



**TC06986**

**Appeal number: TC/2014/01458**

*Income tax - fixed and daily penalties for late filing of self-assessment return - Donaldson considered – appellant had difficulties compiling his return and had health problems for part of the default period - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**JAMES COUTTS**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 29 January 2019 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 12 March 2014, and HMRC's Statement of Case received by the Tribunal and Appellant on 24 February 2017 with enclosures. The Tribunal wrote to the Appellant on 8 August 2017 stating that if he wished to reply to HMRC's Statement of Case he should have done so within 30 days of receiving a copy from HMRC.**

## DECISION

1. This is an appeal by Mr James Coutts ('the Appellant') against penalties totaling £1,600 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment ('SA') tax return for the tax year ending 5 April 2012.
2. The penalties for late filing of a return can be summarised as follows:
  - i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
  - ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties at £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
  - iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
  - iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
3. Penalties of £100, £300, £900 and £300 were imposed, under (i), (ii) (iii) and (iv) above
4. The appellant's appeal is against all the penalties.
5. Daily penalties have been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the "Donaldson case"). Mr Donaldson challenged aspects of HMRC's standard approach to these penalties.
6. Because the outcome of the *Donaldson* appeal was relevant to the Appellant's appeal against daily penalties, the First-tier Tribunal directed that the appeal should be stood over until the *Donaldson* appeal was determined.
7. The three issues before the Court of Appeal in respect of daily penalties were:
  - a) whether HMRC had made a decision required by paragraph 4(1)(b) of Schedule 55 FA 2009 to charge daily penalties;
  - b) whether HMRC had given notice required under paragraph 4(1)(c) of Schedule 55 FA 2009, specifying the date from which the daily penalties were payable;

- c) whether HMRC had specified the period in respect of which the daily penalties were assessed in the notice of assessment, required under paragraph 18 of Schedule 55 FA 2009.

8. Although only issue (b) was before the Upper Tribunal, Mr Donaldson was given permission to raise the two further points (a) and (c).

9. The Court of Appeal decided that:

- a. Parliament had not intended that HMRC should only be able to exercise discretion under para 4(1)(b) on an individual taxpayer-by-taxpayer basis. The policy decision taken by HMRC in June 2010 that all taxpayers who were at least three months late in filing their returns would be liable to a daily penalty, satisfied the requirements of para 4(1)(b).
- b. HMRC had given notice under paragraph 4(1)(c) specifying the date from which the penalty was payable in the SA reminder and SA326 Notice. Both notices stated in terms that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three months late and specified the date from which they were payable depending on whether the person filed an electronic or paper return. The notice could be given in advance of any default.
- c. HMRC's notice of assessment under paragraph 18 did not specify the period for which the daily penalties had been assessed. The notice should have specified the period over which the penalty had been incurred and should also have specified the three month period for which the penalty had been charged, or at least state the date when the penalties started. However the court decided the omission fell within the scope of s 114(1) TMA 1970 and thus did not affect the validity of the notice of assessment. The court's view was that Mr Donaldson was not misled or confused by the omission and the period of assessment could be worked out without difficulty.

*How the Court of Appeal decision affects this appeal*

10. HMRC submit that following the Court of Appeal decision the Tribunal should find that in the present appeal, HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which daily penalties had been assessed, in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice.

*Filing date and Penalty date*

11. Under s 8(1D) TMA 1970 et seq. which states that a non-electronic return must be filed by 31 October following the end of the relevant year or an electronic return by 31 January in the following year. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

12. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

*The background facts*

13. The notice to file for the year ending 5 April 2012 was issued to the appellant on 6 April 2012.

14. The filing date was 31 October 2012 for a non-electronic return or 31 January 2013 for an electronic return. The appellant's non-electronic return for the year ending 5 April 2012 was received by HMRC on 6 March 2014.

15. As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 12 February 2013 in the amount of £100.

16. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 14 August 2013 in the amount of £900, calculated at £10 per day for 90 days.

17. As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on or around 14 August 2013 in the amount of £300.

18. On 3 September 2013, the appellant appealed to HMRC against the penalties on the grounds his general health remained "as per his appeal against 2010-2011 late filing penalties". HMRC had previously accepted the 2010-11 appeal upon independent review. On 17 September 2013, upon receipt of the appellant's appeal, HMRC suspended collection of the daily penalties.

19. As the return had still not been received 12 months after the penalty date, HMRC issued a notice of penalty assessment on or around 25 February 2014 in the amount of £300.

20. The appellant advised he was continuing to prepare the 2011-12 tax return as best he could, and given more time he felt he could do so. He also hoped to be able to complete the 2012-13 tax return on time. The appellant advised he was working three to four days per week, although he stated he was unable to perform much thought work. However he felt there was progress and was hoping to bring his tax affairs up to date. The appellant referred to the details of his ill health recorded in his 2010-11 appeal and quoted reference ARU/LDY/41078. The appellant also advised he had requested appeal paperwork on 30 April 2013 but had received no reply.

21. On 19 December 2013 HMRC rejected the appeal but offered a review.

22. On 17 January 2014 the appellant requested a review of HMRC's decision. He stated he had supplied documentation in support of his continued illnesses since 2005-06 and contends these were unforeseeable and beyond his control. He said he was accepting the treatments as prescribed by the NHS services he was consulting. He said he intended to pay his tax when due, and made a commitment to pay tax due for 2011-12 by 31 January 2014 regardless of whether or not he had submitted the overdue tax return. The appellant made a similar commitment to submit his tax return for 2012-13 before any penalties would be imposed.

23. On 21 February 2014 HMRC carried out a review and issued their review conclusion, which was that the decision should be upheld as the 2011-12 tax return had still not been received. The fact that the appellant's appeal for 2010-11 had been upheld did not necessarily mean that the same reasons would be accepted for 2011-12. HMRC's view was that sufficient time had been given in order for the return to be completed and received by the due date. HMRC reiterated the tax due for 2011-12 should have been paid by 31 January 2013, also the due date for online submission of the tax return.

24. On 28 February 2014 the appellant wrote to HMRC confirming that his paper tax return for 2011-12 was ready to submit and that he had paid the penalty charged for late filing of his 2012-13 tax return. He advised he would attend to the completion of this tax return 'shortly'.

25. On 12 March 2014 the appellant notified his appeal to the Tribunal, giving his grounds as:

"In all communications regarding Self-Assessment, HMRC state "we cannot consider your appeal against penalties until we have received your returns". Regardless of this we are bombarded with notices of filing penalties even after Suspended notice. If it were not for the excellent telephone helpline this can be upsetting.

Having sent my returns for year ending 5 April 2012 just last Wednesday 5 March 2014 that would make the above statement or the action invalid! The returns in question 2011-2012 were sent by First Class Next Day delivery Royal Mail together with a cheque to £368.30 the full amount of tax due on Wednesday 5 March 2014.

Although HMRC are most diligent and precise with dates (quite rightly so) they are habitually up to fourteen days late with dated mail delivery so reducing the client legal time to act or make lengthy telephone calls so causing further concern and worry.

Due to some legal issue HMRC informed me by mail dated 16 October 2013 received 25 October that they were suspending both the 6 month penalty and the daily penalty. To date there has been no update or reference to this matter other than a letter dated 25 February delivered 5 March indicating that I have

been charged an additional £300.00 which if I have filed a recent tax return will be in a revised penalty assessment shortly.

I find it most difficult to keep up with the above bits and pieces train of events particularly since there is still no mention of the "Suspended" items and what and when that is likely to be resolved.

In consideration of the circumstances for the above late filing and the penalties, the fact that the legal tax due and paid is such a small amount in comparison I consider that HMRC should be guided and pointed to the realities of small tax payers having to complete such complicated paperwork which causes most of the of the trouble and worry.”

26. On 24 April 2014 the First-tier Tribunal directed that the appeal should be stood over until the *Donaldson* case was finalised.

27. The stay lasted for several years, as the Tribunal’s decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761).

28. The Court of Appeal’s decision became final when the Supreme Court refused permission for leave to appeal on 21 December 2016. Thereafter, HMRC have been asked to provide statements of case on the many appeals stayed behind *Donaldson* in order that they could be resolved.

#### *Relevant statutory provisions*

### **Taxes Management Act 1970**

Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

### **Schedule 55 Finance Act 2009:**

29. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

30. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'

31. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a SA return is submitted late.

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

- (1) P is liable to a penalty under this paragraph if (and only if)--
  - (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.
- (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
  - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

- (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
  - (b) £300.

34. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:



- (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
  - (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

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

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any para-graph of this Schedule.
- (2) In sub-paragraph (1) "special circumstances" does not include--
  - (a) ability to pay, or
  - (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
  - (b) agreeing a compromise in relation to proceedings for a penalty.

36. 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:

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

37. The appellant’s grounds of appeal are as set out in his Notice of Appeal to the Tribunal.

## *HMRC's Case*

38. Late filing penalties for the year ended 5 April 2012 are due in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund.

39. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information was clearly shown on the 2011-12 notice to file issued to the Appellant on 6 April 2012.

40. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the appellant to ensure his 2011-12 tax return was filed by the legislative date and payment made on time.

41. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

42. The appellant has been making SA tax returns for many years. Therefore, HMRC consider him to be experienced with the SA system including the due dates for paper and online returns.

43. HMRC acknowledge that the appellant's health has deteriorated in recent years, notably that he suffered a stroke in September 2015 and sympathise with his current situation. HMRC note his daughter has been granted Power of Attorney and HMRC records have been updated to reflect this from 29 March 2016. However this appeal is concerned with the period at which the appellant's paper tax return for the year 2011-12 was due and the default period to 6 March 2014, when the tax return was actually received, in addition to the reasons given for late filing of the return.

44. It is highly unlikely HMRC will accept an appeal against any penalty where the corresponding tax return remains outstanding. However HMRC suspended collection of the 2011-12 daily penalties on 17 September 2013 upon receipt of the appellant's appeal and issued a letter on 20 September 2013 in response to the appeal against the daily and 6 month penalties, encouraging him to file his outstanding return without further delay to enable the appeal to be considered.

45. HMRC set a date 45 days in advance to review the appeal again, pending receipt of the tax return. The appellant wrote to HMRC again and his letter was received on 4 November 2013. The appellant advised he was progressing with the completion of his 2011-12 tax return and would submit 'shortly'. The appellant explained he was no longer taking the medication, Simvastatin, and aimed to

submit his 2012-13 tax return on time. HMRC reviewed the appeal again on 15 November 2013 and allowed further time before considering the appeal further.

46. However as the 2011-12 tax return was still outstanding on 17 December 2013, HMRC decided there was no reasonable excuse for the continued absence of the tax return. HMRC rejected the appellant's appeal against the 6 month penalty. A holding letter was issued on the same day to the appellant for the daily penalties, indicating HMRC did not consider there was a reasonable excuse, but that his appeal could not be finalised until a decision was handed down in respect of the *Donaldson* case. The appellant had already been advised his appeal against the late filing penalty would not be considered as he had not made his appeal within the allowed timeframe.

47. A holding letter was issued to the appellant on 19 December 2013, which was clear in specifying the type of penalty and amount which had been suspended.

48. HMRC routinely issue statements, either where new transactions are applied or an outstanding balance exists. Each penalty notice was issued once, at the dates listed above. It would not be appropriate were HMRC to take a decision not to notify the appellant that a penalty had been charged

49. When HMRC considered the appellant's appeal, the 12 month late filing penalty had not been charged.

50. As a result of the continued absence of the 2011-12 paper tax return, together with the fact the appeal was dealt with before the 12 month anniversary of the due date, the penalty was automatically imposed on 25 February 2014. There was no facility for HMRC to suspend the 12 month late filing penalty before it had been charged, or for an appeal to have been made in advance of the charge.

51. HMRC acknowledged receipt of the appellant's 2011-12 paper SA tax return, which was due to be received by 31 October 2012, on 6 March 2014.

52. According to the appellant he was able to maintain his self-employed fishing business and generate a year on year increase in his profits, during the 2012-13 and 2013-14 default periods. No evidence exists to demonstrate that the appellant was unable to manage the rest of his private and business affairs. He was also represented by an accountant from 13 September 2011. This accountant submitted the appellant's 2012-13 electronic tax return on 29 April 2013. The appellant could have made provision for his 2011-12 tax return to be completed, had he required support to do so. However the appellant remained responsible for ensuring his legal obligations were satisfied and could not transfer his responsibilities to his accountant.

53. Under SA the appellant was legally required to complete his tax return for 2011-12 once issued, and ensure HMRC received this no later than 31 October 2012 if filing on paper or 31 January 2013 if filing electronically. The appellant has been within the SA regime since 2004-05 and HMRC would consider he should be sufficiently aware of all his obligations and ensure these are met.

54. The 12 month penalty was charged as the appellant failed to submit any tax return for 2011-12 by 31 January 2014, which was twelve months after the statutory online filing date. If the appellant had submitted his paper tax return between 1 November 2013 and 19 December 2013, when his appeal was dealt with, the penalty would have been charged at an earlier date.

55. HMRC recognise the appellant has suffered ongoing health issues since 2005. As his health problems were a long term issue, he would have been aware of them in advance of the due date for filing his 2011-12 tax return. HMRC would not accept an appeal against late filing penalties where a taxpayer had failed to put any provisions in place to ensure their obligations could be met, despite several years of similar health issues. Additionally, the fact the appellant appeared able to maintain his self-employed fishing business throughout the default period, would lead HMRC to take the view his tax return could also have been submitted on time. The appellant was also able to submit his overdue tax return for 2010-11 on 1 May 2013, by which time his 2011-12 tax return was also already overdue.

56. The appellant has a history of late filing, predating his failure to file his 2011-12 tax return on time, starting with his first year within SA in 2004-05. Indeed his 2007-08, 2008-09 and 2009-10 tax returns have never been submitted on time and consequently late filing penalties were charged for all years from 2004-05 onwards. A late filing penalty was also charged for 2012-13 as, despite the appellant's stated intention to file on time, he also failed to file his 2012-13 by the due date.

57. Whether or not there is any tax to pay has no relevance with regard to the requirement to complete a tax return and submit it on time. The late filing penalties are fixed and charged according only to the period of default, any amount of tax due also has no relevance. HMRC will not accept a claim the customer found the completion of a tax return too difficult as a reasonable excuse for failing to meet the obligation to file a tax return on time. It would have been for the appellant to seek any help he needed to complete his tax return and should have done so in good time to ensure the filing date was met.

58. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time.

#### *Special Reduction*

59. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances.

“Special circumstances” is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

60. In other contexts “special” has been held to mean ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

61. HMRC have considered the appellant’s health problems and submit that there are no special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

62. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

63. HMRC submit that its decision not to reduce the penalties under paragraph 16 was not flawed and in any event there are no special circumstances which would require the Tribunal to reduce the penalties.

#### *Proportionality*

64. HMRC submits that the penalties under appeal are not criminal in nature for the purpose of Article 6 ECHR:

- The “offence” is merely administrative (i.e. the failure to file a return on time).
- The nature of the offence requires no proof of qualitative misconduct. All that is required is for a return to be filed after the proper filing date.
- The penalties are simply an administrative means of securing the production of timely returns. Their aim is to encourage compliance, not punish defaults.

65. In any event, even though HMRC do not accept that Article 6 rights are engaged in respect of these penalties, HMRC contend that it has fully complied with the requirements of Article 6, in particular the appellant was told what he had done wrong and the statutory basis for the allegation against him. There could not therefore be any reasonable doubt about the “nature and cause of the accusation” against the person. Likewise, the person was made fully aware of their right to a statutory review or to appeal to an independent tribunal.

66. HMRC also submit that the penalties are not disproportionate and the penalty regime is proportionate to its aim. In order for a national measure to be considered disproportionate, it must be “not merely harsh but plainly unfair” (see

*International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158). HMRC contend that the penalties imposed here are not ‘plainly unfair’ and fall within the wide margin of appreciation in framing and implementing taxation policies (*Bysermaw* at para.71). Moreover, the regime includes provisions for ‘reasonable excuse’ and ‘special circumstances’ which allow mitigation in appropriate cases.

### *Conclusion*

67. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

68. There is no statutory definition of “reasonable excuse”. Whether or not a person had a reasonable excuse is an objective test and “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

69. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

70. If there is a reasonable excuse it must exist throughout the failure period.

71. The appellant had successfully filed previous tax returns online and should have been aware of the online filing procedures. He had also defaulted many times in earlier years and therefore would also have been aware of the penalty regime.

72. HMRC sent a late filing penalty to the appellant on 12 February 2012 for £100. This and subsequent penalties should have acted as a prompt to him to file his return.

73. I acknowledge the appellant’s health problems, particularly after September 2015. However this appeal is concerned with the period during which the appellant’s paper tax return for the year 2011-12 was outstanding, to 6 March 2014, when the tax return was actually received. As HMRC say, the appellant appeared able to continue with his business throughout the default period.

74. HMRC allowed the appellant sufficient time to file his 2011-12 return but he failed to avail himself of the opportunity of avoiding penalties by not filing his return until 5 March 2014, over 13 months late.

75. Therefore any excuse the appellant may have had did not subsist throughout the entire period of delay and therefore does not amount to a reasonable excuse. The late filing penalties have been charged in accordance with legislation and there is no reasonable excuse for the appellant's failure to file his tax return on time, nor by the date the penalties arose.

76. I find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction regulations

77. The appeal is therefore dismissed and the late filing penalties of £1,600 are confirmed

78. 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.

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 FEBRUARY 2019**