



TC06774

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Appeal number: TC/2015/04813

10 *INCOME TAX –Whether reasonable excuse for the late submission of Self-Assessment Tax returns for 2010-2011, 2012-2013. No, Initial late filing penalties levied under paragraph 3 of Schedule 55 confirmed. Whether daily penalties under paragraph 4 of Schedule 55 were correctly imposed. Yes. Whether penalties levied under paragraphs 5 and 6 were correctly imposed – No*

15 **FIRST-TIER TRIBUNAL
TAX CHAMBER**

SCOTT ANTHONY JAGGER

Appellant

- and -

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

Respondents

20

**TRIBUNAL: PRESIDING MEMBER:
PETER R SHEPPARD
MEMBER: SUSAN STOTT**

Sitting in public at Wellington House, Wellington Street, Barnsley on 26 February 2018

25 **The Appellant in person**

Richard Kelly, Officer of HMRC, for the Respondents.

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DECISION

Introduction

5 1. This considers an appeal against penalties totalling £3,200 imposed by the
respondents (HMRC) under Schedule 55 Finance Act 2009 for the late filing by the
appellant of his Self-Assessment Tax returns for 2010/2011 (£1,600); and 2012/2013
(£1,600). In the appellant's Notice of Appeal the amount stated as being appealed
10 against is "£3,807.70". It is clear that penalties totalling £3,200 had been levied on the
appellant by HMRC for the stated years. These are detailed below. This leaves a balance
of £607.70 which needs explanation. In a letter attached to the Notice of Appeal the
appellant refers to a statement he received from HMRC in March 2015 which advised
him that £3,878.03 was outstanding. In the bundle of papers before the Tribunal was a
15 Self-Assessment statement dated 7 February 2018 which shows an outstanding balance
of £3,491.43 which includes penalties of £1,500 from 2010/2011 and penalties of
£1,600 from 2012/2013, interest on unpaid penalties for 2010/2011 of £232.19; and
interest on unpaid penalties for 2012/2013 of £153.61; and sundry other items. At the
hearing it was said that the amount then outstanding was £3,436.33. There was no clear
20 explanation of how the amount of £3,807.70 was made up. The Tribunal proceeded on
the basis that should it allow any appeal against a penalty in whole or in part this should
lead to a reduction of the interest said to be due.

Preliminary matter

2. Towards the end of the hearing the appellant advised that during the morning
25 before the hearing he had telephoned the HMRC helpline. During that call he was
advised that his 2008/2009 self-assessment tax return was still outstanding. The
appellant considered he had already sent this return to HMRC twice. Mr Kelly
confirmed that there were no penalties outstanding in respect of that tax year. During
the discussions it became evident that the appellant had been given two different Unique
30 Taxpayer Reference numbers (UTR). Mr Kelly had no information with him to make
comment. The Tribunal was concerned that HMRC's SA notes that had formed part of
the considerations at the hearing related to only one of the UTR's. SA notes on the other
UTR may reveal telephone calls which the appellant submits he made, but did not
appear on the record, particularly a call in December 2013 to advise a change from self-
35 employment to employed status. If another set of SA notes relating to the other UTR
exists these might explain some of the missing tax returns which the appellant is
adamant he has sent.

3. The Tribunal therefore directed that HMRC check their records to confirm there
were two UTR's issued to the appellant and if so whether they have records for the
40 second UTR which were not presented to the Tribunal and which might help to confirm
whether or not returns had been received, whether or not telephone calls had been
logged, and whether or not the penalties should have been levied. HMRC were directed
to report their findings to the Tribunal, with a copy to the appellant at the latest by four
weeks after the date of those directions.

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4. HMRC responded to the directions by confirming that for some unexplained reason the taxpayer had been issued with two UTR²s. The one for which Mr.Kelly had the records for at the hearing covered the period from 2009 onwards. The other UTR covered the period before 2009.

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5. HMRC reported that they had checked their records for both UTRs and confirmed that the appellant's 2008/2009 return has not been received. However the records also show that there are no outstanding penalties for the 2008/2009 year. They reported that there was only one telephone call recorded on the SA notes and this showed that the appellant contacted HMRC on 17 January 2011 and was advised that the 2008/2009 and 2009/2010 tax returns had been sent back to him in November 2010 because they were incomplete. The appellant had advised that his net profit was below the personal allowance for 2008/2009 and 2009/2010.

6. As no penalties are outstanding for the 2008/2009 tax year HMRC consider there is no appealable matter for the 2008/2009 year. That being the case the Tribunal has proceeded to consider the appeal against the penalties for the late submission of the appellant's tax returns for 2010/2011 and 2012/2013 only.

Legislation

Finance Act 2009 Schedule 55
Taxes Management Act 1970, in particular Section 7, 8, 12AA, 31, 49, and 115
Interpretation Act 1978 in particular Section 7.
Civil Evidence Act 1995, in particular Sections 8 and 9

Case law

Crabtree v Hinchliffe [1971] 3 All ER 967
David Collis v HMRC [2011] UKFTT 588 (TC)
HMRC v Hok Ltd [2012] UKUT 363 (TCC)
The Clean Car Company Ltd v Customs and Excise [1991] VATTR 234
Liutauras Skorobogovas [2017] UKFTT 305 (TC)
Christiano Biazussi v HMRC [2017] UKFTT 763 (TC)
David Hesketh and Jennifer Hesketh v HMRC [2017] UKFTT 871 (TC)
William Andrew Tinkler [2016] UKFTT 170 (TC)
Patrick Carr v HMRC [2017] UKFTT 863 (TC)
Christine Perrin v HMRC [2018] UKUT 156 (TC)
D R Sudall v HMRC [2017] UKFTT 404 (TC)
Keith Donaldson v HMRC [2016] EWCA Civ 761
Rowland v HMRC (2006) STC (SCD) 536

Facts

7. Schedule 55 of the Finance Act 2009 ("the Schedule") makes provision for the imposition by HMRC of penalties on taxpayers for the late filing of tax returns.

8. If a person fails to file an income tax return by the “penalty date” (the day after the “filing date” ie the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

9. Paragraph 4 of the Schedule provides:

- 5 “(1) A person is liable to a penalty under this paragraph if (and only if)–
- (a) The 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
 - 10 (c) HMRC give notice to the person specifying the date from which the penalty is payable.”
- (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).”

10. Paragraph 5 of the Schedule provides:

- 15 “A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.
- The penalty under this paragraph is the greater of –
- 5% of any liability to tax which would have been shown in the return in question,
 - 20 and
 - £300”.

11. Paragraph 6 of the Schedule provides:

- “A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 12 months beginning with the penalty date.
- 25 a. The penalty under this paragraph is the greater of –
- i. 5% of any liability to tax which would have been shown in the return in question, and
 - ii. £300”.

30 12. Paragraph 1(3) of the Schedule states:

“If a person’s failure falls within more than one paragraph of this Schedule, a person is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17 (3)).”

35 13. Paragraph 17 (3) states:

“Where a person is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed [the relevant percentage] of the liability to tax”.

5 14. Paragraph 17 (4) states “The relevant percentage is

- (a)....
 - (b)....
 - (ba)...
- In all other cases 100%.”

10

15. The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

15 16. The appellant has changed address within Barnsley many times over the past 15 years. HMRC have recorded ten different addresses since 2003. The table below shows the last six of these addresses because these changes were relevant for events covered by this appeal.

Address	Start date advised by appellant	End date advised by appellant	Start date recorded by HMRC	End date recorded by HMRC
18 Rockingham Court	2 May 2008	10 Apr 2010	13 May 2008	7 Jul 2010
75 Pitt Street West	10 Apr 2010	24 Jun 2011	7 Jul 2010	30 Sep 2011
1 Elim Mews	24 Jun 2011	27 Jul 2012	30 Sep 2011	26 Jul 2012
37 Oakwell Vale	27 Jul 2012	27 Jul 2013	26 Jul 2012	30 Jul 2013
8 Calverley Gardens	27 Jul 2013	10 Dec 2013	30 Jul 2013	22 Jan 2015
48 Parkland View	10 Dec 2013	present	22 Jan 2015	

17. In this case in respect of the tax year ended 5 April 2011 penalties totalling £1,600 were levied by HMRC.

20 18. HMRC say they issued a notice to file to the appellant on 7 July 2011. The filing date for a non-electronic return was 31 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant’s paper return was received by HMRC on 23 April 2015.

25 19. As the return was not submitted by the filing date of 31 January 2012 HMRC issued a notice of penalty assessment on or around 14 February 2012 in the amount of £100. HMRC say that this was sent to the 1 Elim Mews address.

20. On 23 May 2012 the appellant telephoned HMRC and was advised of the penalties and was advised to complete the returns.
21. On 5 June 2012 HMRC sent a 30-day daily penalty reminder letter to the Appellant. HMRC say that this was sent to the 1 Elim Mews address.
- 5 22. On 3 July 2012 HMRC sent a 60-day daily penalty reminder letter to the Appellant. HMRC say that this was sent to the 1 Elim Mews address.
23. As the return had still not been received three months after the penalty date of 1 February 2012, HMRC issued a notice of daily penalty assessment of £900 on or around 7 August 2012, calculated at £10 per day for 90 days (1 May 2012 to 29 July 2012 is 10 90 days). HMRC say that this was sent to the 37 Oakwell Vale address.
24. As the return had still not been received six months after the penalty date of 1 February 2012, HMRC issued a notice of six month penalty assessment of £300 on or around 7 August 2012. HMRC say that this was sent to the 37 Oakwell Vale address.
25. As the return had still not been received twelve months after the penalty date of 1 February 2012, HMRC issued a notice of twelve month penalty assessment of £300 on 15 or around 19 February 2013. HMRC say that this was sent to the 37 Oakwell Vale address.
26. In respect of the tax year ended 5 April 2013 penalties totalling £1,600 were levied by HMRC.
- 20 27. HMRC say they issued a notice to file to the appellant on 6 April 2013. The filing date for a non-electronic return was 31 October 2013 whereas for an electronic return the filing date was 31 January 2014. The appellant's paper return was received by HMRC on 23 April 2015.
28. As the return was not submitted by the latest filing date of 31 January 2014, HMRC 25 issued a notice of penalty assessment on or around 18 February 2014 in the amount of £100. HMRC say that this was sent to the 8 Calverley Gardens address.
29. On 3 June 2014 HMRC sent a 30-day daily penalty reminder letter to the Appellant. HMRC say that this was sent to the 8 Calverley Gardens address.
30. On 1 July 2014 HMRC sent a 60-day daily penalty reminder letter to the appellant. 30 HMRC say that this was sent to the 8 Calverley Gardens address.
31. As the return had still not been received three months after the penalty date of 1 February 2014, HMRC issued a notice of daily penalty assessment of £900 on or around 18 August 2014, calculated at £10 per day for 90 days (1 May 2014 to 29 July 2014 is 90 days). HMRC say that this was sent to the 8 Calverley Gardens address.
- 35 32. As the return had still not been received six months after the penalty date of 1 February 2014, HMRC issued a notice of six month penalty assessment of £300 on or

around 18 August 2014. HMRC say that this was sent to the 8 Calverley Gardens address.

5 33. As the return had still not been received twelve months after the penalty date of 1 February 2014, HMRC issued a notice of twelve month penalty assessment of £300 on or around 24 February 2015. HMRC say that this was sent to the 48 Parkland View address.

10 34. HMRC supplied a copy of their internal record showing the dates of issue of the returns and the penalty notices. Copies of the actual notices were not provided so the Tribunal had no opportunity to check the date of issue, the amount levied, and to what address they had been sent.

35. On 1 April 2015 the appellant telephoned HMRC to query the outstanding self-assessment returns and how to appeal the penalties.

36. On 19 April 2015 the appellant appealed to HMRC against £1,500 of the 2010-2011 penalties. He attached a letter of the same date which included the following:

15 “I completed and submitted my 2010-2010 tax return in August 2011. The documents were sent by first class Royal Mail. Unfortunately, I did not send them recorded delivery as I believed they would reach you.

20 The first I knew of any outstanding tax returns was when I received a letter/ statement in March 2015 advising me that I owed £3,878.03. I then called the help line number several times before getting through to an advisor who advised me that you had not received my tax returns for: 2008-2009, 2009-2010, 2012-2013 and 2013-2014. I was advised to re-submit the returns along with an appeal form.

25 I also called the helpline for a break-down of the penalties in order to complete the appeal forms, when I told the advisor I was no longer self-employed the young lady advised me that this was not recorded in my notes.

This got me thinking of what other information may not have been recorded. I called the helpline in December 2013 to advise them that I had become employed and have called them over the years with changes to my address.”

30 37. The appellant then gives details of his six addresses from 2 May 2008 to date as shown in the table above. The letter continues:

“I have now completed the outstanding returns, which are enclosed and have been sent by Royal Mail Recorded Delivery to enable me to track that you receive the documents.

35 Throughout the periods that I was self-employed there has not been any outstanding tax balances to be paid so the £3,878.03 is made up fully by late submission charges and penalties...

... Having to pay the penalties will be extremely difficult and will cause us financial strain ...”.

5 38. HMRC took this as an appeal against the penalties for both 2010-2011 and 2012 - 2013. They replied in two letters both dated 20 July 2015 saying that the appeal was out of time in respect of both tax years.

10 39. During the hearing the Tribunal raised a query over whether paragraphs 1(3) and 17(3) of Schedule 55 should apply. It was accepted that the tax due by the appellant in both tax years was nil. The question was whether or not the penalties levied under paragraphs 5 and 6 of Schedule 55 had been determined by reference to a liability to tax. HMRC asked if they could make written submissions on the point after the hearing. The Tribunal therefore issued directions that each party should make written submissions on the matter.

Appellant's submissions

15 40. The appellant appealed to the Tax Tribunal on 12 August 2015. In the grounds of appeal the appellant wrote:

20 “I completed and submitted my 2008-2009, 2009-2010, 2010-2011, 2012-2013 tax return between June and August of the particular financial year. Unfortunately I do not recall specific dates and times and over the course of moving home some of my accounts/ HMRC documents have been misplaced or damaged. The documents were sent by first class Royal Mail. Unfortunately I did not send them recorded delivery as I believed they would reach you.....”.

41. The letter then continues by repeating the appellant's letter to HMRC dated 19 April 2015 as set out above.

25 42. The appellant submitted that he had been self-employed as a taxi driver but in both 2010/11 and 2012/13 his income was less than the personal allowance, therefore no tax was due in either year.

43. At the hearing the appellant stated that he had never received any of the 2010/2011 penalty notices said to have been sent to the 1 Elim Mews address. He said that he had experienced postal problems because it was a new address.

30 44. The appellant said that he was not convinced that HMRC update change of address notifications as quickly as they have indicated. He said that on the SA notes provided there is indication that he telephoned HMRC on 20 June 2011. It was in that telephone call that he notified his change of address from 75 Pitt Street West yet HMRC did not record the new address at 1 Elim Mews until 30 September 2011.

35 45. The appellant stated that he telephoned HMRC in December 2013 to advise that he started employment on 10 December 2013. This call was not included in the SA notes. He therefore considered the SA notes to be unreliable.

46. In respect of the directions issued by the Tribunal the appellant said that he considered the wording of section 17 (3) has the effect that the aggregate of the 6 month and 12 month penalties each of £300 should not exceed the liability to tax so should be reduced to nil.

5 **HMRC's submissions**

47. HMRC say that the appellant originally appealed against the penalties for tax years 2008/09, 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14. However the penalties for the 2008/09, 2009/10, 2011/12, and 2013/14 years have since been removed by HMRC so the appeal concerns the 2010/11 and 2012/13 penalties only.

10 48. HMRC say the appellant has not disputed receipt of a notice to file for either of the tax years 2010/2011 and 2012/2013

15 49. HMRC say that although the appellant says in his grounds of appeal that he submitted returns between June and August for each financial year, their records show no receipt of returns in those time frames. The paper returns for both 2010/2011 and 2012/2013 were received on 23 April 2015.

20 50. HMRC say that the appellant has not provided any documentary evidence, such as recorded postal delivery, to show the returns had been submitted on time and to the correct address. Having been issued, in accordance with the Taxes Management Act 1970, with a tax return for the years in question the appellant was obligated to submit those returns.

51. HMRC say all notices and letters have been sent to the appellant's most recent address. They say that the terms of Section 7 of The Interpretation Act provides that "service is deemed to be effected by properly addressing, pre-paying and posting a letter....unless the contrary is proved...".

25 52. HMRC say penalty notices are sent to the appellant's address on file at the relevant time. There is no obligation on the appellant to update his address with HMRC; however, HMRC can only send notices to the address provided by the appellant. If a taxpayer does not update their address with HMRC, HMRC will continue to send notices to the address on file.

30 53. HMRC point out that when cross referencing the appellant's addresses stated in the appellant's grounds for appeal and the addresses held on HMRC's system it can be seen that the penalty notices for the 2012/13 were sent to 8 Calverley Gardens whereas the appellant states his address as 48 Parkland View for this period.

35 54. HMRC state that their records show that the appellant did not update his address until 22 January 2015 and therefore the notices were sent to the last known address. They point out that Section 115 of the Taxes Management Act 1970 states that service of any notice may be delivered to a person at his last known place of residence. Therefore, on this basis HMRC contend that the penalty notices have been served on the appellant and are therefore valid.

55. In the bundle of papers provided before the hearing HMRC included;

- A specimen Self Assessment Tax return and payment reminder form SA309A bearing the words HMRC 07/11.
- 5 • A specimen Self Assessment Late tax return Notice of penalty assessment of £100 form SA326D bearing the words HMRC 02/12.
- A specimen Self Assessment: Late tax return Daily penalty reminder form SA372-30 bearing the words HMRC 10/11.
- A specimen Self Assessment: Late tax return Daily penalty reminder form SA372-60 bearing the words HMRC 10/11.
- 10 • A specimen Self Assessment Notice of penalty assessment form SA370 bearing the words HMRC 08/11.

56. HMRC say there is no statutory definition of reasonable excuse. They drew attention to the statements by Judge Medd in the *Clean Car Co Ltd v HMRC*. His decision included:

15 *“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?”*

20 57. HMRC submit the penalties are not disproportionate and they are neither harsh nor plainly unfair.

58. In respect of paragraphs 1 (3) and 17 (3) of Schedule 55 in accordance with the Tribunal’s direction HMRC sent written submissions to the Tribunal.

59. After setting out the relevant legislation HMRC submissions included:

25 “The point raised by the Tribunal is that as the Appellant’s tax liability for both years is nil, and as the respondents observed the tax liability in order to determine whether the penalty should be raised under either 2 (a) or 2(b) of paragraph 5, and either 5 (a) or 5(b) of paragraph 6, paragraph 17 (3) then applies to reduce both penalties of £300 to zero.”

30 It is not disputed that the appellant’s tax liability for the years under appeal is nil.

60. HMRC submit that the Tribunal’s suggestion is contrary to a literal reading of paragraphs 5(2), 6(5) and 17(3) – in particular, the distinction between penalties issued under (a) and (b) of paragraphs 5(2) and 6(5)

61. In the Appellant's case, the penalties were raised under paragraph 5(2)(b) and paragraph 6(5)(b) of Schedule 55, as once the appellant's return was received which showed a tax liability of £0, £300 was the greater sum.

5 62. Paragraph 17(3) applies only to penalties which are "*determined by reference to a liability to tax*" [emphasis added]. Neither paragraph 5(2)(b) nor paragraph 6(5)(b) make any mention of a liability to tax.

63. Although the tax liability is observed in order to decipher whether 2(a) or 2(b) of paragraph 5 applies, and similarly whether 5(a) or 5(b) of paragraph 6 applies, penalties issued under paragraph 5(2)(b) and paragraph 6(5)(b) are not ultimately determined by reference to a liability to tax; they are fixed statutory penalties of £300 and therefore 10 paragraph 17(3) does not apply to reduce the penalties to zero.

64. A penalty issued under paragraph 5(2)(b) or paragraph 6(5)(b) of Schedule 55 should, as far as statutory interpretation is concerned, bear no distinction to a penalty issued under either paragraph 3 or paragraph 4. Each penalty is a pre-determined fixed 15 penalty which arises if P has failed to submit a return by each paragraph's respective penalty date.

65. The Tribunal has acknowledged that paragraph 17(3) does not apply to penalties raised under paragraph 3 or paragraph 4, and therefore on a literal reading of paragraphs 5 and 6, there is no reason why paragraph 17(3) should apply to penalties raised under 20 paragraphs 5(2)(b) and 6(5)(b).

66. If the legislation were to be interpreted as the Tribunal is suggesting, it would create a situation where it would be advantageous for a taxpayer with a nil tax liability to submit their return later rather than sooner. Paragraph 17 (3) applies where a penalty which is determined by reference to a liability to tax is issued under more than one 25 paragraph of Schedule 55. A taxpayer with a nil tax liability, facing a penalty of £300 under paragraph 5, could then delay submitting their return until a penalty would also become due under paragraph 6. In the knowledge that no penalties would be due as paragraph 17(3) would then reduce both penalties to zero. This, the respondents argue, is contrary to the intentions of the legislation, which is to penalise for further delay and 30 non-compliance.

67. Further to the respondents argument above, it cannot have been Parliament's intention that a taxpayer should be liable to penalties under paragraphs 3 and 4, which cannot be mitigated due to that taxpayer not being liable to tax, only for that taxpayer to escape penalties under paragraphs 5 and 6 because they are not so liable to tax. 35 Penalties under paragraphs 5 and 6 are issued for the most serious delays – 6 months and 12 months respectively – and therefore require more stringent consequences if a return is not submitted by their respective penalty due dates.

68. By creating two possibilities of a penalty under paragraphs 5(2) and 6(5) Parliament intended that, at the very least, a penalty of £300 should be payable under 40 each paragraph in the absence of a return. This is necessary in order to encourage compliance, which is the key function of the penalty regime.

69. The penalties issued under paragraph 5(2)(b) and paragraph 6(5)(b) of Schedule 55 are fixed penalties pre-determined by Parliament, not by reference to any liability to tax.

70. In respect of the late filing penalties HMRC has considered special reduction under ~~(paragraph 16 Schedule 55 of the Finance Act 2009.)~~ They refer to the case of *Crabtree v Hinchcliffe*. HMRC say that in considering whether there are special circumstances they have considered the reasons put forward by the appellant. HMRC say that during their review of the late filing penalties they noted no special circumstances which would merit a reduction in the penalty.

10 Tribunal's Observations

71. In respect of the appellant's complaint that the level of the penalties will cause him extreme difficulty and financial strain the Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power to amend them unless they are incorrectly imposed or they are inaccurately calculated.

15 72. In *HMRC v Hok Ltd* the Upper Tribunal at paragraph 36 said

20 "...The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of the perception that it is unfair."

25 73. There was no dispute that the returns were submitted late. The appeal is therefore concerned with whether or not the appellant had reasonable excuse for not submitting his self-assessment returns for 2010-2011, and 2012/13 by the due dates.

30 74. There is no definition of reasonable excuse. HMRC refer to what they consider the actions of a taxpayer should be when considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. This wording reminded the Tribunal of what his Honour Judge Medd OBE QC wrote in *The Clean Car Company Ltd v The Commissioners of Customs and Excise*. He wrote:

35 *"It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were*
40 *accurate and made timeously, his age and experience, his health or the incidence*

of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse....”.

5 75. It appears to the Tribunal that the appellant’s only submission on reasonable excuse is that he did not receive the notices of the penalties. The penalties are the result of not submitting a return on time. The reasonable excuse must be a reasonable excuse as to why the return was not submitted on time. There is no suggestion that the appellant did not receive the returns. He has submitted that he sent them on time but has not submitted any evidence in support. The Tribunal has no alternative but to conclude that the
10 appellant has not established a reasonable excuse for the late submission of the returns.

76. The Tribunal has considered whether the penalties have been levied in accordance with legislation.

15 77. In respect of the initial late filing penalty of £100 levied by HMRC in each of the tax years 2010/2011 and 2012/2013, the appellant says that he sent the returns on time but HMRC did not receive them. HMRC say the appellant has produced no evidence to show that he posted the returns for example by recorded delivery.

78. Because of this lack of evidence the Tribunal is unable to accept that the returns were submitted on time and therefore the appeal against the late filing penalties of £100 for each of the tax years 2010/2011 and 2012/2013 is dismissed.

20 79. The Notice of the £100 penalty for the late filing of the appellant’s 2010/11 tax return was sent to him on 14 February 2012 at what the appellant has confirmed was his correct address of 1 Elim Mews.

25 80. In respect of the daily penalties for 2010 /2011, HMRC say they sent 30 day and 60 day penalty reminder letters to the appellant at his address at 1 Elim Mews on 5 June 2012 and 3 July 2012 respectively. The appellant has confirmed that this was the correct address for him at that time but he was experiencing postal difficulties as this was a new address. The Tribunal notes that the notices were not sent by HMRC by recorded delivery. The notices were not returned to HMRC as undelivered.

30 81. The Tribunal regards it as possible that one of the communications could have failed to reach the appellant but considers it much more difficult to accept that the initial filing penalty notice, the 30 day penalty reminder letter, the 60 day penalty reminder letter, the daily penalty notice, the 6 month late penalty notice, and the 12 month late penalty notice all failed to reach him even though they were all correctly addressed. The Tribunal has noted that the appellant telephoned HMRC on 21 May 2012 and in
35 that call was advised of the potential penalties and advised to complete the return. Nevertheless it was not until almost 3 years later on 23 April 2015 that the return was received by HMRC. In these circumstances the Tribunal is satisfied that the appellant did receive notice of the consequences of not submitting the 2010/2011 return including potential penalties. It may be that because he knew no tax was due the appellant did not
40 appreciate the need to advise HMRC of that fact by submitting his return. In these

circumstances the Tribunal considers that the appeal against the daily penalty for the late submission of the appellant's 2010/2011 return must be dismissed.

5 82. In respect of the daily penalties for 2012/2013, HMRC say they sent 30 day and 60 day penalty reminder notices to the appellant at his last known address at 8 Calverley Gardens on 3 June 2014 and 1 July 2014. The appellant has confirmed that he left that address on 10 December 2013. It is therefore likely that they were not received by the appellant.

10 83. The Tribunal accepts that the appellant left 8 Calverley Gardens on 10 December 2013 but HMRC say he did not notify HMRC of the change until 22 January 2015. The appellant submits he telephoned HMRC in December 2013 but there is no evidence to support that.

15 84. It is the appellant's responsibility to keep HMRC advised of any change in his address. The Tribunal therefore concludes that HMRC sent the notices to the address of the appellant last known to them. There is no dispute that the return for 2012/2013 was sent to the correct address for the appellant. The appellant was therefore aware that he was required to submit the return in the time limit advised on the return document. It is only the notices of daily penalties that he failed to receive. HMRC can only send notices to the address they have on file. Unfortunately the Tribunal has no alternative
20 but to conclude that the appellant was aware he was required to submit a return but failed to do so. He did not receive the reminder notices because he had failed to notify HMRC of his change of address until 22 January 2015. In these circumstances the Tribunal considers that the appeal against the daily penalty for the late submission of the appellant's 2012/13 return must be dismissed.

25 85. In respect of the £300 six months late filing penalty and the £300 12 months late filing penalty, the Tribunal considered the submissions of the parties.

86. The relevant part of paragraphs 5 and 6 uses the same wording, that is:

“The penalty under this paragraph is the greater of –

30 i. 5% of any liability to tax which would have been shown in the return in question, and

ii. £300”.

35 87. In the Tribunal's view this means that in order to determine the penalty that applies it is necessary to consider two amounts and determine which is the greater. The first amount is 5% of any liability to tax which would have been shown in the return in question. The second amount is £300.

88. In the case in point for both tax years the first amount is nil because the tax due is nil and 5% of that sum is nil. The second amount is £300. It is clear that the greater amount is £300. However, that amount has been determined by first referring to a liability to tax.

89. Paragraph 17(3) states “Where a person is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax ...”. It is clear to the Tribunal by comparing two amounts, one of which is “5% of any liability to tax”, the process by which the penalties under Schedule 55 paragraphs 5 and 6 are
5 determined can only be done by reference to a liability to tax. The Tribunal does not accept HMRC’s submission that paragraphs 5(2)(b) and 6(5)(b) should be considered independently of paragraphs 5(2)(a) and 6(5)(a). Having compared two amounts, one of which involves reference to a liability to tax, it is not appropriate to then consider the penalty was not determined by any reference to a liability to tax but was a fixed
10 sum. In order to determine the penalty it is necessary to consider which is the greater of two amounts, one of which is 5% of any liability to tax. The penalty has therefore been determined by reference to a liability to tax.

90. In the Tribunal’s view HMRC cannot determine the penalty as being £300 without first considering whether or not 5% of the tax due is greater than £300.

15 91. In their submissions at paragraph 55 above HMRC say: “In the Appellant’s case the penalties were raised under paragraph 5(2)(b) and paragraph 6(5)(b) of Schedule 55, as once the Appellant’s return was received, which showed a tax liability of £0, £300 was the greater sum”.

20 92. To the Tribunal this shows that after reference to the tax liability which was £0 HMRC decided that £300 was greater. They therefore have determined the penalty by reference to a liability to tax which is what they are required to do. HMRC try to make a distinction between observing there was no liability to tax and reference to the liability to tax. If there is any difference between the meaning, the Tribunal does not accept that it alters the fact that the penalties were determined after reference to a liability to tax.

25 93. HMRC’s submissions concentrate on paragraph 17(3). They make little reference to paragraph 1 (3) which says “If a person’s failure falls within more than one paragraph of this Schedule, a person is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).” It is clear to the Tribunal that the appellant has been penalised under more than one paragraph of Schedule 55, namely paragraphs 3, 4, 5
30 and 6 and is therefore liable to a penalty under each of those paragraphs but subject to paragraph 17(3). It is therefore clear that paragraph 17(3) is intended to have effect where there are penalties under more than one paragraph of Schedule 55.

94. Paragraph 17 (3) starts “Where a person is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax...”.

35 95. In looking at this Schedule the only paragraphs that refer to determining a penalty by reference to a liability to tax are paragraphs 5 and 6.

96. HMRC have made no suggestion that any other paragraph of the Schedule requires penalties to be determined by a reference to liability to tax. Therefore if HMRC’s submissions in this case are accepted it makes paragraph 17 (3) of no effect.

40 97. The Tribunal accepts HMRC’s submission that neither paragraph 5(2)(b) nor paragraph 6(5)(b) make any mention of a liability to tax. However these penalties

cannot be imposed without first having considered paragraph 5(2)(a) or paragraph 6 (5)(a) both of which do refer to a liability to tax. It is therefore not possible to impose a £300 penalty without first having referred to the liability to tax.

5 98. In their submissions HMRC say that at the very least the penalties under paragraphs 5 and 6 should be £300. In saying this HMRC are effectively submitting that paragraphs 1(3) and 17 (3) only have effect where 5% of the liability to tax is greater than £300. However the legislation makes no such provision.

10 99. Paragraph 16(1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalties below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there are any special circumstances in this case which would allow them to reduce the penalties and have concluded there are none. The Tribunal does not consider that HMRC's decision is flawed.

15 100. In respect of both the 2010-2011 return and the 2012-2013 return, the Tribunal considers that paragraph 17 (3) operates so that the aggregate of the penalties under paragraphs 5 and 6 should not exceed [the relevant percentage] of the liability to tax. The relevant percentage as determined by paragraph 17 (4) is 100%. Therefore for both tax years the aggregate of the penalties should not exceed 100% of the liability to tax which was nil.

20 101. The Tribunal considers that these penalties were incorrectly imposed.

102. Therefore in respect of the tax year 2010/2011 the appeal against the 6 month late £300 penalty assessed under paragraph 5 of Schedule 55 is allowed; and the appeal against the 12 month late £300 penalty assessed under paragraph 6 of Schedule 55 is also allowed.

25 103. In respect of the tax year 2012/2013 the appeal against the 6 month late £300 penalty assessed under paragraph 5 of Schedule 55 is allowed; and the appeal against the 12 month late £300 penalty assessed under paragraph 6 of Schedule 55 is also allowed.

30 104. In respect of all the penalties for which the Tribunal has allowed the appeal the interest charged to date will need to be adjusted accordingly.

35 105. 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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**PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 17 October 2018

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