TC07882

INCOME TAX – penalty for failure to make returns - Schedule 55 of the Finance Act 2009 – whether reasonable excuse or special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00813

BETWEEN

CARLA ALVES **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 5 October 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 24 February 2020 (with enclosures), HMRC's Statement of Case (with enclosures) and an e-bundle of papers prepared by HMRC, the contents of which are described further in this decision notice.

DECISION

INTRODUCTION

1. Miss Alves is appealing against a penalty or penalties that HMRC have imposed under paragraphs 3 and 4 of Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit her annual self-assessment return on time for the tax year 2017-2018.

2. The penalties that have been charged can be summarised as follows:

   (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 26 March 2019, and

   (2) "daily" penalties totalling £870 under paragraph 4 of Schedule 55 imposed on 9 August 2019.

3. Miss Alves' grounds for appealing (based on the information set out in the appeal to HMRC dated 4 October 2019 and her Notice of Appeal to the Tribunal dated 24 February 2020) can be summarised as follows:

   (1) Miss Alves believed she had dealt with the self-assessment return by the due date of 31 January 2019. She had attempted to file this herself (having insufficient funds to ask Edwin Smith to do this on her behalf). Having accessed the online HMRC software to make the return she was left with the impression that HMRC had all the details needed and that she was not required to do anything further.

   (2) She only became aware that it was still outstanding when she received notice in July of penalties. As soon as she received the July notification she organised for her accountant to submit the return on her behalf. She acted as soon as she became aware of the issue.

   (3) At that time she had to travel to Brazil for several weeks to deal with bereavements in her close family.

   (4) HMRC say that they sent a notice in June but she did not receive this. The penalties were not properly notified to her in advance of being charged.

   (5) Her accountant - Philip Nixon of Edwin Smith - did not receive any notification of any fines or penalties until the notices dated 9 and 27 August 2019.

4. A second Notice of Appeal was submitted on 26 March 2020, as Miss Alves' first notice was rejected by the Tribunal as late. Whilst that appeal has been closed by the Tribunal as a duplicate, I have had regard to this second Notice as it includes the explanation that the appeal was submitted one day late. Mr Nixon says they made the mistake of applying a month rather than 30 days as the deadline, noting also that the review conclusion letter from HMRC which was sent to Mr Nixon was dated 27 January 2020, so the original submission on 24 February 2020 was within 30 days of that date.

5. There is a preliminary issue relating to whether Miss Alves is appealing against both the late filing penalty and the daily penalties or just the latter, and a related issue as to the respective stages of the appeal process and matters of lateness. I have set out below the chronology in relation to the appeal(s) first, then considered what this means for the matters which are before me.

6. For the reasons set out below, I have dismissed Miss Alves' appeal and the late filing penalty of £100 and the daily penalties of £870 are confirmed.

PRELIMINARY ISSUE

7. The Notice of Appeal states the appeal is against "Penalty for late filing of self-assessment tax return", the amount is set out as £870 of penalties (ie the amount of the daily penalties) but the desired outcome is for "cancellation of the daily penalties and late filing penalty". HMRC in their Statement of Case "submit" that the appeal is just against the daily penalties, and state that they do not object to the appeal being made late (which, as explained further below, I take to refer only to the possible lateness of the appeal against the daily penalties being notified to the Tribunal).

8. Mr Nixon appealed to HMRC on 4 October 2019 against "penalties of £1,002 charged relating to the late submission of her 2017-18 self-assessment tax return as notified on the notice issued dated 9 August 2019". There were (according to HMRC's records) two penalties issued on 9 August 2019, but these were the £870 daily penalties for late filing and a £132 late payment penalty. The late filing penalty of £100 had been issued in March 2019.

9. HMRC responded in two letters, both dated 13 December 2019:

(1) rejecting the appeal against "the late filing penalty" as late, and

(2) considering but rejecting the appeal against the daily penalties on substantive grounds that there was no reasonable excuse.

10. Those two letters do not cross-refer to each other, and both have the same generic heading "Appeal against the penalty for sending in your 2017 to 2018 Self Assessment tax return late". However, they do each state in their introductory paragraphs the penalty which they are addressing (albeit that this does not match the penalties to which Mr Nixon had referred in his letter of 4 October 2019).

11. The request for a review of HMRC's decision was made on 10 January 2020 using HMRC's prescribed form. In the section which requires the taxpayer to check boxes to show which decisions they want HMRC to review Mr Nixon had checked "late filing penalty" and "late payment penalty".

12. Mr Nixon also wrote to HMRC on 10 January 2020 referring to both of HMRC's letters of 13 December. He then states:

> "We received two Notices of penalty Assessment dated 9 and 27 August 2019. The 9 August notice gives a revised appeal deadline of 5 October 2019. Our appeal letter was sent first class on 4 October 2019 and should have been received by that deadline.
>
> This letter is to address your appeal rejection letter."

13. So having sought to explain that the appeal was not late, Mr Nixon then states that he is only addressing the rejection of the appeal.

14. The process for making an appeal against penalties imposed under Schedule 55 is to appeal to HMRC under s31A TMA 1970, the deadline being 30 days after the penalty notice was issued (with both HMRC and the Tribunal having power to extend that deadline), and then to notify the appeal to the Tribunal, with deadlines being dependant upon whether a review of the decision has been offered or requested.

15. Addressing first the imposition of the daily penalties, Mr Nixon appealed to HMRC on 4 October 2019, which was considered and rejected by HMRC in their (second) letter of 13 December 2019. That appeal to HMRC was late, but it is apparent that HMRC accepted the late appeal (as they are entitled to do) but went on to reject it. Mr Nixon requested a review of that decision (both in the form submitted and the letter of 10 January 2020), and the review conclusion letter upheld HMRC's decision. That letter set out Miss Alves' right to appeal to

this Tribunal within 30 days. The review conclusion letter is dated 24 January 2020 and the Notice of Appeal was given to the Tribunal on 24 February 2020. HMRC state in their Statement of Case that they are not objecting to the late notification – and I infer from this that they are referring to the late notification of the appeal to the Tribunal, as that is the only appeal which HMRC consider is being made. It is not clear that the appeal was in fact notified late to the Tribunal – whilst the review conclusion letter is dated 24 January 2020, the letter under cover of which it was sent to Edwin Smith (in which it refers to the letter having been sent to Miss Alves "today") was dated 27 January 2020.

16. In view of all the circumstances, I give permission (if needed) for the appeal against the daily penalties to be notified to the Tribunal late. The substance of the appeal is addressed in the Findings of Fact and Discussion below.

17. Whilst HMRC accepted the appeal to them against the daily penalties being made late (albeit that they refused it on substantive grounds) they did not consent to such a late appeal being made against the late filing penalty. There is also the difficulty that Mr Nixon's letter of 4 October 2019 was not expressly appealing against the late filing penalty (as it was not dated 9 August 2019 and was not £132); but HMRC read that letter as such an appeal, rejected it as late, and in their letter of 13 December 2019 set out the options of writing to HMRC to explain the reasons for not appealing against the penalty on time (explaining the address and heading to use) or appealing to the Tribunal.

18. It is not clear that Mr Nixon appreciated that HMRC were dealing differently with the two penalties. It may well be that he thought that HMRC had mistakenly issued two different letters on the same date, and that the refusal to accept the appeal on the grounds that it was late had been superseded by the consideration and rejection of the appeal. His letter of 10 January 2020 does not use the heading prescribed by HMRC and goes on to address why he considers there was a reasonable excuse for the late filing of the return (not the lateness of the appeal against the penalty), and there is no logical reason why he was addressing these arguments only to the daily penalties and not to the late filing penalty (as both penalties were imposed in respect of the same default).

19. Having reviewed the correspondence between the parties, I do not consider that Miss Alves has accepted HMRC's decision to refuse to accept the making of a late appeal against the late filing penalty. Whilst there is some ambiguity in both Mr Nixon's letter of 10 January 2020 and the Notice of Appeal I consider that looked at in context Miss Alves is still seeking to appeal against that late filing penalty. Given that HMRC have refused consent (in their letter of 13 December 2019) for the appeal to HMRC to be made late, the Notice of Appeal to the Tribunal should be taken as an application for permission to make a late appeal to HMRC.

20. In *Martland v HMRC* [2018] UKUT 178 (TCC) the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal – such guidance was given in the context of late notification of an appeal to the Tribunal rather than to HMRC but the Upper Tribunal considered the statutory provisions setting out the appeal rights to be similar. It said:

> "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.
> (2) The reason (or reasons) why the default occurred should be established.
> (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…"

21. Following that approach:

(1) The late filing penalty was issued on 26 March 2019 but no appeal was made until (at the earliest) the letter of 4 October 2019. I treat this as the date of the appeal for this purpose as HMRC did so and it is the letter to which the response was HMRC's rejection. Having received that response it is unlikely that Miss Alves or Mr Nixon would have identified that a mistake had been made and that a new (even later) appeal might need to be made to HMRC. The appeal was therefore more than five months late. This is a serious and significant delay.

(2) From the information before me, I infer that the reason for the lateness of the appeal is in part that Miss Alves did not receive (or recall receiving) it – she says she thought that she had filed her return and only realised there was a problem when she received the penalty in July – which I assume was the penalty reminder letter. There is then a question as to why it took from July to October to make the appeal, but I consider that this delay is likely to be explained by the immediate focus on the filing of the return (to prevent penalties continuing to accrue) and the bereavements which Miss Alves suffered and the need to deal with them and stay out in Brazil until September 2019.

(3) Considering all the circumstances, there is clearly some prejudice to HMRC in my allowing an appeal to be made late (in that it opens up the possibility of what was otherwise a final penalty being cancelled) but in substantive terms they have already set out their position in the Statement of Case for the appeal against the daily penalties so no additional resources need to be devoted to the matter (depending on how procedurally matters then progress). On the other hand, it is important that there be finality in proceedings and that statutory time limits are respected. Given that the papers are before me I am able to reach a view on the strengths/weaknesses of Miss Alves' case – there is clearly an explanation (supported by strong evidence) of events during the summer of 2019, but a gap in the explanation as to what had caused the default in the first place, subject to working through the detail provided by HMRC of

the activity on Miss Alves' online account. The strength or weakness of the case is not such as to strongly influence a decision on whether to give permission. I am mindful that it is not appropriate for me to give permission just because another appeal (ie that against the daily penalties) on a related matter is already before me.

22. Conducting the balancing exercise, I am satisfied that the merits of the (inferred) reasons for the delay do, on balance, outweigh the prejudice to HMRC by my giving permission and overriding the statutory time limits.

23. Having given permission, the next procedural step would be for the appeal against the late filing penalty to be considered by HMRC, and then (if such appeal is unsuccessful) for an appeal to be made to the Tribunal. Such an approach is very unattractive, particularly given that the arguments set out by HMRC in their Statement of Case in respect of the appeal against the daily penalties would apply equally to an appeal against the late filing penalty. Having regard to the overriding objective in rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly (which includes avoiding unnecessary formality and seeking flexibility in the proceedings and avoiding delay), I have concluded that the appropriate approach is to treat HMRC as having rejected the substantive appeal to them for the reasons which they have set out in their Statement of Case and to treat Miss Alves as having given notice of her appeal against that decision to the Tribunal. HMRC has been notified of that appeal.

24. This decision notice therefore considers Miss Alves' appeals against both the late filing penalty and the daily penalties imposed by HMRC for late filing of her 2017-2018 return. Notwithstanding a reference to a late payment penalty (this being the balance of the £1,002 referred to in the letter from Mr Nixon of 4 October 2019) and the box being ticked to request a review of the decision to impose a late payment penalty, I have concluded that no appeal has been made to this Tribunal against such late payment penalties.

BURDEN OF PROOF

25. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely the balance of probabilities.

26. Before considering the evidence before me, I had regard to the decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [50] to [54]:

> "50. In [*Qureshi*] the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
>
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
>
> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which,

> if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."
>
> 52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.
>
> 53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:
> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."
>
> 54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

FINDINGS OF FACT

27. Miss Alves' self-assessment return for the tax year 2017-2018 was due on 31 October 2018 (if in paper form) or 31 January 2019 (if submitted electronically). It was submitted online on 26 July 2019 and was therefore late.

28. She has previously been within the self-assessment regime and submission reports produced by HMRC show that her agent had previously filed self-assessment returns as follows:

(1) For tax year 2013-2014 on 26 January 2015,

(2) For tax year 2014-2015 on 29 January 2016,

(3) For tax year 2015-2016 on 31 January 2017, and

(4) For tax year 2016-2017 on 30 January 2018.

29. Miss Alves states that she believed she had submitted her return online in time (and was doing this herself as she did not have the funds to pay her accountant to do this for her). She had clicked the last page to send, but didn't see a message that it was sent albeit that she did believe it had been sent. HMRC explain that when a return a submitted successfully an onscreen message is displayed which advises that the submission has been successful. In addition, a confirmation email is sent to the registered filer advising that the submission was successful. If a confirmation email had not been received, the status of the submission can be checked by logging back into the online account.

30. More fundamentally, HMRC deny that Miss Alves had attempted to file her return for the tax year 2017-2018 online at any time before the due date of 31 January 2019. Where a taxpayer seeks to file online, they must sign up to use HMRC's Online Services and then enrol (or register) for the service they require – in this case that would be the Self-Assessment service. They must then wait for an activation code to be posted by HMRC to their home address and then they must activate their Self-Assessment account within 28 days. HMRC submit that:

(1) Miss Alves' returns for previous tax years had been filed by her agent;

(2) As at the end of the tax year 2017-2018 she did not have a Self-Assessment account with HMRC that would have enabled her to file a return herself;

(3) They have reviewed the tax records (by national insurance number and Unique Taxpayer Reference) to check all online activity on her account from 31 July 2016 to 30 January 2020. Their records show a "session journey" each time an account is accessed, which sets out the "notable events" from the session, ie what the person accessing the account tried to do;

(4) After 6 April 2018 Miss Alves accessed her online account on just two occasions before the due date for submission – on 31 July 2018 and on 16 October 2018. On neither of these occasions did she seek to enrol for Self Assessment; and

(5) She then accessed her account 11 times on 13 May 2019 and the session journey shows that she was trying to enrol for Self Assessment. Miss Alves was clearly experiencing problems, and accessed the account on both 17 May 2019 and 20 July 2019, also trying to enrol for Self Assessment.

31. HMRC have produced redacted versions of these session journeys which I have considered carefully. I have not been able to follow every line item set out therein. However, I am satisfied (and so find) that they are an accurate record of the activity on Miss Alves' account during the relevant period and that she did not attempt to enrol or register to file her self-assessment return online at any time before 31 January 2019. The sessions on 31 July 2018 and 16 October 2018 show activity related to tax credits and childcare providers. I do not know what problems she experienced in May 2019 when trying to register, but by this time the return was in any event late.

32. HMRC produced computer-generated records by way of evidence of the communications they say were sent (by post) to Miss Alves. HMRC's processes are automated, such that documentation is generated automatically and sent out directly to taxpayers. HMRC do not hold a copy of the documents which they say were generated and posted to Miss Alves. Their records show the following:

(1) The Return Summary states that a notice to file for the tax year 2017-2018 was sent on 6 April 2018, with a return due date of 31 January 2019 or paper return due date of 31 October 2018. The return was submitted online on 29 July 2019.

(2) The View Taxpayer Summary Details shows that the address on HMRC's system was 2 Cherry Grove, and that this base address was effective from 4 July 2014.

(3) View/Cancel Penalties states that the following were sent to Miss Alves:

(a) Late filing penalty on 26 March 2019, and

(b) Daily penalties on 9 August 2019.

(4) There was another print-out without a heading (although in the experience of this Tribunal this looks like the type of report that is printed from a taxpayer's SA Notes) which states that the following were automatically issued:

(a) 30 day daily penalty reminder letter on 4 June 2019, and

(b) 60 day daily penalty reminder letter on 2 July 2019.

(5) A SA statement was sent to Miss Alves on 7 May 2020 showing the amounts owing on her account – this statement showed the late filing penalty of £100 for the tax year 2017-2018.

33. The View/Cancel Penalties sheet also states that late payment penalties of £132 each were issued on 9 August 2019, 27 August 2019 and 18 February 2020.

34. The bundle which HMRC prepared included specimens (ie non-taxpayer specific) of the notice to file and notice of penalty assessments and the daily penalty reminder.

35. In her grounds of appeal Miss Alves has denied receiving the letter which HMRC sent in June (2019), which I infer was the 30 day penalty reminder letter, but did receive the letter in July, which I infer was the 60 day penalty reminder letter. She does not comment on whether or not she received the notice to file (which HMRC say was sent on 6 April 2018) or the late filing penalty (which HMRC say was sent on 26 March 2019). The daily penalties were issued after her return had been submitted and the letter from Mr Nixon to HMRC in October 2019 acknowledges that this was received. HMRC agree that the penalty notices were not sent directly to Mr Nixon.

36. The evidence produced by HMRC is somewhat equivocal, in that they do not maintain copies of documentation which they say was sent and have not produced evidence of the system which generates or sends this documentation. However, there is no dispute as to the address which was maintained by HMRC (which is the same as that set out on the Notice of Appeal), Miss Alves acknowledges receiving some of the correspondence and none of the letters were returned to HMRC as undeliverable. Based on the dates, I infer that Miss Alves did receive the SA Statement sent in May 2019, and this is what prompted her to try to register for Self Assessment online. In these circumstances, and relying on s7 Interpretation Act 1978, I am satisfied that notice to file was given to Miss Alves as was notice of daily penalties becoming due as required by paragraph 4(1)(c) of Schedule 55.

37. Miss Alves received a letter about penalties for late submission of the return and contacted Mr Nixon by email on 20 July 2019 and asking that Edwin Smith submit the return for her (which they did).

38. Miss Alves' mother sadly died on 21 July 2019 and Miss Alves travelled to Brazil on 23 July 2019, just in time for the funeral the following day. On 26 July her uncle then died. She stayed in Brazil to help with the funeral arrangements. Her father was very sick requiring hospital treatment, and she took the time to look after him and his affairs, seeing to it that he received the necessary medical treatment. Her cousin then took over his care and Miss Alves returned to the UK on 5 September 2019. Her father then died on 2 October 2019. I find as facts that these events occurred.

39. On 4 October 2019 Edwin Smith appealed to HMRC against what were described as penalties of £1,002, as notified on a notice dated 9 August 2019.

40. As set out above, on 13 December 2019 HMRC rejected what they referred to as the appeal against the late filing penalty as out of time, and considered and rejected the appeal against the daily penalties.

41. On 10 January 2020 Edwin Smith requested a review of this decision (and I have addressed already what I find this to have related to).

42. HMRC's review conclusion letter is dated 24 January 2020 and confirms HMRC's decision to charge the daily penalties of £870. They considered whether the explanations given by Miss Alves constitute special circumstances but concluded they did not. The cover letter to that, addressed to "Mr Smith" is dated 27 January 2020 and refers to the review conclusion letter having been issued to Miss Alves "today".

DISCUSSION

43. Relevant statutory provisions are included as an Appendix to this decision.

44. The burden of proof is on HMRC to establish, on the balance of probabilities, that the penalties were correctly imposed; it is then for Miss Alves to demonstrate that a reasonable excuse exists for the defaults or that there were special circumstances.

45. I have concluded that the tax return for the 2017-2018 tax year was submitted on 26 July 2019. It should have been submitted by 31 October 2018 (in paper form) or 31 January 2019 (electronically). Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

Reasonable excuse

46. Paragraph 23 of Schedule 55 provides that a penalty does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC, or on appeal the Tribunal, that there is a reasonable excuse for the failure and the failure was remedied without unreasonable delay after the excuse had ended. Paragraph 23(2) states that neither an insufficiency of funds, unless attributable to events outside the taxpayer's control, nor reliance on another person to do anything, unless the taxpayer took reasonable care to avoid the failure, can be considered a reasonable excuse.

47. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "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?…
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

48. That this is the correct test has been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [81] the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

(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. In doing so, the Tribunal 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 Tribunal, 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 Tribunal 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.

49. Miss Alves was required to file the return for 2017-2018 by 31 January 2019, but it was not filed until 26 July 2019. In considering whether there is a reasonable excuse, it is important to note that the question is whether there is a reasonable excuse for the default, ie for the late filing. It is quite clear that from July 2019 onwards Miss Alves has had an incredibly difficult time dealing with a devastating succession of bereavements. Her return was submitted by her agent during this time, thus preventing further penalties from accruing. Unfortunately, these events all occurred after the due date for filing, and there is no argument (or evidence) that any of these circumstances had arisen before the deadline for filing. They cannot therefore constitute a reasonable excuse for the failure to file the return on or before 31 January 2019.

50. I have considered Miss Alves' statement that she thought that she had filed her return online. I have found that she had not in fact tried to enrol for Self Assessment online at any time before 31 January 2019, a necessary step before she could try to file her return online. Accordingly, it was not objectively reasonable for her to have thought that she had successfully submitted her return and that there was nothing further for her to do. Furthermore, even though Miss Alves has denied being aware of any problems until July 2019, her actions in seeking to register for self-assessment in May 2019 (at a time shortly after HMRC had sent the SA Statement showing the late filing penalty) indicate that she had been made aware at that time that her return had not been filed. There is no objectively reasonable excuse for not then taking action to remedy this default for another two months.

Special circumstances

51. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

52. In other contexts "special" has been held to mean "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). However, the Upper Tribunal in *Edwards* said at [72] that:

> "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."

53. The Upper Tribunal then agreed with this statement of the Tribunal in *Advanced Scaffolding*:

> "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."

54. HMRC have considered whether "special circumstances" exist, both in the review conclusion letter and in their Statement of Case. As they have treated the appeal as only being against the daily penalties, HMRC can only have conducted this exercise in relation to the daily penalties. They have considered all of the arguments put forward by Miss Alves in her grounds of appeal (and the preceding correspondence) and concluded that there are no special circumstances which would justify a reduction in the penalty. I do not consider that their decision is "flawed" and accordingly I cannot alter it.

55. HMRC have not considered "special circumstances" in relation to the late filing penalty. The absence of such consideration is itself "flawed" and entitles me to exercise the same discretion as that which is available to HMRC. However, I do not consider that the circumstances put forward by Miss Alves are special such as to justify a reduction in the penalty.

CONCLUSION

56. The late filing penalty of £100 and the daily penalties of £870 are affirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 13 OCTOBER 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

1. Section 7 Interpretation Act 1978 contains provisions in relation to documents that are served by post:

> 7. References to service by post
>
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

2. Section 8 Taxes Management Act 1970 sets out the obligation on individuals to file a self-assessment return, and includes at s8(1):

> 8. Personal return
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

3. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

> 4—
>
> (1) P is liable to a penalty under this paragraph if (and only if) —
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

5—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of —

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

6. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of —

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 100%,

(b) for the withholding of category 2 information, 150%, and

(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of —

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 70%,

(b) for the withholding of category 2 information, 105%, and

(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of —

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

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

> 23—
>
> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

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

> 16—
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

9. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

> 22—
>
> (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

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