



**TC03279**

**Appeal number: TC/2013/05478**

*Income tax –penalty for late payment– reasonable excuse – reliance on statements from HMRC that no penalties charged – disproportionality of penalty– held – no reasonable excuse for late payment – HMRC notification and systems for recording penalties matters of administrative law outside the remit of the Tribunal – HOK Ltd relied on –penalty not disproportionate in terms of the Human Rights Act - appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PATRICK WALL**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RACHEL SHORT  
MRS JO NEILL**

**Sitting in public at 45 Bedford Square London on 20 January 2014**

**Mr Patrick Wall the Appellant in person**

**Mrs Karen Weare, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal concerning the imposition of penalties amounting to £10,400  
5 for late payment of income tax for 2011/12 tax year. The tax was due on 31 January 2013 and was not paid until 7 March 2013. HMRC issued a penalty determination on 19 March 2013 at 5% of the tax due under s 107 and Schedule 56 Finance Act 2009.

### *The Facts*

2. The Appellant is a UK resident individual who disposed of shares in a UK  
10 company during the 2011/12 tax year, giving rise to a total tax liability for the year of £208,010.70. The Appellant was issued with a notice to file an income tax return for the 2011/12 tax year on 6 April 2012. The tax payable was due on 31 January 2013. The Appellant had appointed a tax agent but the tax agent failed to notify him of the requirement to pay the tax by the due date. HMRC sent the Appellant a letter on 26  
15 February 2013 notifying him of his tax liabilities. The Appellant paid the full amount of tax due on 7 March 2013. On 19 March 2013 HMRC issued the Appellant with a 5% penalty on the basis that the tax had paid on 7 March 2013 more than 30 days after the due date. The Appellant appealed to this Tribunal on 14 August 2013 in respect of that penalty.

### 20 **The Evidence**

3. We were provided with HMRC's transcripts of conversations between their  
representatives and Mr Wall of 6 and 7 March 2013, 13 March 2013 and 13 April  
2013. The transcript of the 13 March call referred to Mr Wall's earlier discussions  
with HMRC, but no specific details were provided of any other earlier calls by  
25 HMRC or Mr Wall.

### **The Law.**

4. The relevant legislation is set out in s 59B Taxes Management Act 1970 which  
sets out the payment date for income tax due under self assessment, and s 107 and  
30 Schedule 56 Finance Act 2009 which sets out the penalties chargeable for payment of tax after the due date. Paragraph 9 of Schedule 56 sets out HMRC's ability to reduce penalties if there are "special circumstances" and paragraph 16 sets out the circumstances in which a penalty will not arise if the taxpayer has a "reasonable excuse" for failing to make a payment on time.

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### **The Arguments**

5. The Appellant is not disputing that the payment was made late and is not suggesting that reliance on his tax adviser or lack of knowledge of the due date for

payment should be treated as a reasonable excuse for these purposes. The Appellant's main argument is that he spoke to HMRC on a number of occasions during March 2013 and was told that no penalty would be applied for this late payment. He therefore does not consider that the penalty should now be payable.

5 6. The Appellant stated that he spoke to HMRC in early March and on 13 March  
and on both occasions was told by HMRC that no penalty would be charged on his  
account. The Appellant could not provide the contact details of the HMRC  
representatives to whom he spoke or the precise date of his first conversation with  
10 HMRC in early March, but said that it was made clear in both of these conversations  
by HMRC that no penalty would be levied.

7. Mr Wall also suggested as a subsidiary argument, that the level of penalty  
charged was harsh by reference to the lateness of the payment and in view of what he  
had been told by HMRC.

15 8. HMRC argued that Mr Wall had no reasonable excuse for late payment and  
that there was no basis on which HMRC should reduce the penalty due to "special  
circumstances" under paragraph 9 of Schedule 56.

9. HMRC suggested that their representatives had stated to Mr Wall that no  
penalty had been placed on his account because, at the dates when Mr Wall spoke to  
them, (before 19 March 2013) the penalty notice had not been issued and therefore the  
20 penalty had not been recorded on his account. Nevertheless, the penalty was legally  
due because Mr Wall had not paid the full amount of the tax due as at 1 March 2013  
and the penalty accrued from that date. HMRC confirmed that they had attempted to  
contact Mr Wall on 25 February 2013, but had not been able to speak to him.

10. HMRC had records of phone conversations with Mr Wall on 6 and 7 March (in  
25 which Mr Wall confirmed that he would pay the full amount of tax due) and 13  
March, but no evidence of earlier conversations in which it had been stated that the  
penalty would not be imposed. HMRC suggested that this earlier conversation had  
been with the debt management team at HMRC and they did not have access to these  
transcripts. HMRC had provided copies of transcripts of all telephone calls which  
30 were available to them.

11. In relation to Mr Wall's reference to the penalty being harsh, Mrs Weare  
referred to the *Total Technology* decision (*HMRC v Total Technology (Engineering  
)Ltd*, [2012] UKUT 418 (TCC)) as authority for the Tribunal's inability to consider  
disproportionality arguments. In respect of HMRC's misleading statement to Mr  
35 Wall, she suggested that this was a matter of administrative law which was outside the  
remit of the Tribunal on the basis of the *Hok* decision (*HMRC v Hok Ltd* [2012]  
UKUT 363 (TCC)).

## Decision

12. It was made clear by Mr Wall that he was not attempting to argue that there was  
40 any "reasonable excuse" for late payment of his tax for the 2011/12 tax year. Mr  
Wall's dispute was with HMRC's misleading statements that no penalty would be

placed on his account as a result of this late payment. We have considered whether this is a dispute which is within the remit of this Tribunal, particularly on the basis of the decision in *Hok Ltd*. Our conclusion is that this appeal does not relate to an amount of tax due, or whether a penalty is due as a matter of law, but only to HMRC's procedures in notifying, or failing to correctly notify a taxpayer, whether penalties would be levied. Therefore this is not a matter which can be considered by the Tribunal but falls within the remit of the administrative courts and judicial review principles.

13. We have concluded that Mr Wall's position is similar to the taxpayer in the *Hok* decision, where it was clearly stated by the judge: "*here the question is not the amount of the penalty or even whether one is due as a matter of law ..... but whether HMRC should be precluded from imposing the penalties prescribed by that section, or from collecting them if due..... is a quite separate question of administration, one which ... is capable of determination only by way of judicial review and therefore not by the First – tier Tribunal*" Similarly, Mr Wall's dispute is not about whether the penalty is legally due, but whether, because of HMRC's misleading statements, it should not be levied. Accordingly, this is not a question which this Tribunal has the power to consider.

14. Mr Wall also referred, briefly, and as a subsidiary argument, to the fact that this penalty was harsh and should be adjusted for that reason. HMRC suggested that this was not an argument which we could consider on the basis of the conclusions in respect of proportionality arguments set out in the *Total Technology* decision. That decision considered both EU law based arguments of proportionality and Human Rights Acts 1998 arguments considering the fairness of penalties. The tax in question here is not an EU based tax and therefore arguments concerning proportionality as applied in the VAT arena are not applicable. However, the Human Rights Act approach to the fairness or otherwise of penalties is relevant to this charge. In determining that this penalty is unfair we would need to conclude, by reference to all of the circumstances of this case that this penalty was both "harsh and plainly unfair" and that this was a circumstance in which the taxpayer has surmounted the high hurdle which has been set in determining whether a penalty set by statute should be struck down. Given the lateness of this payment (more than a month) and the level of tax due, (the penalty amounts to 5% of the tax due) our conclusion is that this penalty falls well short of being either harsh or unfair by reference to the relevant criteria.

15. For these reasons, the Tribunal grants HMRC's request that the penalties for the 11/12 tax year should stand and the Appellant's appeal in respect of HMRC's misleading statements concerning the non application of penalties should be struck out under Rule 8(2) of the Tribunal Procedure (First – tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the Tribunal does not have jurisdiction in relation to that part of the proceedings.

16. 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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**RACHEL SHORT  
TRIBUNAL JUDGE**

**RELEASE DATE: 29 January 2014**

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