. Our conclusion on this point is reinforced by the fact that none of these events or conditions stood in the way of Mr Lund, during this same period of inactivity in relation to his tax affairs, incorporating a limited company, 'Fanny's Ale House Limited', on or about 21 May 2013. As he explained to us, that had been done with an eye to mitigating his tax liability, with professional assistance from an accountant, 'Kevin from Chesterfield' (whose surname Mr Lund could not remember), but who he had met at a charity ball in Helmsley 2 or 3 years earlier, and whose business card Mr Lund had kept.

41. Mr Lund and Kevin had met at least half a dozen times in 2012/13, at the pub, to discuss the incorporation of Mr Lund's pub business. Mr Lund could not remember whether he had discussed his personal tax affairs with Kevin. We find that difficult to accept. Mr Lund was a self-assessed individual taxpayer. On the face of it, his whole income came from his pub business. He wanted to incorporate that pub business: that is, he wanted to channel his personal income through the company. It would have been obvious common sense for any person in his position, taking advice from an accountant, to discuss their personal tax position. One good reason would be to make sure that their personal tax affairs were in order and up to date so as to 'clear the decks' before incorporation.

42. In our view, the evidence surrounding the incorporation of the company is further support for the conclusion that Mr Lund was in fact able to attend to business, notwithstanding any illness and other difficult events in his life.

43. Even after the incorporation of the company, there is then still a delay of about 18 months - until 18 November 2014 - until the returns were received. That delay is not satisfactorily explained.

44. The fact that Mr Lund eventually satisfied the underlying tax liability does not answer the point in these appeals. The penalties imposed because of failure to file are imposed because of failure to file, pure and simple. They do not depend on the sum of tax which is eventually assessed or determined. The penalties imposed for late
5 payment are imposed with reference to the amount of tax assessed or determined at the times that the penalties are imposed. In these instances, the tax eventually assessed was in excess of the tax earlier determined. Hence, there were balances to pay.

45. We also note that the earliest payment against the accrued tax liabilities - which reached about £185,000 - was not made until the end of January 2015. Prior to that,
10 nothing had been received for several years. Mr Lund did not put forward any reason why he could not simply have made, or arranged to be made, a payment electronically, for example by BACS. This would have taken minutes. There was no evidence that his condition was such that he was incapable of conducting his ordinary banking affairs. Moreover, such a payment would not necessarily even have required
15 a return, but could, for example, have been done on the basis of an estimate.

46. We do not place any weight on the fact that Mr Lund's tax affairs were already, as at 2010/11, in some disarray, and that he had failed to make filings for earlier years and determinations had been issued. We have approached this appeal entirely on the basis of what was happening in the relevant period, and not before.

20 47. In conclusion, we do not accept that Mr Lund has been able to demonstrate any reasonable excuse for any of the late filings, or any of the late payments.

Special Circumstances

48. The legal test which we must apply is whether HMRC has approached the
25 question of special circumstances in a way which can be shown to be flawed in the light of the principles applicable in proceedings for judicial review.

49. Ms Bartup acknowledged, candidly, that the first express reference to special
30 circumstances appears in HMRC's Statement of Case (24 July 2017). HMRC did not seem to have expressly considered the issue of special circumstances, as such, in its earlier decision-making (for instance, the letter of 14 January 2015, which is - put neutrally - extremely perfunctory) or its review (30 March 2015).

50. We were helpfully referred to the decision of the Tribunal (Judge Popplewell) in
35 *Qusted t/a Eyelevel Design Consultants* [2017] UKFTT 460 (TC) which (at Paragraph [20]) contains a useful summary of the principles applicable to special circumstances.

51. Guided by and applying those principles, even if we were to find that HMRC
40 had failed to consider whether Mr Lund's circumstances were special (in the accepted sense of exceptional, abnormal or unusual), and that failure rendered the penalties "flawed in the light of the principles applicable in proceedings for judicial review", that is not the end of the argument.

52. We consider that HMRC, looking at the information and material before us, would still inevitably have come to the same decision as it did: that is, we consider that HMRC would inevitably have refused a special reduction and would have upheld the penalties, and that that decision would have been a reasonable one to reach in a public law sense: see *John Dee Limited v Commissioners of Customs and Excise* [1995] STC 941 (Court of Appeal).

53. Therefore, we also dismiss the appeal insofar as it is advanced in relation to special circumstances.

Decision

54. The appeal is dismissed, and the penalties which are set out in the Tables in Paragraphs 5 and 6 of HMRC's Statement of Case dated 24 July 2017 are upheld.

55. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 9 January 2018