



**TC06554**

**Appeal number: TC/2015/04938**

*INCOME TAX – Penalties for failure to make self-assessment returns – HMRC’s failure to prove compliance with requirements of Schedule 55 Para 4(1)(c) – Daily penalties for two years quashed - Whether a reasonable excuse for the other penalties? – No – Whether special circumstances? – No – Whether penalties disproportionate? – No jurisdiction: HMRC v Boshier - Appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MISS CAROLINE BERRY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**

**Sitting in public at the Oxford Combined Court Centre, St Aldates, Oxford OX1  
1TL on Friday 1 June 2018**

**The Appellant’s husband, Mr Frederick Josland, appeared for the Appellant**

**Mrs Rosy James, a Litigation Officer, appeared for the Respondents**

## DECISION

1. The appellant appeals against penalties that HMRC has imposed on her under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns for the years 2010/11, 2011/12, and 2012/13 on time.
2. The penalties that have been charged can be summarised as follows.
3. For the year **2010/11**:
  - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 20 March 2012;
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 13 September 2012;
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 13 September 2012;
  - (4) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 28 March 2013.
4. For the year **2011/12**:
  - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 21 March 2013;
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 20 September 2013;
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 20 September 2013;
  - (4) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 3 April 2014.
5. In relation to the twelve month penalties, it is important for me to record that HMRC does not argue that these are due because of any deliberate withholding of information by the Appellant. The penalties are issued under Paragraph 6(5) of Schedule 55. This is not a case of dishonesty, or want of integrity, or any issues as to the Appellant’s character.
6. For the year **2012/13**:
  - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 18 February 2014;
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 18 August 2014;
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 18 August 2014;

7. The legislation is set out in the Appendix, and was also contained in the Authorities Bundle prepared for the hearing.

8. The Notice of Appeal dated 16 August 2015 refers to a sum of £5731.98. It is not obvious how that sum is arithmetically arrived at. It includes some interest. However,  
5 and as explained to the parties, and insofar as this appeal is advanced against interest, I have no jurisdiction.

9. One issue which arose at the beginning of the hearing was whether the appeal was in fact limited to the penalties imposed for the years 2010/11, 2011/12, and 2012/13, or whether it should be treated as an appeal also against penalties (amounting  
10 to £700) imposed in relation to late self-assessment filings for 2004/5, 2007/8, 2008/9, and 2009/10. Mr Josland indicated that he did wish those penalties to be considered as part of this appeal. I dismiss that application. All such appeals are well out of time. Even the latest penalty (imposed for 2009/10) was several years' old when the Notice of Appeal was filed (16 August 2015). Whilst I have jurisdiction to give permission for  
15 a late appeal, this is exercisable only where (amongst other matters) a good reason is put forward explaining the delay. In my view, no good reason has been put forward in this case. Accordingly, I refuse permission for those years to be appealed out of time.

10. A further issue which I must address, which arose during the hearing, concerns the daily penalties for 2010/11 (£900) and 2011/12 (£900). These were described on  
20 the Self-Assessment Statement for April 2015 (at page 113 of the bundle) as 'Suspended'. Miss Berry wrote a letter to HMRC on 3 July 2015 stating her belief that those penalties had been suspended. Reading between the lines, this seems to have been said in the sense that Miss Berry believed that those penalties were no longer being pursued. The Grounds of Appeal do not say anything about this.

25 11. Mrs James told me that the self-assessment statement in fact meant, although it did not expressly say, 'suspended *pending determination of the appeal*'. On balance, it seems to me that was correct. It is consistent with HMRC's internal notes (at pages 199 and 200 of the bundle) which show 'Collection Suspended' on 1 April 2015, as opposed  
30 to 'Penalty Cancelled'. The way in which this was described on the Self-Assessment Statement was perhaps not as clear as it could be, but I have decided that the true position was that those penalties were suspended pending determination of the appeal, and accordingly that those two particular penalties remain live and must be determined in this appeal.

12. The appellant's grounds for appealing are as follows:

35 *"It was acknowledged by telephone from HMRC in December 2014 that I should not have been defined as self-employed and therefore not required to complete an annual self-assessment return. I was advised that the only process for unravelling the history of penalties and interest charges was for me to submit retrospective annual returns which I did online. This confirmed that the actual  
40 tax owed amounted to around £150. The cumulative value of the fines and interest amount to almost £6000. I was further advised by HMRC that upon completion*

*of the tax returns, HMRC would then have the trail of information it needed to waive the penalties and associated interest.”*

13. This is supplemented by her letter of 28 January 2015, which says that she was a  
5 single parent bringing up 3 children, and:

*“I have for several years been afraid to address the question of tax. I do not fully  
understand the tax system but was assured by friends that my earnings were  
always within ‘personal allowance’ thresholds and that I wouldn’t be liable for  
tax on my small earnings. Stupidly, I have paid little attention to letters from  
10 HMRC believing that I had not earned enough to be liable for payments.”*

14. On 1 April 2015, the Appellant contacted HMRC and again said that friends had  
told her that she did not need to file a self-assessment return if her income was within  
the personal allowance.

15. Although the Appellant did not label her grounds either as reasonable excuse or  
15 as special circumstances, I treat her grounds as seeking to address both.

### **Findings of fact**

16. The Appellant has been in the self-assessment regime since 22 July 2004. She  
was originally described as a book-keeper, but latterly became a self-employed livery  
20 manager.

17. The Appellant made paper filings for years which were earlier than the ones  
giving rise to the penalties in this case. On 15 January 2008 she made paper filings for  
2004/5, 2005/6, and 2006/7. The filing for 2004/5 attracted a late filing penalty, but  
those for 2005/6 and 2006/7 did not, since there was no tax due for those years (which  
25 were under the pre-2009 rules where the amount of the penalty was geared to the  
amount of the tax).

18. On 23 July 2009, she made a paper filing for 2007/8. That filing was late and  
attracted a penalty.

19. Hence, the Appellant had some experience – in the years from 2005 to 2009 – of  
30 being in the self-assessment regime, of making filings, including for years where her  
income was below the personal taxation threshold, and of being penalised when her  
filing was late.

20. She did not file for 2010/11, 2011/12, 2012/13 until 28 January 2015. Those were  
all electronic filings. All were late. The filing for 2012/13 was just under 1 year late  
35 (the latest filing date for that year being 31 January 2014).

21. Miss Berry made those filings with the assistance of Mr Josland. He told me that  
he had become aware, two or three months earlier - that is to say, towards the end of  
2014 - of a large amount of post from HMRC, including letters which were unopened.  
He had then helped the Appellant to get her affairs in order.

22. The Appellant's filings for those years showed the following turnover, profit, and tax due:

- (1) 2010/11 – turnover £10,520; net profit £4,280; tax £0
- (2) 2011/12 – turnover £20,160; net profit £7,920; tax £151.55
- 5 (3) 2012/13 – turnover £14,016; net profit £4,416; tax £0

23. The net profit for two of those years was below the personal allowances then in force, resulting in no tax payable. However, the net profit for 2011/12 was above the personal allowance threshold then in force.

24. I do not know how these figures were arrived at - for example, whether Miss  
10 Berry kept books and records which would have allowed her, at the time, to calculate whether her net profit was over or under the personal allowance threshold.

25. But I am satisfied that the Appellant (i) was in the self-assessment regime for those years; and (ii) was appropriately in the self-assessment regime. She was in receipt of income, albeit modest. She was within the personal allowance for two of the years,  
15 but not the third. There is no exemption from filing self-assessment returns for those whose taxable income is below the personal allowance. Nor is there any exemption for those who are single parents with school age children.

26. Before the question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred  
20 as a result of which a penalty is, prima facie, due. Mere assertions in Statements of Case or at the hearing by Presenting Officers are not sufficient. Evidence is required, and, unless sufficient evidence is provided to prove the relevant facts relating to a particular penalty on the balance of probabilities, then that penalty must be cancelled without any question of 'reasonable excuse' becoming relevant: see the decision of the Upper  
25 Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC) at Para [69].

27. I am satisfied from HMRC's print-out that Notices to File under section 8 of the *Taxes Management Act 1970* were issued to the Appellant on 6 April 2011 (for  
30 2010/11); 6 April 2012 (for 2011/12); and 6 April 2013 (for 2012/13). I am satisfied that the Appellant was therefore obliged to file self-assessment returns for those years.

28. No issue is made as to service of those Notices to File, and Miss Berry's recorded address has been the same since 26 June 2008.

29. However, an evidential problem emerges here. The Notices to File (SA316) in the bundle before me in evidence are at pages 40-42. They are not copies of the actual  
35 notices to file sent to Miss Berry, but are generic.

30. In and of itself, that may not be an insuperable obstacle to HMRC meeting the burden of proof imposed on it. But, the SA316s for 2010/11 and 2011/12 put in evidence before me are both headed 'Draft September 2013' and, consistently with this, have '09/13' in the bottom right hand corner. The SA316 for 2012/13 has 09/15 in the

bottom right hand corner. That is to say, all of the generic Notices to File before me in evidence, on the face of it, post-date the actual Notices to File which (as I have found) were sent to Miss Berry at the time.

5 31. I canvassed this issue with Mrs James at the hearing. She was not able to tell me why the 2010/11 and 2011/12 notices said what they did in indicating that they were drafts from September 2013. But she submitted that I can be satisfied on the balance of probabilities that the SA316s before me contained the same information which would have been contained in the Notices to File which would have been issued at the time: including, critically, any information as to the penalties for filing late, and the daily  
10 penalties so as to constitute notice for the purposes of Schedule 55 Paragraph 4(1)(c).

32. Whilst I am satisfied that Notices to File were issued, I cannot be satisfied as to what was in them and whether they gave the appropriate statutory notice. I am not prepared to speculate. I do not accept HMRC's submissions on the point, which are not evidence.

15 33. This is a point which assumes importance in relation to the daily penalties charged for each of these years, since, as a matter of law, I need to be satisfied that HMRC has met the basic legal requirements to charge penalties, and in particular that HMRC has served a notice of the kind referred to in Schedule 55 Paragraph 4(1)(c). Whilst this is not a point raised by the Appellant in support of her appeal, these are penalty appeals,  
20 and HMRC still bears the burden: see *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC)

34. This means that I must turn to consider the other documents in the file.

35. There is evidence that £100 late filing penalties were imposed on 14 February 2012; 12 February 2013; and 18 February 2014.

25 36. In the bundle, there are Notices SA 326 – 'Self Assessment: Late tax return Notice of Penalty Assessment' and Notices SA 327 – 30 day and 60 day daily penalty letters.

37. Generic copies of these are in the bundle: at pages 93 – 102:

- (1) Pages 93/4 – SA326D – May 2011, October 2011 release, but no tax year populated;
- 30 (2) Pages 95/96 – SA326D – dated 14 February 2012 for 2010/11;
- (3) Pages 97/98 – SA326D – 07/15 in the sidebar, but no tax year populated;
- (4) Page 99 – SA327-30 – marked 10/11 relating to tax year 2010/11;
- (5) Page 100 – SA327-60 – marked 10/11 relating to tax year 2010/11
- (6) Page 101 – marked 08/11 for tax year 2010/11.

35 38. In relation to 2010/11, I am satisfied that HMRC gave appropriate notice for the purposes of Paragraph 4(1)(c) in relation to daily penalties. HMRC's internal records can be cross-referenced to the generic documents, and, on balance, I am find that those documents do reflect the information which was sent to Miss Berry at the time. This is

because the marking of those documents (unlike the Notices to File) show them to have been current at the appropriate times.

39. However, I am not so satisfied for 2011/12. I have already expressed my conclusion in relation to the Notice to File for this year. On the evidence before me, I do not know, and hence cannot assess whether the notices actually sent to Miss Berry were in accordance with Paragraph 4(1)(c), and I not prepared to speculate. That is an evidential deficiency which is incapable of being cured by section 114 of the *Taxes Management Act*. I cannot use notices from 2010/11 to guess at the content of notices in 2011/12.

40. Accordingly, the £900 daily penalties for 2011/12 cannot stand, and are quashed.

41. Nor, for similar reasons, can I be so satisfied for 2012/13. I have already expressed my conclusion in relation to the Notice to File for this year. Again, on the evidence before me, I do not know, and hence cannot assess whether the notices actually sent to Miss Berry were in accordance with Paragraph 4(1)(c), and I not prepared to speculate. The generic notices for 2010/11 do not help me. Accordingly, the £900 daily penalties for 2012/13 cannot stand, and are quashed.

### **Reasonable Excuse**

42. I have set out the Appellant's arguments above.

43. I do not accept that she had a reasonable excuse for any of the late filings.

44. On her own evidence, she was deliberately ignoring letters from HMRC.

45. I reject the suggestion that Miss Berry believed that she was no longer in the self-assessment regime. She had been in the regime for several years from 2004, and had been making self-assessment returns. For at least two of those earlier years, she had made returns even though her taxable income was within the personal allowance. That is known from the fact that no penalties were charged. She continued to receive Notices to File from HMRC. Against this background, I cannot accept that the Appellant at some time came to believe, even though her circumstances had not changed, that she was no longer in the self-assessment regime. She did not consult an accountant. She did not consult HMRC. I do not accept that she relied on the beliefs of her friends. But, even if she had done, that was not, in the circumstances, an objectively reasonable thing to have done.

46. The Appellant remained self-employed and economically active in the years which give rise to this dispute. She was making a decent, if modest, income, fluctuating around the personal threshold, depending on the size and treatment of her expenses.

47. There was no evidence before me indicating that she was genuinely incapable of dealing with her tax affairs during this period, or of getting someone else to deal with them on her behalf. The turning point seems to have come with the involvement of Mr Josland in late 2014.

48. My impression is that Miss Berry was telling the truth when she said that “*I have for several years been afraid to address the question of tax.*” Fear of the taxman is not a reasonable excuse. In my view, and put colloquially, she was sticking her head in the sand. Mr Josland told me, and I accept, that much correspondence was not even opened, let alone read or understood. But ignoring it did not make the situation go away or get better.

49. I reject the suggestion that Miss Berry was told by HMRC that she should not have been in the self-assessment regime at all for the years which are the subject matter of this appeal. There is no evidence that she was ever told this by anyone at HMRC, and it makes no sense given that Notices to File were being issued. The fact that there is a record that Miss Berry's Self Assessment record may have been closed on 28 January 2015 'following automatic selection' (at page 38 of the bundle) is not relevant, because it post-dates the filing due dates.

50. Mr Josland, speaking on Miss Berry's behalf, told me that the 'catch-up exercise' had been discussed with HMRC, which was helpful and sympathetic, but that Miss Berry and he still believed that the only route to deal with the penalties was an appeal to this Tribunal. Indeed, Mr Josland told me “*the official said that you will need to apply to get the penalties removed*”. That was right, and that is what has happened, and why the hearing before me was held.

51. The difficulty which Miss Berry faced in early 2015 was that she had failed to file several successive years' worth of self-assessment returns when she should have done. Her obligation to file had not gone away. The effect of filing those returns was simply going to bring her into conformity with the law, in that she would then have filed returns. But it was not going to deal with the penalties.

52. Whilst I recognise that she was working hard to keep a roof over the head of her and her children, I do not accept that her matrimonial status or her parenting responsibilities can amount to reasonable excuses for late filing. These did not stand in the way of her continuing to undertake self-employment in various roles, leading to the turnover detailed above.

### 30 **Special circumstances**

53. HMRC does not seem to have explicitly considered special circumstances. However, it does not seem to me that this renders its decision in relation to the penalties flawed in a public law sense. Miss Berry advanced her circumstances, which I have concluded do not amount to reasonable excuse. As such, I do not consider that the failure to consider these as special circumstances would ultimately make any difference to the analysis.

### **Proportionality**

54. Removal of two £900 penalties reduces the aggregate penalties to £2,700. This is against a tax liability of £150 for the years in question, as detailed above. Against this background, it has been argued that the penalties are disproportionate.



55. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate.

56. Moreover, Parliament has, in Paragraph 23(2) specifically limited the Tribunal's power to reduce penalties because of the presence of 'special circumstances' and, elsewhere in this decision, I have already considered that question.

57. Therefore, for reasons similar to those set out in *HMRC v Boshier* [2013] UKFTT 01479 (TCC) I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

## 10 **Conclusion**

58. For the above reasons:

(1) I confirm the penalties for 2010/11, amounting to £1600;

(2) I quash the daily penalties of £900 for the year 2011/12, but confirm the other penalties imposed for that year, amounting to £700;

(3) I quash the daily penalties of £900 for the year 2012/13, but confirm the other penalties imposed for that year, amounting to £400;

(4) Insofar as interest on the quashed penalties is payable, HMRC shall recalculate accordingly.

## 20 **Application for permission to appeal**

59. 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.

30 **DR CHRISTOPHER MCNALL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 22 JUNE 2018**

## APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

5 2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

10 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

15 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

20 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

25 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- 5 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- 10 (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

- 15 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- 20 (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

- 25 (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

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

(2) For the purposes of sub-paragraph (1)—

- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

5

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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16—

(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, or

15

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

20

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

25

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

30

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

35

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

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(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

1.