[2020] UKFTT 0073 (TC)

# TC07568

**Appeal number: TC/2018/07235**

***INCOME TAX - individual tax return - penalties for late filing - whether properly imposed – yes – late appeal against late filing penalty – permission to appeal late denied – appeal against daily and 6 month penalties - whether reasonable excuse - no - whether special circumstances - no - appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ANDREW MORTON** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**The Tribunal determined the appeal on 30 January 2020 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 14 November 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 18 December 2018 and various correspondence between the parties.**

DECISION

## Background

1. This is an appeal against the following penalties visited on the appellant under Schedule 55 Finance Act 2009 ("**Schedule 55**") for the late filing of an individual tax return for the tax year 2016/2017.

(1) A late filing penalty of £100 ("**late filing penalty**").

(2) A daily penalty of £900 ("**daily penalty**").

(3) A 6 month late filing penalty of £300 ("**6 month penalty**").

2. Making an appeal is a two-stage process. Firstly an appellant must make an appeal to the respondents (or "**HMRC**"). Secondly the appellant must notify that appeal to this tribunal. As regards the late filing penalty, the appellant did make an appeal to HMRC on 24 October 2018, but did not make any such appeal for the daily penalty for six month penalty. HMRC told the appellant in a letter dated 1 November 2018 that his appeal against the late filing penalty, was late, and they were not prepared to accept it. However the appellant notified the tribunal of his appeal against all three penalties on 14 November 2018. As far as the daily penalty and six month penalties are concerned, HMRC are prepared to accept that the notification to the tribunal comprises an appeal to them as they consider that it is in the interests of justice for this matter to be resolved without further delay. I agree.

3. However, treating the notice of appeal as the appeal itself as regards the daily penalty and six month penalty means that it too was made considerably late. Notification of the daily penalty was given on or around 2 August 2017 and notification of the six month penalty was given on or around 10 August 2018.

4. The relevant legislation which is set out below allows HMRC to accept a late appeal in certain circumstances, and HMRC are prepared to allow the appellant's late appeal against the daily penalty and six month penalty. They are not, however, as stated above, prepared to allow a late appeal against the late filing penalty. And so as a preliminary issue I need to decide whether to give the appellant consent to bring his appeal against that late filing penalty, out of time.

## Evidence and findings of fact

5. From the papers before me I find the following facts:

(1) The appellant has been in the self-assessment regime for some time and is filed online consecutively since 2013/2014.

(2) HMRC records show that the appellant "opted in" to HMRC's self-assessment digital service on 17 January 2016. The appellant advised HMRC's

digital services that he wished to use an email address at yahoo.co.uk which is the same email address as is shown on the appellant's appeal to the tribunal.

(3) A notice to file his 2016/2017 tax return was issued to the appellant on 6 April 2017 and sent to the appellant's online tax account secure mailbox; and an email alert was also sent to the appellant's email address. That alert was not bounced. An extract from HMRC's computer records suggests that the appellant read this message on 16 February 2018.

(4) On 23 January 2018 the appellant made a payment of £118.60 to HMRC.

(5) The due filing date for an online return for that tax year was 31 January 2018, and since the return for that tax year was not received by that date a penalty notice for the late filing penalty was issued to the appellant on 13 February 2018 to his on-line tax account and an email alert was sent to his email address on the same date. An extract from HMRC's computer records suggests that this message too was read on 16 February 2018.

(6) On 5 June 2018 a 30 day daily penalty reminder was issued to the appellants on-line tax account and an email alert was also issued to his email address.

(7) On 31 July 2018 a 60 day daily penalty reminder was issued to the appellant's on-line tax account and an email alert was also issued to his email address.

(8) A notice of penalty assessment for the daily penalties was issued to the appellant on 2 August 2018. A penalty email notice was issued to the appellant's email address on the same date, and HMRC's records suggest that it was read on 23 October 2018.

(9) On or around 10 August 2018 HMRC issued a notice of penalty assessment for the six month penalty. HMRC's records suggest that the email notice alerting the appellant to the issue of this penalty was issued to him on 14 August 2018 to his email address, and was read by the appellant on 23 October 2018.

(10) HMRC's records suggest that the appellant accessed his on-line account on 16 January 2018, 16 February 2018, 19 April 2018, 23 October 2018, 24 October 2018 and 26 October 2018.

(11) A digital alert by way of email was issued to the appellant at his email address on 21 September 2018 which advised him that a statement of account had been sent to his on-line account. That statement confirmed that the late filing penalty, the daily penalty and the six month late filing penalty had been charged to his account.

(12) Following completion of an electronic tax return, the screen prompts a taxpayer to check and correct any errors that are highlighted. The tax computation is then viewed and the following page then has options to view, print and save a copy of the return. HMRC say that the text at the top of this page clearly states "Before submitting your return you can view, print and save a copy of your return to your own computer. Select "Next" at the bottom of the screen to go on to

submit your return".

(13) HMRC also say that to submit the return online a taxpayer has to read and agree a statement confirming that the information provided is complete and correct and asked to read input their details, user ID and password. When the return has been successfully submitted to HMRC there is an on-screen message to confirm receipt and a confirmation email is sent to the email address provided by the taxpayer. No such confirmation message/email was received by the appellant at the time that he purportedly completed and submitted his on-line tax return in January 2018.

(14) On 17 October 2018, HMRC's debt management and banking department issued a letter to the appellant advising him that his tax return was overdue. On receipt of that letter, the appellant contacted HMRC immediately who asked if he had paid the tax owed and he told them that he had paid the tax on 23 January 2018 and had bank statements to support this. HMRC also told him that a common mistake when completing online tax returns was to fail to click on the last submission button and on looking at his portal, the appellant thought that this seems to have happened in his case. So he immediately submitted the tax return which HMRC records show was received on 23 October 2018.

(15) On 24 October 2018 the appellant appealed to HMRC against the late filing penalty. In that appeal he gave the reason as to why his appeal was late as being "on receipt of the letter, I contacted HMRC and they advised after I had proof of paying my due tax on 23/1/2018 that I may have done all the form, got calculations and missed the last submit section…… I had! I have now submitted. As you would see, I've never been late, this was a genuine oversight." He also stated in that appeal that the reason that he submitted his tax return late was "as stated before… I had missed the last submit button… However I had paid tax due."

(16) By way of letter dated 1 November 2018, HMRC notified the appellant that his appeal against the late filing penalty was out of time and they were not prepared to accept a late appeal.

(17) The appellant did not make any appeal to HMRC in respect of the daily penalty or six month penalty. He did however give notice of appeal to the tribunal on 14 November 2018 for all three penalties.

**Legislation – late appeal**

6. Section 31A TMA 1970 requires a notice of appeal against an assessment to be given in writing to the relevant officer of the Board within 30 days on which the notice of assessment was given to a taxpayer. The legislation which deals with late appeals is set out in section 49 TMA 1970.

> **"**49. Late notice of appeal
>
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

7. Paragraph 21 of Schedule 55 deals with appeals against penalties levied under that schedule.

"21

(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act."

**Legislation – the penalties**

8. A summary of the relevant legislation is set out below:

*Obligation to file a return and penalties*

(1) Under Section 8 of the Taxes Management Act 1970 ("TMA 1970"), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 and references below to paragraphs are to paragraphs in that Schedule.

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

*Special circumstances*

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to me under paragraph 20, I can either give effect to the same percentage reduction as HMRC have given for special circumstances. I can only change that reduction if I think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

*Reasonable excuse*

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

**Case law - late appeal**

9. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

> "40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including
> >
> > [factors (a) and (b)]"."
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> 41. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."
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> 42. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT.
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> 43. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was

preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to

structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

47. *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

48. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal

proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

**Case law - notification of the penalties**

10. A summary of the relevant case law is set out below.

(1) As can be seen from [8(4)] above, in order to visit a daily £10 penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

(2) These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("***Donaldson***").

(3) The Court of Appeal decided that:

(a) The high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.

(b) A notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated 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 the penalties were payable. This was in compliance with the statute.

(c) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the TMA 1970 which the Court of Appeal held applied to the notice. And so they concluded that the failure to specify the period for which the daily penalties had been assessed did not invalidate the notice.

**Case law - Reasonable excuse**

11. In the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***") the following guidance was given to the FTT when it needs to consider a reasonable excuse defence:

"81 When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. "

**Case law - Special circumstances and proportionality**

12. The issue of special circumstances and proportionality in the context of late filing penalties has been most recently, and definitively, considered by the Upper Tribunal in the case of *Barry Edwards v HMRC* [2019] UKUT 131 ("***Edwards***"). The relevant extracts are set out below:

"66. We agree with Mr Ripley that the reasoning of *Bosher* is not applicable in relation to the question as to whether a penalty imposed pursuant to Schedule 55 to FA 2009 is disproportionate. Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is in the context of that specific jurisdiction that the question of proportionality must be considered. We did not take Mr Carey to argue to the contrary. It is therefore clear that the FTT erred by determining that it had no general power to reduce a penalty on the grounds that it is 10 disproportionate on the basis of the reasoning of the Upper Tribunal in *Bosher*……

72. In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:

"The respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".

73. The FTT then said this at [101] and [102]:

"101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in

> schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
>
> 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration……..

84. However, we were referred to HMRC's guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due. A taxpayer who does not think he should be within the self assessment regime when he receives a notice to file because as a matter of course he will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to 35 the notice. That is precisely what ultimately happened in this case.

85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances

justify a reduction in a penalty……..”

13. There have been a number of other cases on special circumstances from which I derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

(1) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(2) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(3) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(4) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(5) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(6) I can allow the taxpayer's appeal if I find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill) (*John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(7) In deciding whether HMRC's decision was unreasonable, I should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture*

*Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(8) As Lady Hale said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome - whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(9) Having undertaken that assessment:

> (a) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.
>
> (b) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

*Proportionality*

14. A summary of the principles relating to proportionality is set out below:

(1) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(2) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23].

(3) In the context of its application to penalties, the principle of proportionality is that:

(a) penalties may not go beyond what is strictly necessary for the objective pursued; and

(b) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(4) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(5) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

**Burden and standard of proof**

15. The burden is on the appellant to explain why I should give him permission to appeal against the late filing penalty out of time. One part of that analysis will be a consideration of whether, and if so when, HMRC issued the appellant with a valid notice of assessment of that penalty.

16. If I do give him permission then the burden that he is not liable for such penalty also rests with the appellant. And in any event the burden that is not liable for the daily penalties or the six month penalty lies with the appellant. But HMRC must establish that they have served valid notices to file on the appellant.

17. In each case the standard of proof is the balance of probabilities.

**Notices**

18. As I mentioned above, the issue and service of appropriate notices is important to both the appellant's application to bring his appeal against the late filing penalty out of time, and to the underlying appeal against the penalties.

19. HMRC claim to have served valid notices of assessment on the appellant for each of the penalties. Importantly, the appellant has not denied that he received these. But I am still obliged to find as a fact that the requisite notices were properly given to the appellant. As mentioned above, these notices comprise notices of assessment of the penalties pursuant to paragraphs 4 and 18 of Schedule 55, and notices to file a return under section 8 TMA 1970.

20. As evidence that they have served valid notices of penalty assessments for the penalties, HMRC have provided the following evidence that these were issued to the appellant and that their contents complied with the relevant paragraphs of schedule 55:

(1) A paper print out of HMRC's computer records entitled "View/Cancel Penalties" dated 29 November 2018. This document suggests that the notice of assessment for the late filing penalty was issued on 13 February 2018; for the daily penalty on 31 July 2018 and for the six month penalty, on 10 August 2018.

(2) A generic copy of notice SA326D which is the penalty notice for the late filing penalty.

(3) A paper copy of an extract from HMRC's computer records which HMRC say shows that the appellant read the late filing penalty notice on 16 February 2018.

(4) A further extract from HMRC's computer records suggesting that the daily penalty was issued on 2 August 2018 (a different date from the date set out at (1) above) and further suggesting that it was read by the appellant on 23 October 2018.

(5) A further extract from HMRC's computer records suggesting that the six month penalty assessment was issued to the appellant on 14 August 2018 (again a different date from the one set out at (1) above) and further suggesting that it was read by the appellant on 23 October 2018.

(6) A pro forma notice SA370 which is the form used by HMRC to notify a taxpayer of a daily penalty and a six month penalty.

(7) An extract from HMRC's computer records which comprises a statement of the appellant's running account with HMRC as at 21 September 2018 which identifies the three penalties under appeal.

21. Even though there is some inconsistency in the dates on which the penalty notices for the daily penalties and the six month penalty were issued (which might be explained by one of those dates being the date of the assessment and the other the date on which the notice of assessment was sent to the appellant) I think it is more likely than not that notices of penalty assessment containing the correct statutory information were given to the appellant. As I have said above, the appellant has not denied receiving them. I have paused for thought, given that the appellant brought his appeal against the penalties very shortly after he received a letter dated 17 October 2018 from HMRC's debt management department. HMRC's computer records suggest that he had logged onto his HMRC account on 16 February 2018 and again on 19 April 2018 by which time, again according to HMRC's records, he would have been served with the notice of assessment of the late filing penalty. And so, given that he responded with such alacrity to HMRC's letter, his lack of action in response to the foregoing penalty notifications suggests that he might not have received them. But the appellant has not suggested this, notwithstanding that the letter is sent to him by the tribunal offered him an opportunity to respond to HMRC's statement of case. And so on balance I find that valid notices of penalty assessment were given to the appellant on or around the dates suggested by HMRC.

22. I am also satisfied that valid section 8 TMA 1970 notices, to file a tax return, were given to the appellant. As evidence that they have done this, HMRC have provided the following documentary evidence:

(1) An extract from HMRC's computer which is headed "Return Summary" which suggests that a notice to file was issued on 6 April 2017. It also identifies the due date for filing an on-line, and paper return, and that the appellant's return was actually received by HMRC, online, on 23 October 2018.

(2) A paper copy of an extract from HMRC's computer records which HMRC say shows that the appellant read the notice to file (it is form SA316) on 16 February 2018. However this document in fact refers to notice SA326D i.e. the penalty notice issued on 13 February 2018.

(3) A pro forma copy of SA316 (i.e. the notice to complete a tax return).

23. I find that the evidence that a notice to file was sent the appellant on 6 April 2017 is unreliable and treat it with considerable suspicion. It is well known that whilst this date appears on most if not all of HMRC's return summary is, the notices are in fact sent out (or are often sent out) on later dates.

24. However, this appellant clearly filed his tax return albeit late, and was busy completing it in January 2018. The issue is that he failed to complete the final step required to effectively submit it online.

25. Given that the appellant does not deny receiving a notice to file, I think, on the basis of that and the evidence provided by HMRC, that it is more likely than not that HMRC did give him a notice to file even though it may not have been sent to him on the date recorded by HMRC.

**Discussion and conclusion**

*Late appeal*

26. I turn now to the question of whether I should give the appellant permission to make an appeal against the late filing penalty, out of time. I have found that notification of the late filing penalty was given to the appellant on 13 February 2018. An appeal to HMRC should have been made within 30 days of that date i.e. on 13 March 2018, but no such appeal was made until 24 October 2018 some seven months later. This is clearly a significant delay. But in the context of the appeals against the other penalties, I do not believe it to be serious given that the same issues need to be considered in all of the appeals.

27. The appellant has given no cogent reasons for this delay. In his appeal to HMRC he explained that his appeal was late because having received the debt management letter of 17 October 2018 he contacted HMRC telling them that he had paid his tax and was advised that he may have missed the last stage of the submission exercise when submitting his on-line return. And he realised that this was the case. This is no reason for why he failed to submit a timely appeal against the late filing penalty notice.

28. Turning now to the final stage of the *Martland* test, I must evaluate all the circumstances of the case, balancing the prejudice to the appellant of not giving permission with the prejudice to the respondents of giving permission. And in this evaluation I am conscious that it is particularly important for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected.

29. At this stage, too, it is open to me to have regard to any obvious strengths or weaknesses of the appellant's case. The appellant's case for relief from the late filing penalty is identical to his case for relief from the daily and six month penalties, namely that he failed to complete the final step required for submitting an online return, and that he has paid his tax. I have considered this in more detail in the context of those two penalties, and for the reasons set out below, I consider that the appellant has neither a reasonable excuse nor are there any special circumstances which allow either myself or HMRC to reduce the penalties. If I were to grant the appellant permission to appeal late against the late filing penalty, I would then go on to dismiss his appeal.

30. Statutory time limits should be respected. The appellant's appeal is some seven months late. I have found that it is more likely than not that notification of the late filing penalty was given to the appellant on 13 February 2018 and HMRC's records suggest that he accessed his online account on 16 February 2018. I suspect that the appellant simply overlooked the notice, but if not, and he deliberately failed to bring his appeal following that notification, then clearly that demonstrates a considerable disrespect for statutory time limits.

31. I do not find HMRC will be prejudiced if I gave the appellant permission to appeal late. As I say, the issues are identical in the appeals against all three penalties.

32. However given the length of the delay, the lack of any cogent reasons for this delay, and the weakness of the appellant's case, his application for permission to appeal against the late filing penalty is refused.

*Reasonable excuse*

33. The test of whether a taxpayer has a reasonable excuse is set out in *Perrin*. It is an objective test i.e. do the facts demonstrate an objectively reasonable excuse for the default. But I must take into account the experience and other relevant attributes of this particular taxpayer in the situation in which he found himself at the relevant time.

34. The appellant's explanation for why he failed to submit his tax return for the tax year 2016/2017 is straightforward. It was, in his own words, "a common mistake when completing the self-assessment is to get the calculation but then not click the last submission button. On looking on my portal this is what seems to have happened so I immediately submitted this form".

35. The appellant also asserts that he has never failed to submit a timely return before and having paid his tax on 23 January 2018, believe that he had completed the process.

36. I am afraid that I do not consider this to be a reasonable excuse. HMRC say, and I accept this, that the appellant has filed online consecutively since 2013/2014. The appellant, having been given an opportunity to gainsay this, has not done so. The appellant was fully conversant with the process (albeit a detailed one) for successfully completing and submitting an online tax return. Indeed, the fact that he opted in to HMRC's self-assessment digital service in January 2016 suggests to me that the appellant considered himself to be conversant with HMRC's online facilities.

37. When completing his 2016/2017 tax return, therefore, it is my view that the appellant was fully aware of the precise process which needed to be undertaken to effectively submit an online return. And as he would no doubt be the first to admit, he made a silly mistake by failing to complete the final stage in the process, something of which he should have been aware given that he did not receive a confirmation message confirming successful filing. I suspect the appellant is kicking himself that he made this mistake. As HMRC say, however, making a mistake does not constitute, necessarily, a reasonable excuse. The appellant needs to demonstrate that he had such an excuse. He needs to show that an objectively reasonable taxpayer in his position would have done the same thing as he did. And I do not think this is the case. An objectively reasonable taxpayer who had opted in to HMRC's digital services and filed tax returns for several years, online, successfully, would have taken more care with the final stage of the submission process, and made sure that having submitted the return, he had a confirmation receipt.

38. The appellant also implores me to reconsider the penalty given that he genuinely made an error for the first time and a fine of this amount could have a detrimental effect on his business. I have dealt with the first of these points above. As regards the impact of the penalty on his business, I am statutorily obliged to disregard insufficiency of funds as being a reasonable excuse.

39. In essence this is what the appellant is saying when he says that the penalty might have a detrimental effect on his business. And even if I am misconstruing this, a detriment to his business which arises because he has to pay the penalty cannot be a reasonable excuse for failing to have submitted a late return in the first place. I have considered whether it might comprise a special circumstance, below.

40. And so I find that the appellant has no reasonable excuse for failing to submit his tax return on time.

*Special circumstances and proportionality*

41. In their statement of case HMRC say that they have considered the issue of special circumstances and in particular considered whether the facts that; the appellant made a genuine mistake when completing his return; he was not aware of any problems until he received a letter from the debt management unit in October 2018; the appellant would find the penalty financially onerous since it would have a detrimental effect on his business, comprise special circumstances which would enable them to reduce the penalties. HMRC decided that none of these comprise special circumstances. HMRC did not take into account that the appellant also considered that he had paid his tax, and there was nothing further that he needed to do as regards his tax affairs for 2016/2017.

42. I do not consider that these taken together, or individually, comprise special circumstances which would merit a reduction in the penalty. None of these are sufficiently special as to warrant a reduction. The appellant simply made a mistake in failing to check that he had made a successful online submission of his return. The fact that this is the first time that he had made a mistake is not a special circumstance. He had managed to successfully file online in previous years. The appellant has provided no evidence of the detrimental effect that paying the penalties might have on his

business. Payment of a penalty is always going to have a detrimental financial effect on a taxpayer. That of itself cannot be a special circumstance.

43. It is clear from the case of *Edwards* that the penalty regime in Schedule 55 is a proportionate regime. It is intended to penalise taxpayers who fail to comply with their filing obligations. The penalties are not geared to the amount of tax which those late filed returns show is due from a taxpayer. They are designed to ensure filing compliance. Penalties for late payment of tax are dealt with in Schedule 56 Finance Act 2009. So the fact that the appellant thought that he had paid his tax for this tax year and had nothing further to do in order to comply with his filing obligations does not render the application of the penalty regime in Schedule 55 disproportionate as regards his circumstances. Indeed in *Edwards* the fact that a taxpayer owed no tax was found not to be disproportionate.

44. I find that in the context of this appeal there are no special circumstances which might mitigate the appellant's liability to the penalties, and that the application of the penalty regime in Schedule 55 to this appellant is proportionate.

## Decision

45. In light of the above, I dismiss this appeal.

## Appeal rights

46. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**NIGEL POPPLEWELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 07 FEBRUARY 2020**