



TC06649

Appeal number: TC/17/6946

PENALTIES – income tax – late filing of returns and late payment of tax – appeal out of time – some years admitted late – appeal allowed in part on basis of special circumstances and proportionality

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DONALD HAINES

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Determined on the papers with the agreement of both parties, with written representations from Mr Haines and Mrs S J Mistry, HMRC officer, on behalf of HM Revenue and Customs

DECISION

What is in issue?

1. Mr Haines wishes to appeal against penalties for late filing of various tax returns, amounting to £4,900; in addition, he wishes to appeal against penalties for late payment of tax amounting to £484.88. His appeal is late. So the first question is whether the Tribunal should permit the appeal to be lodged late; and if the Tribunal does admit the appeal late, then the second question is whether it should be allowed.

2. While only penalties are in issue, as recent case law has shown, the law is by no means straightforward. Nevertheless, I will try to set out my reasoning as simply as possible. I'll start with a table of what Mr Haines seeks to appeal against:

Tax year		Penalty in £s	Date of penalty
2006/7	Late filing penalty (1 st)	100	19/2/8
	Late filing penalty (2 nd)	100	5/8/8
	Late payment surcharge (1 st)	112.34	17/2/11
	Late payment surcharge (2 nd)	112.34	17/2/11
2007/8	Late filing penalty (1 st)	100	29/10/10
	Late filing penalty (2 nd)	100	29/10/10
	Late payment surcharge (1 st)	130.10	7/10/16
	Late payment surcharge (2 nd)	130.10	7/10/16
2008/9	No tax return issued.		
2009/10	Late filing penalty (1 st)	100	Cancelled by HMRC
	Late filing penalty (2 nd)	100	Cancelled by HMRC
2010/11	Initial late payment penalty	100	14/2/12
	Daily late filing penalties	900	7/8/12
	6 months late filing penalties	300	7/8/12
	12 months late filing penalties	300	19/2/13
2011/12	Initial late payment penalty	100	12/2/13
	Daily late filing penalties	900	8/10/13
	6 months late filing penalties	300	8/10/13
	12 months late filing penalties	300	25/02/14
2012/13	Initial late payment penalty	100	18/2/14
	Daily late filing penalties	900	18/8/14
	6 months late filing penalties	300	18/8/14

Facts

3. At Mr Haines' request, and with HMRC's and the Tribunal's consent, this determination is on the papers. Mr Haines is elderly and lives in Spain: he did not wish to travel to the UK for a hearing. My findings of fact are therefore based on the papers in front of me. There are many gaps in the evidence.

4. I find that Mr Haines had been self-employed for many years; he was in the self-assessment system and used to filing self-assessment tax returns. HMRC have records of contacts they have with taxpayers and these 'SA Notes' for Mr Haines show, and I find, that there was normally contact between HMRC and Mr Haines several times a year from 1998 to the end of 2007. The last contact for many years was on 17 December 2007 when Mr Haines rang to ask HMRC for his statement of account. Mr Haines does not recollect this call.

5. Mr Haines retired at the age of 68 at the end of 2007. He also became itinerant and he did not keep HMRC informed of his whereabouts. A letter from HMRC to Mr Haines was returned undelivered in September 2008; his agent's details were removed from the system six months later.

6. HMRC's IDMS notes, which I understand are the debt collection notes, show lots of chasing letters were sent in 2011-13 but in 2014 after many failed attempts by HMRC to contact him, on 13 June, Mr Haines rang the debt management unit because he heard, via a friend, that HMRC were trying to contact him. He was told of the amount he owed and that it was tax outstanding from 2006/7 and 2007/8; he was also advised there was accrued interest and penalties.

7. Mr Haines instructed accountants to act for him and they wrote to HMRC on 7 July 2014 explaining that they understood that Mr Haines had outstanding tax returns for tax years ended 2007, 2008, 2010, 2011, 2012 and 2013. They asked HMRC to provide a copy of his 2006 tax return and let them know if he had to complete one for 2009. At around this time, Mr Haines settled down at a permanent address in Spain.

8. HMRC replied on 11 August 2014 answering the questions. In the meantime, there had been conversations with his newly appointed agent. The agent asked for time to complete the returns and a hold to be put on collection.

9. The tax returns for the last 3 years in issue were then filed on 31 January 2015. This stopped the 12 months' late filing penalty accruing for year 12/13. I have no explanation for why the returns for the earlier years were not filed at the same time, but for reasons not explained to me, Mr Haines took no further action.

10. HMRC having chased without response, the IDMS notes show that in March 2016 HMRC asked the Spanish authorities to collect the debt of £16,919.94. On 9 May 2016, it appears in response to the arrival of the Spanish equivalent of bailiffs, Mr Haines rang HMRC. The IDMS notes stop at this point. However, on 12 May 2016 his new agents filed his tax returns for 2007, 2008 and 2010. On the same day, Mr Haines paid £16,979.35, the amount claimed by HMRC. In their letter, his accountants claimed that Mr Haines had left his paperwork with his previous

accountants in 2007 to complete and file his last tax returns, but the accountants failed to do this and can't now be traced.

11. Mr Haines' 2007 return shows state pension of £4,300, a private pension of £1,080; it also showed an estimate of his self-employed income of £22,000. His return
5 for 2008 showed an estimate of self-employed income of £15,000; it also showed state pension of £4,514 and private pension of £1,080. His 2010 tax return showed state pension of £6,020 and private pension of £1,080. It showed no other income. The same low income is true of all later returns up to 13/14; indeed, his income went
10 down to hover at around £6,050 per annum. HMRC do not challenge the accuracy of these returns.

12. On 19 April 2017, Mr Haines wrote to HMRC, clearly after at least one phone call, chasing a repayment of tax. He wrote again in June 2017. His letter explained that he filed the returns and paid the money demanded in 2016, HMRC's demands
15 having become 'worrying'. However, he had done so expecting at least some of the money to be repaid; only a small amount having been repaid, and having spoken to an HMRC officer, he was now seeking to appeal the penalties.

13. On 4 August 2017, HMRC refused to accept his appeal out of time as they did not accept he had a reasonable excuse for his lateness in lodging the appeal. He then lodged these proceedings with the Tribunal on 17 September 2017.

14. The above findings do not refer to refer to HMRC's activities. Although HMRC were responsible for production of the bundle, and agreed to the appeal being
20 on papers, they provided me with very little documentary evidence. It might exist, but they have not given it to me. In particular, I have no evidence of any dates on which notices to file were issued to Mr Haines, nor to what address.

15. There is a schedule which lists the dates on which the notices to file were said to
25 be issued but the source of this information is not recorded and its reliability is questionable as it records a return issued for 2009 when it is HMRC's case that none was issued and, moreover, the lack of a 2009 notice to file appears reflected in the agent's contemporary letter of 7 July 2014 (see §7).

16. The only evidence I have that penalties were issued to Mr Haines is a statement
30 of account which shows the penalties and amounts next to a date, which may well be the date on which the penalties were issued.

Is the maths correct?

17. Mr Haines' statement of account showed two payments on account of £2,649.87
35 owed for 2006/7, two payments on account of £3,179.85 owed for 2007/8 and two payments on account of £1,301.04 owed for 2008/9. The penalties were £4,900 and £484.88. This totals rather more than the sum he was being chased for in 2014, an amount which included interest.

18. In any event, when he filed his tax returns, I understand HMRC accepted them. The amount he owed for 2006/7 was £6,359.70, which was a sum in excess of the payments of account which he should have but had failed to pay; the amount for 2007/8 was only £2,602.08, which was less than the payments on account which he should have but did not pay; and nil tax was owed for 2008/9 (see §11). HMRC repaid £1,586.99 and £3,147.34 (total £4,734.33). It appears that the rest of the £16,979.35 has been applied to the penalties and interest. Mr Haines is uncertain whether, even if his appeal has entirely failed, HMRC has repaid all that they owe him. I am unable to determine that from the information in front of me, and it is beyond my jurisdiction in any event: I would urge HMRC to look at it again.

19. In conclusion, and relying on Mr Haines' tax returns, I find (and it was not in dispute) that he owed in tax £6,359.70 for 2006/7 and £2,602.08 for 2007/8. He owed no tax for subsequent years and accordingly had not been not charged late payment penalties for any years after 2007/8. The late payment penalties for 2007/8 were charged at the statutory rate of 5%. It was not explained to me why the 2006/7 penalties were charged at a much lower rate but HMRC do not ask to increase them.

Was he issued with notices to file and penalty notices?

20. Mr Haines was only liable to file tax returns if he received notices to file from HMRC. The only evidence of the issue of notices to file was contained in a table provided by HMRC. I was given no explanation of who compiled the table or from where the information was obtained. Its content was that notices to file were issued to Mr Haines on 6 April every tax year.

21. As evidence it is very weak. And there is no evidence whatsoever of the address to which any notices to file were sent. I was given no evidence of the address to which the notices were sent nor evidence of the last notified address.

22. In these circumstances, HMRC cannot prove that they properly issued either the notices to file nor the penalty notices. So the question is whether they must prove that.

23. Mr Haines has never suggested that HMRC failed to properly serve either the notices to file nor the penalties notices. Had he done so, HMRC would have been on notice to produce what evidence they hold on this. Mr Haines' case has always been that he did not receive them because he moved without notifying HMRC of his current address.

24. While it is for HMRC to prove that Mr Haines was liable to the penalties charged, they do not have to prove matters that are not in dispute.

25. I therefore find, because it was not in dispute, that notices to file were validly issued on 6 April each year (save for 2008/9) and penalties were issued on the dates and in the amounts shown on the schedule produced by HMRC.

Late appeal

26. As I have said, On 4 August 2017, HMRC refused to accept his appeal out of time as they did not accept he had a reasonable excuse for his lateness. He lodged proceedings with the Tribunal on 17 September 2017.

5 27. The appellant asked for leave to lodge his appeal out of time on the basis that
the 4/8/17 letter against which he appealed took 3 weeks to reach Spain (where he
currently lives), which explained why he did not lodge proceedings with the tribunal
until September 2017. But that is a misunderstanding on the part of the appellant.
10 The lateness issue arises because the penalties were levied on various dates between
February 2008 and August 2014. A timely appeal has to be made within 30 days of
the date of the penalty. So in this case, the appeal to HMRC made in June 2017 (§12)
was (in the case of the earliest penalties) over 9 years late; even for the most recent
penalty, the appeal was nearly 3 years late.

The law on late appeals

15 28. The exercise of the Tribunal's discretion in an application by a party to be
allowed to lodge an appeal out of time is very similar to that in an application to be
relieved from the effect of a sanction. Applying *Denton* [2014] EWCA Civ 906, *BPP*
[2017] UKSC 55 and *Data Select* [2012] UKUT 187 (TCC) I conclude that the
Tribunal should, when considering whether to disapply a time-limit, consider all the
20 circumstances of the case and in particular consider:

- (1) What is the purpose of the time limit?
- (2) How long was the delay?
- (3) Is there a good explanation for the delay?
- (4) What will be the consequences for the parties of the extension of time?
- 25 (5) What will be the consequences for the parties of a refusal to extent time?

Purpose of the time limit

29. The purpose of the 30 day time limit to lodge an appeal is to provide finality. A
short but reasonable time is provided for an appeal to be lodged; if no appeal is
lodged, HMRC have the right to assume that the liability is accepted and can proceed
30 to enforce it.

The length of the delay

30. On any measure, the delay here was extremely long. The delay for even the
most recent penalties was nearly 3 years, over 30 times the length of time permitted
for the lodging of an appeal. For the earliest penalties, it is over 100 times the length
35 of time permitted for the lodging of an appeal.

Is there a good explanation of the delay?

31. The explanation for the delay is that Mr Haines was not aware of the penalty assessments. On one level, that is a good explanation for the delay: Mr Haines could not take action in respect of something he knew nothing about. But even if it is a
5 good explanation, it only remains a good explanation if he took prompt action after finding out about the penalties.

32. When did he become aware of the penalties? The evidence before me indicates that Mr Haines became aware that the amount HMRC were demanding included penalties as well as tax at least by 12 May 2016 as penalties in a general sense are
10 referred to in his accountants' letter. However, I find, from the evidence in front of me, that the first time Mr Haines knew he had the right to appeal the penalties was in the phone conversation he had with an HMRC officer the week before 12 June 2017. This is referred to in his June 2017 letter which was the letter which commenced the appeal.

15 33. But however promptly Mr Haines acted once he knew he had a right of appeal, I must take into account that, on another level, his not knowing of the penalties and/or the appeal right is not a particularly good explanation for the late filing of the appeal. And that is because the reason Mr Haines was unaware of the penalties was his own failure to keep HMRC up to date with his address. While he says that on his
20 retirement, he gave his paperwork to his erstwhile accountants with instructions to file his last returns and close down his self-assessment record, even he admits that he never chased them up over this. It seems to me that (retiring during tax year 2007/8) he knew or ought to have realised (a) he almost certainly had tax liability to be reported in years 2006/7 and 2007/8, (b) he had liability to make payments on
25 account. He ought to have ensured that those returns were filed, the tax paid and his self-assessment record closed. Had he done this, he would not even have been issued with notices to file for the later years, let alone penalties. He is clearly at fault here. He is, as he recognises in what he says to the tribunal, the author of his own misfortune.

30 *Consequences if the appeal is or is not allowed to proceed?*

34. HMRC oppose the appeal being allowed to proceed as it is very late; they do not suggest that the lateness of it, however, has affected their ability to defend the appeal.

35. The consequences for the appellant depend on how likely his appeal is to succeed: if it is very likely to succeed then he is significantly disadvantaged if it does
35 not proceed as (especially for the later 3 years) the penalties are substantial for a retired person who (HMRC accepts) has a very low income. If the appeal has no real prospect of success, however, he will lose nothing if the appeal is not allowed to proceed.

36. I am not meant, when assessing whether to admit an appeal out of time, to
40 conduct a mini-trial and decide what the outcome would be if it proceeded; however, in a case such as this when I am presented with all the evidence and (if I admit it) am expected to determine the appeal, it is difficult not to do so. Nevertheless, without at

5 this point deciding the appeal, it seems to me that the prospects of success are weak for the first two years where tax was owing and Mr Haines either knew or should have known it; and he certainly did know that the returns were due as it was his case he had instructed his accountants to prepare them, albeit he then failed to contact them to ensure that they did so. I do not see how he could make out a case of reasonable excuse on the information in front of me.

37. However, for the three most recent years, I consider his prospects of success on appeal to be much greater. For those years it would not have been so obvious that he had tax returns to file nor did he in fact owe any tax.

10 *Decision on late appeal application*

15 38. The appeals against all the penalties are very late. In circumstances where a taxpayer, through no fault of his own, did not know about the penalties, I would normally admit the appeal despite its extreme lateness; this appeal is not in that category. I consider Mr Haines is to blame for leaving the tax returns and tax liability for his last two trading years outstanding and effectively disappearing without giving a forwarding address to HMRC. HMRC do not suggest he did this deliberately; his case, which I accept, is that he instructed accountants to sort it out, but that he carelessly forgot to ensure that they did so. Nevertheless, this does not amount to a very good excuse for making such a late appeal.

20 39. Moreover, having caught up with HMRC in mid-2014, he then for unexplained reasons failed to submit his returns for the earlier years for another 18 months.

40. For the first two years, taking into account that it is also my view that the appeal was unlikely to succeed, the application to appeal out of time the 8 penalties (late payment and late returns) for 2006/7 and 2007/8 should be DISMISSED.

25 41. For the last three years, while I accept that the same carelessness towards his tax affairs was responsible for his being unaware of the penalties being levied, the circumstances were different and I see it as much less serious carelessness. For those years, Mr Haines was not earning income that would require a tax return to be filed. He was elderly and retired. He ought to have told HMRC of his current address but he had no reason to expect returns would be required for those later years. He lodged his appeal as soon as he knew that he could appeal. Moreover, I consider that his appeals for the later years have a much more significant chance of success. They should be admitted.

35 42. So I go on to determine the appeals against the penalties for the three tax years 2010/11 – 2012/13.

The appeal

43. It is well established that it is for HMRC to prove that a taxpayer is liable to penalties, while it is for the taxpayer to prove that he should be excused the penalties. As I have already said, Mr Haines has accepted that the penalties were properly

imposed. As I have said, I don't have the evidence to determine this: however, it is also my view that HMRC are not required to prove a matter that is not in dispute. It would be unfair to require them to do so because, had it been the case that Mr Haines disputed whether the penalties were properly served, HMRC would have had the opportunity to file the evidence.

44. So I move on to consider whether Mr Haines can prove that he should be excused the penalties. There are really only three reasons for which a person can be excused liability to a properly imposed penalty and they are:

- (1) If he has a reasonable excuse;
- (2) If there are special circumstances;
- (3) If the penalty is disproportionate.

I'll consider each in turn.

Reasonable excuse

45. Paragraph 23 of Schedule 55 provides that liability to the penalties does not arise if the appellant is able to satisfy the Tribunal that he has a reasonable excuse for his failure to make a return.

46. While Schedule 55 does not define a reasonable excuse, it is understood to be something which causes the failure to file and which could have caused a conscientious taxpayer, aware of his obligations to HMRC and intending to fulfil them, to fail to file the return. Paragraph 23 does state what a reasonable excuse is not: it is not an insufficiency of funds (unless attributable to events outside the taxpayer's control) and it is not reliance on another person (unless the taxpayer took reasonable care to avoid the failure). It is implicit that the reasonable excuse must cover the period of the default, although it is deemed to do so if the taxpayer remedies the default without unreasonable delay after the excuse ends.

47. Mr Haines puts forward his ignorance of the notices to file as a reasonable excuse for his failure to submit his tax returns. The reason for his ignorance was the same reason as for his ignorance of the penalties: he became itinerant without giving HMRC a forwarding address.

48. I have refused to admit the appeal against the late filing and late payment penalties for the first two years so I need not say anything about them here. But in passing, I comment that for the same reasons as given at §38, it is difficult to see that this could be a reasonable excuse.

49. The reasonable excuse for the penalties under appeal 2009/10-2012/13 must be measured from the first day of non-compliance, 31 January 2011, 2012 and 2014 respectively, until compliance (31 January 2015). In failing to keep HMRC informed of his address during this period was he acting like a reasonable and conscientious taxpayer intending to fulfil his taxation obligations?

50. On the one hand, I can see that if ought to have known of the notices to file which HMRC did issue, he should have known there was no notice for file for 2008/9, his first year of retirement. Treating him as knowing what he should have known, which was that there was no notice to file in 8/9, and taking into account his very low
5 income in that year and afterwards, in my view he would have had no reason to suppose that HMRC would serve him with notices to file in later years. And once he did discover that he was required to file tax returns for these three years, he acted fairly promptly in filing them.

51. But for the circumstances in respect of the earlier years, I might well have
10 accepted that this was a reasonable excuse.

52. But all during 2010-2014, he knew or certainly should have known, that he had left unpaid his tax liability, and unfiled his tax returns, from earlier years 2006/7-2007/8. In failing to contact HMRC in this period 2010-2014, he was not acting as a reasonable and conscientious taxpayer. A reasonable and conscientious taxpayer in
15 his position would have informed HMRC of his address: had he done so, he would have known about the notices to file for later years timeously and could have filed the returns on time (or possibly persuaded HMRC to withdraw the notices to file on the basis of his low income). But he did not and I am therefore unable to accept he had a reasonable excuse for the late filing of the returns for 2010/11, 2011/12 and 2012/13.

20 **Special circumstances**

53. That is not the end of the appeal as I must also consider any special circumstances and proportionality.

54. Sch 55 of the FA 2009 gives, in the first instance, HMRC power to reduce penalties for special circumstances, although in Mr Haines' case, HMRC has made no
25 reduction for special circumstances. The relevant part of Sch 55 reads as follows:

Special reduction

16(1) if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

16(2) In sub-paragraph (1) special circumstances does not include –

- 30 (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.

16(3) In subparagraph (1) the reference to reducing a penalty includes a reference to

- 35 (a) staying a penalty, and
(b) agreeing a compromise in relation to proceedings for a penalty.

55. Then §22(3) of Sch 55 provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of

special circumstances was ‘flawed’, in the sense that HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision; a decision by HMRC is also ‘flawed’ in this sense if HMRC simply failed to think about the matter at all.

5 *Was HMRC’s decision on special circumstances flawed?*

56. So in order to decide if I can consider special circumstances, I have to first decide whether HMRC’s decision on special circumstances was flawed. I find HMRC never considered the possibility of remitting a whole or part of the penalty due to special circumstances: the penalty was imposed automatically. The only occasion on
10 which HMRC would consider special circumstances was on review but there has never been a review because HMRC never accepted the appeal as it was lodged late. That means the ‘decision’ on special circumstances was flawed because HMRC never took a decision on special circumstances. Which means that the Tribunal can do so.

57. Nevertheless, HMRC suggest that there are no special circumstances and the
15 Tribunal should not mitigate the penalties. In order to make a decision on this, I must consider what the legislation means by ‘special circumstances’.

58. There is no test in the legislation but various Tribunals have attempted to give a definition. They often start with what the Court of Appeal (in a different context) said in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H that:

20 “...to be special the event must be something out of the ordinary, something uncommon; ...”

59. In *Warren* [2012] UKFTT 57 (TC) the Tribunal said of “special circumstances”:

25 “[53.] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where
30 it is right that some part of the penalty should be borne by the taxpayer.

[54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be
35 halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.”

40 60. What was said in *Warren* seems right, if very general. In my view, it seems to me that to justify a reduction or remission of a penalty, special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which

renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.

5 61. The only possible special circumstance here, it seems to me, is the disparity between the offence and Mr Haines' income on the one hand and the penalty on the other.

10 62. As I have said, the offence was the failure to keep HMRC informed of his whereabouts in circumstances where he knew he had outstanding liabilities for earlier years. Nevertheless, Mr Haines was penalised for his failures in respect of his 2007/8 and 2008/9 tax liabilities and filing obligations by the penalties for late filing and late payment in respect of those years. Indeed, had it not been for that previous unresolved liability, I would not have considered a pensioner with such a low income and no expectation of tax liability to be at fault for failing to keep HMRC up to date with his address. So, in so far as the years 2010/11-2012/13 were concerned, the offence seemed very minor for the reasons given in §50.

15 63. Moreover, his income was only just over £6,000 in the three years penalised.

20 64. Yet for those last three years, he has had penalties of £1,600 per year for the first two years and £1,300 for the last year. That is a very substantial penalty for the offence and in comparison to his income. While having a nil tax liability is not an answer to a penalty for failure to file, I consider that a penalty of £1,600 against someone earning about £6,000 per annum merely for failing to file a nil tax return in circumstances where it wasn't reasonable to expect a notice to file to be significantly unfair and contrary to what Parliament must have intended.

25 65. I am entitled to make my own decision on special circumstances. In my view, where I am unable to accept that there was a reasonable excuse but consider the size of the penalty out of all proportion to the offender's means and offence, it is right to reduce the penalty.

30 66. So on the grounds of special circumstances for all three of the years, I allow the appeals against all the penalties bar the initial penalty. I DISMISS the appeal against the initial penalties so that for each year a penalty of £100 is due as it seems there should be some penalty for his failure.

Proportionality

35 67. The reason why the Tribunal is said to have the power to consider the proportionality of penalties is that taxpayers are given the right to protection of their property, and can only be deprived of it (such as by a penalty) that is proportionate. What that means was explained in *International Transport Roth* [2002] EWCA Civ 158 where it was said that to lack proportionality a penalty must be 'not merely harsh but plainly unfair'. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC).

68. The cases indicate that the penalty legislation as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate, without the entire scheme of the legislation being disproportionate. I consider both. *Trinity Mirror*, albeit in a case involving VAT which is governed by EU law, explained that the question is not merely whether the non-compliance penalty is out of proportion to the non-compliance, but whether it is so out of proportion it is contrary to the objectives of the legislation requiring compliance ([58]).

The scheme as a whole

69. I do not think that the proportionality of Sch 55 as a whole can be called into question. It has a system of escalating penalties for failure to file. There is an initial late filing penalty of £100, followed by £300 (or 5% of tax if higher) at 6 months and £300 (or a % of the tax, if higher) at 12 months. It is not open-ended as after 12 months, there are no further penalties.

70. The one part of the penalty scheme that might appear disproportionate is the daily penalties. While charged at £10 per day for 90 days, in practice the taxpayer is notified of them at the same time as the six months' late filing penalty, apparently creating a penalty of £1,200 for filing a return (with nil or little tax owing) six months' late, when the 12 months' late filing penalty is only £300.

71. However, I accept that the scheme of the legislation is rational in that it intends, after the initial 3 months of late filing, that the taxpayer should be told in advance that every day he continues to delay filing, he incurs a further penalty of £10. This should encourage immediate filing. If daily penalties fail after a period of 3 months, it is rational that they cease as they would have failed in their objective.

72. In conclusion, I do not think that the scheme of the legislation as a whole is disproportionate.

The penalties in this particular case

73. But while the scheme of the legislation might be proportionate, there is still the possibility that in any individual case it might operate disproportionately. In this case, (a) the returns in question were nil tax returns; (b) Mr Haines' had low income of only about £6,050 for each year in question (2010/11-2012/13); and (c) his real offence was in relation to earlier years (2006/7-2007/8) for which he was separately penalised and I have refused to admit that appeal. Yet Mr Haines has been penalised with flat rate penalties amounting to £1,600 per year for the first two years of 2010/11-2011/12 and £1,300 for the last year. I consider that this is one of those rare cases where all the penalties but the initial £100 penalty go beyond being harsh into being plainly unfair. They are approximately 25% of a very low income for what was in respect of the years 2010/11-2012/13 a very minor offence. The legislation (see s 8 TMA 1970) did not intend persons with income as low as Mr Haines', and with no tax to report, to complete tax returns, so these non-compliance penalties are not in keeping with the intentions of the legislation.

74. I do not consider the original £100 penalty to be plainly unfair as Mr Haines did not in fact have a reasonable excuse for his failure to file for reasons explained above.

75. Therefore, my conclusion on proportionality is the same as my conclusion on special circumstances, and is no surprise as the basis of my conclusion is the same:
5 the daily penalties, the sixth months and twelve months penalties were plainly unfair on the particular facts of this case. They are disproportionate and that amounts to special circumstances.

Conclusion

76. I set out in the table on the next page my conclusions on which penalties I have
10 dismissed the application to appeal out of time (those marked 'DISMISSED') and those penalties in respect of which I have admitted the appeal but then dismissed the appeal ('DISMISSED') and those penalties in respect of which I have admitted the appeal out of time and then allowed the appeal ('ALLOWED').

77. Mr Haines must pay those penalties marked 'DISMISSED' and he has done so;
15 he is not liable to pay those marked 'ALLOWED' and, as he has already paid them, they must be repaid by HMRC.

Interest

78. The Tribunal has no jurisdiction to consider the appeal in so far as it was
20 intended to be against the interest charged. Nevertheless, to the extent that the appeal has been allowed against the penalties, the interest charge will automatically reduce. As Mr Haines has already paid the debt, HMRC will need to re-calculate the interest and repay the excess to Mr Haines.

Tax year		Penalty in £s	Outcome of proceedings
2006/7	Late filing penalty (1 st)	100	DISMISSED
	Late filing penalty (2 nd)	100	DISMISSED
	Late payment surcharge (1 st)	112.34	DISMISSED
	Late payment surcharge (2 nd)	112.34	DISMISSED
2007/8	Late filing penalty (1 st)	100	DISMISSED
	Late filing penalty (2 nd)	100	DISMISSED
	Late payment surcharge (1 st)	130.10	DISMISSED
	Late payment surcharge (2 nd)	130.10	DISMISSED
2010/11	Initial late payment penalty	100	DISMISSED
	Daily late filing penalties	900	ALLOWED
	6 months late filing penalties	300	ALLOWED
	12 months late filing penalties	300	ALLOWED
2011/12	Initial late payment penalty	100	DISMISSED
	Daily late filing penalties	900	ALLOWED
	6 months late filing penalties	300	ALLOWED
	12 months late filing penalties	300	ALLOWED
2012/13	Initial late payment penalty	100	DISMISSED
	Daily late filing penalties	900	ALLOWED
	6 months late filing penalties	300	ALLOWED

79. 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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Barbara Mosedale
TRIBUNAL JUDGE
RELEASE DATE: 9 August 2018

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