



**TC06994**

**Appeal number: TC/2018/05174**

*PENALTIES – late filing and late payment – Schedules 55 and 56 to FA 2009 – whether causation existed between the alleged reason and the default – proximity in timing a precondition for causation – whether reasonable care taken to avoid the failure in reliance on a third party – whether special circumstances – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAVID FLEMING**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE HEIDI POON  
MR IAN MALCOLM**

**Sitting in public at the Tribunal Hearing Centre, Caledonian House, Dundee, on  
30 November 2018**

**Mr David Fleming in person, and Mr Sean Fleming, chartered accountant for  
the Appellant**

**Mr Matthew Mason, presenting officer of HM Revenue and Customs, for the  
Respondents**

## DECISION

1. Mr David Fleming appeals against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ('Sch 55') for a failure to submit his self-assessment ('SA') returns for the four years 2010-11, 2011-12, 2012-13, and 2013-14 on time.

2. Penalties under Schedule 56 FA 2009 ('Sch 56') have also been imposed in relation to the late payment of the tax liability for 2015-16.

### The hearing

3. At the hearing, Mr David Fleming gave evidence concerning his self-employment history, and on his state of knowledge in respect of his personal tax affairs. Mr Sean Fleming is a chartered accountant working in industry, and previously in general practice. Mr Sean Fleming is a nephew of the appellant, and has assisted the appellant in bringing his tax affairs up to date, and in making representations in relation to this appeal.

### The penalties under appeal

4. The following penalties have been levied on Mr Fleming and appealed:

Year	FA 2009	Type of Penalty	Amount £	Date penalty notice
<b>2010-11</b>	<b>Sch 55</b>	Late filing penalty	100	14/02/12
		Daily penalties	900	07/08/12
		6-month late filing penalty	300	07/08/12
		12-month late filing penalty	300	19/02/13
<b>2011-12</b>	<b>Sch 55</b>	Late filing penalty	100	12/02/13
		Daily penalties	900	14/08/13
		6-month late filing penalty	300	14/08/13
		12-month late filing penalty	300	25/02/14
<b>2012-13</b>	<b>Sch 55</b>	Late filing penalty	100	18/02/14
		Daily penalties	900	18/08/14
		6-month late filing penalty	300	18/08/14
		12-month late filing penalty	300	24/02/15
<b>2013-14</b>	<b>Sch 55</b>	Late filing penalty	100	18/02/15
		Daily penalties	900	14/08/15
		6-month late filing penalty	300	14/08/15
		12-month late filing penalty	300	23/02/16
<b>2015-16</b>	<b>Sch 56</b>	30-day late payment penalty	90	17/07/18

		6-month late payment penalty	90	17/07/18
		12-month late payment penalty	90	17/07/18

5. Late filing penalties in relation to the tax years 2014-15 and 2015-16 were also imposed, but were subsequently cancelled by HMRC for the reason that s 8 TMA notices had not been effectively served for those years.

6. In summary, and after the cancellation of the late filing penalties for 2014-15 and 2015-16, the penalties under appeal to which this decision relates are as follows:

(1) The maximum of £1,600 have been imposed for the late filing of the self-assessment returns for the four years under Sch 55, making a total of £6,400.

(2) The total penalties for the late payment of tax under Sch 56 is £270.

The overall quantum of penalties under appeal is £6,670.

### **The facts**

7. From Mr Fleming's oral evidence and the documents provided, we make the following findings of fact relevant to our consideration.

8. Mr Fleming has been a self-employed joiner since May 1994, contracting directly with householders to work on home improvement projects often involving building new kitchens, extensions or conservatories. Apart from his first year of trade, Mr Fleming has not been VAT registered.

9. Mrs Fleming, who was a secretary in a local company, kept the books for Mr Fleming's business, and a Mr Carnegie, an accountant local to where Mr Fleming lives, had been dealing with his tax affairs and filing his SA returns prior to 2010-11.

10. In 2011, Mrs Fleming was hospitalised due to a medical condition and underwent an operation, but complications developed, necessitating another period of hospitalisation for remedial surgery. Her recovery after the successive operations was slow, and she was unable to return to work.

11. In March 2011, Mr Fleming engaged the service of a bookkeeper who had been recommended by a friend. The bookkeeper came three to four hours a week and was paid £12 to £15 per hour. Mr Fleming devolved all administration aspects of his business to the bookkeeper, including all correspondence related to his business.

12. Mr Fleming confirmed that he was unaware of any correspondence from HMRC concerning the late filing penalties that have been accumulating over the years. He indicated that he would have passed all HMRC's letters, 'unopened', to the bookkeeper to deal with; that he had assumed if there had been any matters he needed to deal with, the bookkeeper would have told him.

13. On being asked whether the physical copies of letters from HMRC would have been filed by the bookkeeper, Mr Fleming said they probably would have been in a folder, but he was not aware of them at the time.

14. When asked about the extent the bookkeeper would be trusted to handle money for the business, such as making payments to suppliers or paying in cheques for the business, Mr Fleming confirmed that he dealt with those aspects himself.

15. Mr Fleming also confirmed that he would check his bank statements for payments he was expecting from customers. However, it had not occurred to him that he had made no payments on account to HMRC in these years when no returns were filed. He said that because he was working less than before due to his wife's illness, he was not expecting he would have tax to pay.

16. In September 2015, Mrs Fleming was phased back to work on two to three hours a day. The arrangement came to end after two weeks, as her medical condition caused her to be admitted to intensive care at Perth Royal Infirmary, and was then transferred to Edinburgh Royal Infirmary. She underwent two operations and was only discharged from hospital in December 2015.

17. During this period from September to December 2015, Mr Fleming was commuting between Perth and Edinburgh to see his wife. He would arrive at the intensive care ward of the hospital between 4pm and 5pm, and left at meal time at around 7pm to 7:30pm, arriving home in Perth between 8:30pm and 9pm.

18. From the SA Notes maintained by HMRC, we note the following entries:

(1) On 28 March 2007, taxpayer agreed Time to Pay (TTP), a monthly plan to settle outstanding tax liability; the sum of £2,889 to be paid on 29 May 2007.

(2) On 30 January 2009, taxpayer telephoned regarding problems making payment on time and was advised to contact Debt Management to arrange TTP.

(3) On 15 September 2009, TTP for £10,613 agreed with Mr Fleming to be paid monthly by direct debit of 9 monthly payments of £1,000 from 30/09/09 and a balancing payment of £1,613.49 on 30/6/10.

(4) On 7 May 2010, SA303 received for 2009-10; payment on account to be reduced to nil.

(5) On 23 September 2011, form 64-8 received; Agent's details updated.

(6) On 6 March 2017, Agent's details removed.

(7) On 4 June 2018, a sequestration hearing brought by Debt Management in relation to the outstanding penalties was scheduled for Monday 25 June 2018 at Perth Sheriff Court.

19. It was the sequestration petition that finally got Mr Fleming into action, and he told the Tribunal: (i) that it was his wife who 'picked up' the sequestration notice, saying to him: 'You need to read this'; (ii) that he called Mr Carnegie the next day to enquire why there were returns outstanding, since he had assumed that Mr Carnegie had been filing his returns with the information provided by the bookkeeper; and (iii)

that Mr Carnegie confirmed that the last tax return he submitted for Mr Fleming was for 2009-10; and that the bookkeeper had never been in touch.

20. Mr Fleming took immediate steps to dismiss the bookkeeper and asked his nephew, Mr Sean Fleming, to help him with bringing his tax affairs up to date.

21. Paper returns were filed for the years 2010-11, 2011-12, 2012-13, and 2013-14, while the returns for the years 2014-15, 2015-16 would appear to have been filed online. The SA returns for the six years were all recorded as being received or captured by HMRC on 13 July 2018.

22. HMRC conceded that no relevant s 8 TMA notice would appear to have been served for the years 2014-15 and 2015-16. Consequently, no late filing penalties have been imposed for these two years, though the said returns were filed after their respective due dates.

### **Grounds of appeal**

23. The grounds of appeal as stated in Mr Fleming's letters to HMRC of 19 July 2018 are summarised as follows:

(1) The medical issues surrounding Mrs Fleming in 2011, involving two periods of hospitalisation for medical treatments and operations.

(2) Mrs Fleming then suffered from post-surgery trauma; recovery was slow.

(3) In September 2015, Mrs Fleming's health 'again was deteriorating'; stayed at Edinburgh Royal Infirmary for approximately 14 weeks, and it was an 'extremely traumatic' time for the family.

(4) After 14 weeks in hospital, much of which in intensive care unit, Mrs Fleming was discharged as an in-patient. She again suffered from post-surgery trauma, and was unable to work until June 2018.

(5) Mr Fleming 'had put complete trust in a self-employed bookkeeper to prepare and submit the necessary returns'; that 'any letters [he] did receive from HMRC were given to her unopened and she never did share its contents with [him]'.

24. In an undated letter to HMRC to giving further grounds of his appeal:

'Reflecting on this, I perhaps put too much faith into the bookkeeper which in return has left me in the situation I am in now. ... it is now clear that the person in question was either under qualified or unfit to carry out the volume of work which was asked.'

### **HMRC's case**

25. HMRC's decision letter dated 7 August 2018 refused the appeal on grounds of reasonable excuse for the following reasons:

(1) That during the period of his wife's ill health, Mr Fleming was able to carry on with his business. If he could manage his business affairs, he could have filed his returns and paid his tax on time.

(2) The ongoing ill health of his wife would not have prevented Mr Fleming from filing his returns or paying his tax liability on time.

26. The rest of the decision letter was generic in substance, such as to state that HMRC would not accept as a reasonable excuse: (a) pressure of work, (b) lack of information, (c) no reminder from HMRC, or (d) ignorance of basic law. It continued by setting out the independent review request procedure, or in the alternative, an appeal to the Tribunal, and the matter of interest charge until the penalties are paid.

27. HMRC's decision letter did not address the matter of special reduction.

28. There is no review conclusion decision as Mr Fleming appealed direct to the Tribunal without requesting an independent review of HMRC's decision. Had a review been requested, the matter of special reduction would most probably have been addressed by the Review Officer.

## **The applicable law**

### *Statutory provisions*

29. Section 8 of TMA places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer.

30. The late filing penalties are imposed under paras 3 to 6 of Sch 55 FA 2009. Paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for the return. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable. Paragraph 5 provides for a fixed penalty of £300 (or 5% of tax if higher) if the return remains outstanding after 6 months. Paragraph 6 provides for a fixed penalty of £300 (or 5% of tax if higher) if the return remains outstanding after 12 months.

31. The daily penalties are imposed under para 4 of Sch 55, and a taxpayer is liable to a penalty under para 4 'if (and only if)' HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable'.

32. In relation to the late filing penalties, para 23 of Sch 55 to FA 2009 provides for the defence of 'reasonable excuse', with specific exclusions 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.

(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.'

33. Section 59B of TMA provides for the payment (or repayment) of any outstanding liability (or overpayment) in relation to income tax and capital gains tax for a relevant year. Under sub-s 59B (4), the time limit for making such adjustment is 'on or before the 31<sup>st</sup> January next following the year of assessment'.

34. In relation to the late payment penalties, para 16 of Sch 56 to FA 2009 provides the defence of 'reasonable excuse' on an appeal to HMRC or the Tribunal in very similar terms to those under para 23 of Sch 55.

35. In the absence of a reasonable excuse, a penalty can be reduced if there are 'special circumstances' under para 16 of Sch 55, and para 9 of Sch 56.

36. The Tribunal's jurisdiction in under para 22 of Sch 55, and para 15 of Sch 56, which provide that the Tribunal has the power to:

'(1) affirm or cancel the penalty imposed by HMRC; and

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

#### *Case law on reasonable excuse and special circumstances*

37. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse 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 [18]).

38. In *Jeffers v HMRC* [2010] UKFTT 22 (TC) Sir Stephen Oliver QC (the then President of the Tribunal) states at [17] in respect of reliance on an agent:

'The obligation to make the tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with, eg the obligation to make the return on time can amount to a "reasonable excuse". To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional.'

39. The test of reasonableness as articulated by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234, while specifically refers to a VAT registered trader, is applicable to all taxpayers:

‘The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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?’

40. In *Barrett v HMRC* [2015] UKFTT 329 (TC), the test of reasonable excuse applicable to a penalty is stated at [154] in the following terms:

‘The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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.’

41. In relation to the extent any reliance on a third party can amount to a ‘reasonable excuse’ (in the context of whether ‘reasonable care’ has been taken by the taxpayer), Judge Berner observed in *Barrett* at [161] the following:

‘The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual’s conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.’

42. The Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) gives guidance at [71] on whether an ‘excuse’ amounts to a ‘reasonable excuse’:

‘In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times ...’

43. The legislation does not define ‘special circumstances’. From case law, it is accepted that for circumstances to be special they must be ‘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).



44. In *Rodney Warren & Co v HMRC* [2012] UKFTT 57 (*Warren*), Judge Helier stated at [53] that the consideration of special circumstances ‘must mean something different from, and wider than, reasonable excuse’, for –

‘... (i) if its meaning were confined within that of reasonable excuse, paragraph 9 [of Schedule 56 FA 2009] would be otiose, and (ii) because paragraph 9 [of Schedule 56 FA 2009] 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 it is right that some part of the penalty should be borne by the taxpayer.’

45. Judge Helier’s articulation of ‘special circumstances’ is at [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 (sic) would be 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.’

## **Discussion**

46. The appellant does not dispute that the returns were filed late and that the tax was paid late. To that extent, HMRC have established that there is a *prima facie* case for the imposition of the penalties under Sch 55 for the late filing of returns and under Sch 56 for the late payment of tax.

47. The principal ground of appeal advanced by Mr Fleming concerns his wife’s medical conditions. The secondary ground of appeal is to say that he had placed reliance on the bookkeeper and had assumed that his obligations as a taxpayer had been met with the bookkeeper’s assistance or agency.

48. Whilst Mr Fleming’s two grounds of appeal would seem to be closely related in his mind, we consider each ground of appeal in turn, as the factors relevant to our consideration in relation to each ground are different.

49. Mr Fleming has dwelt in some detail on his wife’s medical conditions from 2011 to 2015. We do not doubt the truthfulness of Mr Fleming’s account, but do not consider the particulars concerning Mrs Fleming’s health as necessary for inclusion here. What was noticeably lacking in Mr Fleming’s representations is an articulation of the impact of his wife’s health on him as a taxpayer in meeting his compliance obligations. For present purposes, the only relevance of Mrs Fleming’s health issues is its causal effect, if any, on Mr Fleming’s multiple failures in filing his returns.

50. In the absence of such representations, the issue of causation between Mrs Fleming’s health conditions and Mr Fleming’s failures in meeting his obligations in return filing and tax payment on time is addressed as follows.

*Whether reasonable excuse due to wife's periods of illness*

51. HMRC have rejected Mrs Fleming's health issues as giving rise to a reasonable excuse because: (a) the health issues were ongoing, and (b) Mr Fleming was able to carry on with his business at all relevant times.

52. We agree with HMRC that if Mrs Fleming's health issues have been ongoing, then that could not give rise to an excuse in terms of causation. That is to say, if Mrs Fleming's ill health has become a constant factor of Mr Fleming's life, then that represents a state of affairs which, of itself, does not provide an excuse for a default.

53. Whilst Mrs Fleming has ongoing health issues, there were clearly two periods when these issues reached a crisis point during which Mrs Fleming was hospitalised and required intensive medical intervention.

54. The first crisis period was in early 2011, and carried on to various degrees into late 2011. During this period, Mrs Fleming underwent two operations in quick succession. The second crisis period was between September and December of 2015, when Mrs Fleming again underwent surgeries and was in intensive care.

55. The Tribunal considers whether this ground of appeal gave rise to a reasonable excuse in relation to any of the defaults by adopting a three-stage approach. The first stage is to consider causation between the excuse and the default; the second stage is to consider whether the excuse, even if it had caused the default, meets the test of reasonableness to become a reasonable excuse; the third stage concerns the duration of the reasonable excuse.

56. The factors relevant to each stage of consideration are the following:

(1) Causation – A penalty is triggered by a default, and for a penalty to be cancelled on ground of reasonable excuse, the Tribunal must be able to find that due to X (the excuse), the taxpayer failed to do Y (the default). For there to be causation, the link between the excuse and the default should neither be remote in temporal sense, or be removed in causation terms. Proximity in timing between the excuse and the default is therefore a precondition for causation.

(2) Reasonableness – If causation is established between the excuse and the default, then the second stage is to apply the test of reasonableness to the excuse in accordance with case law: the test of reasonableness is primarily objective, but takes into account the subjective attributes of the taxpayer in question.

(3) Duration – Where a default has persisted over a protracted period, it is then necessary to consider the application of para 23(2)(c) of Sch 55 to the facts of the case: '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'. Paragraph 23(2)(c) therefore envisages an extension of a reasonable excuse where the Tribunal considers that the failure was remedied without unreasonable delay. The corollary is that the reasonable excuse ceased to exist by the time the Tribunal considers that the taxpayer, in his circumstances, should have remedied the failure. The judgment decision in this respect is to assess what

constitutes ‘unreasonable delay’ in remedying the failure for the taxpayer in question, given the particular set of circumstances in which he found himself.

57. We now turn to the facts of the case to consider causation. Since Mrs Fleming played a crucial role in ensuring that the books were kept up to date and to liaise with Mr Carnegie in relation to return filing each year, her incapacitation could potentially be an excuse that *caused* a default. We consider the circumstances surrounding each crisis period to see if causation can be established.

58. The first crisis period in 2011 had an unspecified starting point. Mr Fleming could not be precise as to which month his wife became hospitalised, other than to say ‘early 2011’. From the fact that Mr Fleming employed a bookkeeper from March 2011, we infer that the first crisis period would have started by March 2011.

59. We accept this crisis period lasted almost a year to the end of 2011. Meanwhile, Mr Fleming had put in place a bookkeeper, whom he believed would fulfil those functions for his business and in relation to his tax affairs as Mrs Fleming used to do.

60. Was there a causation between Mrs Fleming’s health crisis in 2011 to any of the late filing defaults then? For there to be causation, we need to establish that there was a proximity in timing between each of the crisis periods and the relevant defaults.

61. The first filing default was in relation to the SA return for 2010-11 due on 31 January 2012. By the time the return was due for filing in January 2012, Mrs Fleming’s conditions would seem to have stabilised. Mr Fleming was consistent in stating that this period of medical intervention ended in late 2011.

62. Was there sufficient proximity in timing between Mrs Fleming’s health issues in 2011 with the default in relation to the late filing of 2010-11 return for any of the penalties to be discharged? Whilst there was arguably sufficient proximity in timing for the £100 late filing penalty to be discharged, this was countered by the fact that there was the bookkeeper who had been in place for some 10 months by January 2012, and was supposed to see to the return filing with Mr Carnegie.

63. In other words, Mrs Fleming’s health issues in the first crisis period, which we accept to be most of 2011, did not cause the default in relation to the filing of the 2010-11 return by 31 January 2012, or any of the subsequent filing defaults, since she was no longer the person involved with the filing of any of these returns.

64. For the same reason, there was no direct causation between the second period of Mrs Fleming’s hospitalisation in September to December 2015 and any of the defaults. We are of the view that once the bookkeeper was employed in March 2011, Mrs Fleming no longer played a role in the business. Her incapacitation therefore did not directly contribute to any of the filing or payment defaults.

65. The only default with some proximity in timing to the second period of hospitalisation was in relation to the filing of the 2013-14 return, which was due on 31 January 2015. However, the filing due date 31 January 2015 preceded the start of the second period of hospitalisation in September 2015 by some eight months.

66. In relation to the second period of Mrs Fleming's hospitalisation (September to December 2015), the causation test therefore fails at the first hurdle, given the lack of proximity in timing between the excuse and any of the defaults.

67. In the absence of causation between the alleged reason concerning Mrs Fleming's medical conditions and her periods of hospitalisation and any of the defaults, the first ground of appeal is dismissed. It is unnecessary to consider the second stage concerning 'reasonableness' of the excuse, or the third stage in relation to the duration of a reasonable excuse.

*Whether reasonable excuse due to reliance of a third party*

68. Mr Fleming's second ground of appeal concerns his reliance on the bookkeeper to meet his filing obligations. Paragraph 23(2)(b) of Sch 55 provides that where a taxpayer relies on a third party to do anything, *that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.*

69. The relevant question for our consideration is therefore whether Mr Fleming had taken reasonable care in his reliance on the bookkeeper in avoiding his multiple failures. Mr Fleming admitted, on reflection, that he had 'put too much faith into the bookkeeper', who was 'either under qualified or unfit to carry out the volume of work which was asked'.

70. Mr Fleming's observations on reflection are acute and judicious, with which the Tribunal agrees entirely. Based on the facts that the bookkeeper worked for Mr Fleming for three to four hours per week at an hourly rate of £12 to £15 to cover aspects of his business administration, Mr Fleming's reservations of the ability and suitability of the bookkeeper to meet the filing requirements were well justified.

71. It is not a conclusion that could only have been reached so belatedly with hindsight. This conclusion reached by Mr Fleming on reflection could have been reached much earlier, even if not at the inception of engaging the bookkeeper's service, then by the time when the penalty notices arrived in relation to the continual failure to file his 2010-11 return.

72. In the alternative, in the delegation of tasks, Mr Fleming had failed to take reasonable care in ensuring that the remit of responsibilities was clearly understood by the bookkeeper as to include return filing via Mr Carnegie, and in ensuring that the bookkeeper was adequately supervised through Mr Carnegie.

73. Mr Fleming's failure to take reasonable care to avoid the continual failure in filing his return year on year is evident in many ways:

- (1) It would appear that once Mr Fleming had engaged the service of the bookkeeper, he completely disengaged with the process of return filing. He admitted that if a letter was coming from HMRC, he would pass it to the bookkeeper – unopened.

(2) Mr Fleming's evidence was vague as to what he expected to have happened with the bookkeeper's role in return filing. He said at one point that the bookkeeper would have gone to see Mr Carnegie with the books, and arranged for the returns to be filed.

(3) However, his agent's details were changed with the filing of a signed mandate on form 64-8 in September 2011, which meant Mr Carnegie could not have been acting for him after the agent's details were updated.

(4) Mr Fleming could not recall having signed the new mandate, but the mandate would have been most probably signed by Mr Fleming, and that had the effect of removing Mr Carnegie from being his agent. It is unclear who was authorised as the new agent, but most probably would have been the bookkeeper. At no point in the episode of changing his agent did Mr Fleming demonstrate that he had taken any care with what he was doing.

(5) Mr Fleming failed to make any enquiry with either Mr Carnegie or with the bookkeeper at any stage as to the status of the return filing.

(6) From the SA Notes, Mr Fleming had made Time-to-Pay arrangements with HMRC to settle his tax liabilities in previous years. He should have known that there could have been tax to be paid, even when his earnings had decreased. But he seemed to be content not to enquire as to what status his tax liabilities would have been in all these years.

(7) In other areas of his business, such as checking if customers had paid, or paying suppliers by bank transfers, Mr Fleming took care to deal with these matters himself. He apparently did not trust the bookkeeper to the extent of giving her access to deal with his bank account.

74. Whilst Mr Fleming referred to his 'complete trust' of the bookkeeper, we consider his attitude was one of complete non-engagement with his obligations as a taxpayer. Mr Fleming started self-employment in 1994, which pre-dated the introduction of Self-Assessment in 1996-97. He would have been familiar that a tax return was required annually to account for his earnings, even before self-assessment.

75. We do not consider the 'complete trust' Mr Fleming claimed to have placed in the bookkeeper to be a reasonable thing for a responsible taxpayer, conscious of and intending to comply with his obligations regarding tax, to have done. The so-called 'complete trust' appeared to be a convenient mechanism for Mr Fleming not to concern himself with all matters in relation to his tax affairs, so much so that he would not even concern himself to open any letters from HMRC.

76. For all these reasons, we do not find that Mr Fleming had a reasonable excuse in his reliance on the bookkeeper for any of the defaults for which penalties have been imposed because he did not take reasonable care to avoid any of these failures.

#### *Whether special circumstances for a reduction*

77. Paragraphs 16 of Sch 55 and 9 of Sch 56 allow HMRC to reduce a penalty below the statutory minimum if there are special circumstances. HMRC's decision of

7 August 2018 refusing the appeal against the penalties did not include a consideration of special reduction.

78. The relevant provisions for special reduction under Schedules 55 and 56 envisage a reduction in a penalty rather than absolution. Having concluded that there was no reasonable excuse for any of the defaults, and in the absence of a decision on special reduction having been made by HMRC, the Tribunal makes a decision on special reduction as one that HMRC had the power to make.

79. In considering whether Mr Fleming had special circumstances that merit a reduction of the penalties, our reasoning as applied to the facts is as follows:

(1) Whilst Mr Fleming would concern himself with making a Time-to-Pay arrangement as evident with the TTP arrangements he made in March 2007, and in January and September 2009, he seemed to have devolved most of his compliance responsibilities as a taxpayer to Mrs Fleming. In that regard, Mrs Fleming appeared to us to be the person who had the oversight of Mr Fleming's compliance obligations, and she was fulfilling a crucial role in ensuring that Mr Fleming met his obligations by their respective due dates.

(2) Mrs Fleming's medical conditions were serious in 2011, and that her incapacitation would have a direct effect on the return filing for 2010-11, since the customary annual routine of making the books ready for Mr Carnegie would not have been possible throughout 2011.

(3) Mr Fleming engaged the service of a bookkeeper in March 2011 in the belief (or in the hope) that he would find in the bookkeeper a replica of Mrs Fleming: a person who would take over the tasks that Mrs Fleming had been fulfilling for him with the same dedication and commitment. It seemed to us that Mr Fleming perhaps did not fully appreciate what Mrs Fleming did in his stead in relation to his tax compliance obligations, and as a result, he failed to instruct and to supervise the bookkeeper adequately, as he had not been the person concerned with the oversight of his tax affairs.

(4) Mrs Fleming was slow in recovery after the various medical treatments in 2011. It is understandable that Mr Fleming would be preoccupied with the health issues affecting Mrs Fleming. In these circumstances, and from the force of habit, coupled with the wishful belief that the bookkeeper was replacing Mrs Fleming's input into his business in all respects, Mr Fleming continued to adopt an attitude of non-engagement with his own tax affairs as was his wont.

(5) Whilst Mr Fleming had carried on working, he was not working to former capacity due to the care of his wife. We have not examined in detail the extent Mr Fleming reduced his workload. We note that his tax liabilities for which Time-to-Pay was arranged amounted to £10,613 in 2009. In contrast, and apart from the year 2015-16, there was no tax payable by Mr Fleming in the years for which returns had been filed late.

(6) We accept that Mr Fleming was the main carer of his wife throughout the relevant periods, while he continued to work at a much reduced level. In

September 2015, Mrs Fleming's health suffered another setback that resulted in her extensive stay in intensive care.

(7) In view of the crucial role that Mrs Fleming had previously played in Mr Fleming's tax affairs before the protracted defaults, and in the context of the additional stress brought on by the health issues surrounding Mrs Fleming which left Mr Fleming as the carer and the breadwinner, we consider that these gave rise to circumstances that were 'exceptional'.

80. It was unsurprising that Mrs Fleming was the person who alerted Mr Fleming to the fact of the Sequestration Petition, and that he must take prompt actions. Whilst we do not find it excusable that Mr Fleming should adopt an attitude of non-engagement in relation to his tax affairs, to the extent that all HMRC's letters would remain unopened by him, we consider that there were circumstances in his life around the relevant times that were 'exceptional' and 'out of the ordinary run of events' due to the health issues and long periods of hospitalisation of Mrs Fleming.

81. Pursuant to the provisions under paras 22 of Sch 55, and 15 of Sch 56, the Tribunal makes a decision for which HMRC have the power to make by allowing 30% reduction of the overall penalties imposed for the late filing of returns and the late payment of tax for the relevant years.

### **Disposition**

82. For the reasons stated, the appeal is allowed in part. The overall quantum of penalties of £6,670 is reduced by 30% to £4,669.

83. 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.

**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 21 FEBRUARY 2019**