[2020] UKFTT 0013 (TC)

TC07519

Appeal number: TC/2019/04678

Income tax - fixed and daily penalties for late filing of self-assessment return - application for permission to appeal out of time - Appellant in PAYE employment and in receipt of Employment Support Allowance during default year - HMRC unable to tax ESA via appellant's tax coding - appellant had never been self-employed - he assumed HMRC had made a mistake - ignored Notice to file - whether reasonable excuse and whether excuse continuing throughout default period - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STANISLAV HORVATH **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN STOTT

Sitting in public at Bradford Tax Tribunal, Phoenix House, Rushton House, Bradford on 23 September 2019

The Appellant in person

Mr Adam Moore, Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal by Stanislav Horvath ('the appellant') against penalties totalling £1,600 imposed by the respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his self-assessment ('SA') tax return for the year ending 5 April 2016 ('the default year').

2. The appeal was made outside the 30 day time limit within which penalties must be appealed. The appellant applies for permission to appeal out of time. HMRC objects to the application.

Background

3. HMRCs records show the appellant's employment history record as follows:

Employer/DWP	Start date	End Date	Pay	Tax	Code
Lime Ltd	04.17	04.18	£11140	£0	
Advance Ltd	04.16	04.17	£11140	£0	
Noble Egg	31.08.2015	16.09.2016	£7905	-£39	1074L
Travail Group	1.06.2015	28.08.2015	£3732	£216	1074LX
DWP ESA	28.01.2015	9. 07.2015	£1421	£0	1060LX
Northern Corrugate Ltd	2004	01. 2015	N/A	N/A	-

4. The appellant had two jobs and one period as a contribution-based Employment and Support Allowance claimant during the 2015-16 tax year. HMRC's end of year reconciliation showed there had been an underpayment of tax because the taxable ESA benefits had not been included in the 'previous pay' notified to his employers, Travail Group and Noble Egg. This gave the appearance that the appellant had more of his personal allowance left than was actually the case, thus resulting in a PAYE underpayment for his last employment of that tax year. The outstanding liability was £286.20**.**

5. HMRC was not able to collect the underpaid tax though the appellant's tax code because he had multiple subsequent low paid employments.

6. HMRC therefore was required to collect the debt through self-assessment and a Notice to file was issued on 23 March 2017.

7. The appellant acknowledges that he received the Notice to file, although there was initially confusion whether the Notice was intended for him or his son because his son shared the same name. Because he did not believe that he needed to file a SA return and for other reasons subsequently explained in his Notice of Appeal, he ignored the Notice.

8. The appellant's 2015-16 return was due to be filed no later than 30 June 2017. A Notice to file had been issued by HMRC on 23 March 2017.

9. The penalties for late filing of a return can be summarised as follows:

   i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.

   ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.

   iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

   iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

10. The appellant did not file his return until 29 October 2018.

11. Penalties of £100, £900, £300 and £300 were raised:

- under paragraph 3 on 4 July 2017
- under paragraphs 2 and 3 on 2 January 2018
- under paragraph 4 on 3 July 2018

12. In addition to the penalty letters, 30 day and 60 day daily penalty reminder letters were sent to the appellant on 31 October 2017 and 5 December 2017.

13. On 27 February 2018, HMRC wrote to the appellant explaining the reason for the tax underpayment and reminded him that he needed to file his return.

14. On 26 September 2018 the appellant telephoned HMRC and was advised of the reason for the penalties. He was again reminded to file his return. The conversation was followed up by a letter to the appellant from HMRC.

15. On 26 November 2018 the appellant telephoned HMRC and was told how to appeal the penalties.

16. Section 31A TMA 1970 requires that an appeal to HMRC against a penalty is made within 30 days of the decision.

17. On 12 December 2018, the appellant submitted a late appeal to HMRC against all the penalties.

18. On 7 February 2019 HMRC rejected the late appeal because it was out of time. A tax payer has 30 days from the date of HMRC's decision or review decision to appeal to the Tribunal.

19. On 9 July 2019 the appellant lodged an out of time appeal with the Tribunal. The appeal is against all the penalties.

Reasonable excuse

20. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

21. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

22. HMRC's view is that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

23. If there is a reasonable excuse it must exist throughout the failure period.

24. The appellant's grounds of appeal are set out in the summary of his notice of appeal (see paragraphs 38 to 45 below)

Relevant statutory provisions

Taxes Management Act 1970

25. Section 8 - Personal return - provides as follows:

(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, on or before the day mentioned in subsection (1A) below, 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.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under this section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(4A)Subsection (4B) applies if a notice under this section is given to a person within section 8ZA of this Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B)The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

Section 31A; provides that notice of appeal must be given within 30 days after the specified date.

Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given -

(a) in writing,
(b) within 30 days after the specified date,

(c) to the relevant officer of the board.

Schedule 55 Finance Act 2009:

26. The penalties at issue in this appeal are imposed by Schedule 55 FA 2009.

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

(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).

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

(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.

Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)-

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, 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.

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

(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.

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:

(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.

Civil Procedure Rules

27. *[The CPR's are not binding on the Tribunal but reference to the rules and how they have been amended, is necessary to understand the changes in the approach to applications for relief from sanction]*

The rule before the Jackson reforms came into force on 1 April 2013 sets out the circumstances that the court must take into consideration on any such application, as follows:

Rule 3.9 of the CPRs in its original form reads as below:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including -
>
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre- action protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party."

With effect from 1 April 2013 Rule 3.9 and factors (a) to (i) were removed by the Civil Procedure (Amendment) Rules 2013 with a material change to its substance

CPR 3.9

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders."

Applications for permission to bring a late appeal - case law authorities

28. A number of recent decisions have clarified the approach to be applied in applications for relief from sanction under CPR r. 3.9. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.

29. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been taken in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 A three-stage approach is now required to applications for relief. (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)]"."

30. 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".

31. The first stage is a departure from the test of 'triviality' referred to in *Mitchell,* which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.

32. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.

33. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

34. The majority expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.

35. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The 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.

36. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the same three stage approach. The Court also said:

> "44. 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. When considering "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."

37. 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.

Appellant's case

38. The appellant says that he has never been self-employed and until the position was fully explained to him he was not aware that he had to file a return for 2015-16. His son who shared the same name had been in dispute with HMRC over another matter which the appellant said had led to a mix up in respect of letters received from HMRC.

39. In his Notice of Appeal to the Tribunal the appellant states that he worked for one employer between 2004 and 2015. During that time occasions arose when he was due a tax refund because his wages had not exceeded his personal allowance. He says that he called the tax office many times but had a great deal of difficulty recovering the refunds which were due to him.

40. He says that in 2015 he received an email which he believed was from HMRC confirming that he was due to receive a tax refund. The email requested details of his bank account number, his date of birth, address and other personal details. The email was in fact a scam and not from HMRC. Subsequently monies were fraudulently withdrawn from his bank account.

41. When he received the first fixed penalty notice in July 2017 for £100, because it did not bear a National Insurance number he thought it was another scam. He thought that the scam penalty notice was intended for his son. They both decided to ignore it and the subsequent penalty letters received in January 2018 and July 2018.

42. He took advice from the Citizen's Advice Bureau in Bradford. It was difficult to get an appointment and he was shepherded from one CAB department to another, before being eventually advised that if he had never been self-employed he was not obliged to submit a self-assessment return.

43. The appellant says that he was totally unaware that the Employment Support Allowance which he received in 2015-16 was taxable income. Contribution-based ESA

is taxable, whereas income-based ESA is not. That is the reason he could not understand why the calculation sent with the Notice to file showed tax due of £286. So far as he was concerned, he had always been employed and paid tax via PAYE. He had relied on his employers to ensure that any liability to tax was duly discharged at source.

44. He says that none of the letters which accompanied the penalty notices explained the reasons for the penalties. He was not told why he had to file a self-assessment or why penalties had been imposed until September 2018. He filed his return in October 2018. He is now paying the tax due and interest by instalments of £10 a week.

45. He says he was also unaware that he had a right to appeal the penalties. He was finally told of his right to appeal to the Tribunal by a letter from HMRC on 7 February 2019. That was the reason for his late appeal which was received by the Tribunal on 9 July 2019.

HMRC's case

The late appeal

46. HMRC issued a 30 day fixed penalty notice to the appellant on 4 July 2017 in respect of his late 2015-16 return, informing him that he had been fined because the tax return had not been received and to submit his tax return to prevent further penalties being charged. The appellant acknowledges that he received the penalty Notice.

47. HMRC issued further penalties on 2 January 2018 and reminder letters which would have informed the appellant that his tax return was still outstanding and to send it to HMRC to prevent further penalties. The final penalty was issued on 3 July 2018. In total the appellant received six penalty letters or reminders.

48. The appellant was aware of his appeal rights from the receipt of the initial 30 day penalty notice and certainly from 26 November 2018 when his appeal rights were again explained to him

49. The appellant has not submitted an appeal against the penalties within the 30 day time limit.

50. There have therefore been multiple and serious delays in submitting the appeals.

51. Throughout the default period, the appellant was able to meet his filing obligations in respect of his claim for tax credits. The appellant also asserts that he was suspicious about HMRC's penalty letters because he had been scammed via email by someone purporting to be from HMRC. However, from the copy emails produced by the appellant in evidence, this was after the event, having happened in October 2018.

52. Moreover, there was no concern over receiving and responding to HMRC's letter regarding tax credits. Doubting the authenticity of HMRC's letters appears to be a dubious reason as to why the appellant did not comply.

53. The appellant has failed to provide a reasonable excuse both for the late appeal and for the failure to submit the returns on time. If the appellant contends that he could not meet his filing obligations because of health reasons (being the reason he was in receipt of ESA) HMRC would point to the fact that he has been in regular employment throughout the period in question. Any concern the appellant had over the authenticity of the penalty notices could have been immediately resolved by contacting HMRC directly - as he eventually did in September 2018, around 1 year 6 months after the Notice to file was issued.

54. The application for permission to bring a late appeal is made pursuant to rule 20(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("The Tribunal Rules").

55. Rule 20(1) of the Tribunal Rules (SI2009/273) provides that a Notice of appeal must be sent or delivered to the Tribunal within the time limit imposed – 30 days after the decision to impose the penalty, or any subsequent review decision.

56. HMRC submit that the burden of proof in this matter lies with the appellant to demonstrate why the Tribunal should exercise its discretion to permit relief from sanction to admit an appeal that is brought late. The Tribunal should not exercise its discretion to allow the appellant's application to appeal out of time without compelling reasons and the allowing of an extension of time should be the exception rather than the norm. The allowing of an extension of time should be the exception rather than the norm. There has been a lengthy delay; the appeals against the penalties are up to two years out of time. The appellant's delay cannot be considered anything but serious and significant. The appellant's actions should be judged against objective standards of reasonableness.

Substantive appeal against the penalties

57. Late filing penalties for the default year were due in accordance with Schedule 55 FA 2009. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged. This information and warnings of penalties were clearly shown on the Notice to file issued to the appellant for each of the default years.

58. The appellant was told that there had been an underpayment of tax. The reason was explained to him, but despite this he did not file his return until October 2018, approximately 15 months late.

59. By the appellant's own admission he was aware of the situation at least by July 2017 as he received the initial penalty letter and he acknowledged that he received all of HMRC's penalty letters.

60. The appellant was working throughout the default period and there was nothing precluding him from meeting his filing obligations.

61. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every-day responsibilities of the appellant to ensure his tax returns were filed by the legislative date and payment of any tax due made on time.

62. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. The tax guidance and HMRC's website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

63. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

64. 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.

65. 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). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

66. HMRC have considered the appellant's grounds of appeal - that he thought he did not have to file a return for 2015-16 and that he thought he had been taxed under PAYE and had no tax liability. These are not special circumstances which would merit a reduction of the penalties below the statutory amount.

67. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was "flawed when considered in the light of the principles applicable in proceedings for judicial review".

68. HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

Conclusion

69. The appellant's appeal to the Tribunal is substantially out of time.

70. As HMRC say, the Tribunal should grant permission to appeal out of time, only exceptionally and based on compelling reasons showing why an appeal could not have been made in time, or at least within a reasonable time after the 30 day time limit.

71. In considering whether to grant permission to appeal out of time a number of factors must be taken into consideration including the length of the delay in bringing the late appeal, the reasons why the delay occurred and so far as we are able to consider them, the merits of the substantive appeal.

72. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period or periods of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

73. Is there a good reason for the delay? The appellant received four penalty assessments between July 2017 and January 2018. In addition, he received periodic statements and reminders.

74. The appellant has not produced any credible evidence to show why he was unable to appeal the penalties as and when they arose. He has not offered any reason why he could not have sought help to file a return or submit an appeal to HMRC sooner than 18 December 2018, more than 13 months after the first penalty or to the Tribunal in July 2019 when he lodged his Notice of appeal.

75. Even if the appellant may have had a reasonable excuse when receiving the first fixed penalty letter, the excuse did not endure throughout the default period and up to the point in time when the appellant lodged his appeal with the Tribunal. Applying objective standards of reasonableness and taking into account HMRC's arguments as set out in paragraphs 46 – 56 above, there was no reason why the appellant could not have filed his 2015-16 return much sooner than he did, nor any reason why he could not have appealed to the Tribunal much earlier than he did.

76. We also agree with HMRC that the scam email which the appellant received as copied in his evidence to the Tribunal did not occur until October 2018, very much after the event.

77. Having taken into account the length of delay in bringing the appeal out of time and the merits of the appeal, we conclude that permission to bring a late appeal should be refused.

78. The late filing penalties have been charged in accordance with legislation and no reasonable excuse has been shown for the appellant's failure to file his 2015-16 tax return on time. The penalties are therefore confirmed.

79. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it

pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 8 JANUARY 2020