



TC06926

Appeal number: TC/2018/04069

PENALTIES – late filing of ATED return – Schedule 55 to FA 2009 – whether retrospective notices meet the requirement under para 4(1)(c) for the daily penalties to be imposable – whether para 17(3) capping provision applies – whether the 6-month late filing penalty ‘fixed’ or ‘tax-gearred’ – whether reasonable excuse or special circumstances – proportionality – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ADVANTAGE BUSINESS FINANCE LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE HEIDI POON

The Tribunal determined the appeal on 30 November 2018 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 25 June 2018 (with enclosures), HMRC’s Statement of Case acknowledged by the Tribunal on 17 October 2018, and the Appellant’s Reply dated 26 October 2018, (with enclosures).

DECISION

Introduction

1. The appeal is against penalties imposed under Schedule 55 to the Finance Act 2009 ('Sch 55') in relation to the late filing of the Annual Tax on Enveloped Dwellings ('ATED') return for the year ended 31 March 2017.
2. The penalties under appeal total £1,200 and consist of:
 - (1) Daily penalties totalling £900 under para 4 of Sch 55;
 - (2) The fixed six-month penalty of £300 under para 5 of Sch 55.
3. The appellant has accepted and settled the fixed penalty of £100 for the initial late filing of the return, and this element is not a matter under appeal.

Findings of fact

4. The appellant company, Advantage Business Finance Ltd, is the owner of a property in Fulham, London, and is required to make an annual ATED return in compliance with the requirement under s 159 of the Finance Act 2013 ('FA 2013').
5. The relevant dates in respect of the ATED return for 2016-17 are as follows:
 - (1) On 15 January 2016, the appellant purchased the Fulham property.
 - (2) On 30 April 2016, the ATED return for the year 2016-17 was due.
 - (3) On 30 January 2017, the ATED return for 2016-17 was filed.
6. As the return was filed more than six months after the due date of 30 April 2016, HMRC imposed penalties under Sch 55 with the following communications:
 - (1) On 27 October 2017, the fixed penalty notice of £100 was issued.
 - (2) On 22 December 2017, HMRC sent a letter to notify the charge of:
 - (a) daily penalties in the sum of £900 covering the period from 1 August to 29 October 2016;
 - (b) a 6-month late filing penalty in the sum of £300, which the letter states is for the period from 1 November 2016 to 30 January 2017.
7. It is common ground that no tax liability arose in relation to the 2016-17 ATED return. No late payment penalty under Schedule 56 to FA 2009 is therefore in point.
8. Mr David Brockhurst, as a director of the appellant company, appealed against the penalties. From the Companies House records made available, Mr Brockhurst is a solicitor and was appointed as a director on 23 February 2015. Mrs Nicola Brockhurst is an accountant, and was appointed as a director of the appellant on 20 January 2017.
9. In respect of the appeal and review process, the relevant events are as follows:
 - (1) On 26 March 2018, Mr Brockhurst appealed against the £1,200 penalties, following a payment request dated 23 March 2018.
 - (2) On 20 April 2018, HMRC rejected the appeal.

(3) On 7 May 2018, Mr Brockhurst requested a review of HMRC's decision, referring to the decision of *Jackson v HMRC* (TC06329).

(4) On 29 May 2018, HMRC's review conclusion upheld the penalties.

Appellant's case

10. By notice dated 25 June 2018, Mr Brockhurst appealed to the Tribunal, attaching a statement of grounds of nearly three pages long. The substantive grounds are the same as those in Mr Brockhurst's reply of 26 October 2018 to HMRC's Statement of Case, in which he summarised the grounds of appeal as follows:

'1. That under 17(3) of Sch 5, Finance Act 2009 the penalties should be reduced to nil and

2. That the penalties are unduly harsh and disproportionate, such that the Tribunal can invoke the Special circumstances provisions and determine that penalties should be cancelled.'

The first ground under para 17(3) of Sch 55

11. This ground is essentially rehearsing the conclusions drawn in the decision of *Alan Leslie Jackson v HMRC* [2018] UKFTT 0064 (TC) ('*Jackson*')

(1) The penalty under para 5(2) is determined by reference to a tax liability. If the tax liability had been £10,000 the penalty under this paragraph would have been £500 (at 5%), but where the tax liability is nil, the penalty would be £300. Both amounts are determined by reference to the liability to tax.

(2) The penalty would have been the same if it were not calculated by reference to the tax liability as HMRC contended.

(3) Since they are not the same, the only conclusion is that the amount of the penalty depends on the underlying tax liability and hence para 17(3) applies.

The second ground under para 16 for special reduction

12. The ground for special reduction as advanced is as follows:

(1) That no actual tax was payable, and the imposition of a £1,200 penalty seems unduly harsh.

(2) The progressive penalty system is designed to allow the taxpayer to rectify the position and be further penalised if they do not act in response. In the present case, the late return was filed in January 2017. The first penalty was issued on 27 October 2017, followed by £1,200 penalties on 22 December 2017; hence:

'Between these dates, I requested, by email, confirmation that there was no further liability indicating my desire to comply with my obligations as a taxpayer. No reply was made by HMRC to this request.'

(3) The special circumstances according to Mr Brockhurst:

'Clearly, as the initial penalty was issued 9 months after I filed the return (unprompted, albeit late), and the additional penalties were issued only 2 months later, there was no opportunity for me to rectify

my position as a result of HMRC action. In fact I had complied with my obligations to file a return BEFORE HMRC had issued a penalty at all. I therefore contend that there are special circumstances in play ...' (emphasis in capital original)

HMRC's case

13. HMRC submitted that the £300 penalties levied under para 5(2)(b) and 6(5)(b) of Sch 55 are not made by reference to a tax liability, but according to the length of time the return remained outstanding.

14. The minimum amount of penalty for a failure to file a return after 6 or 12 months is the greater of 5% of any liability to tax that would have been shown on the return or £300. The £300 is charged irrespective of any liability to tax. Paragraph 17(3) of Sch 55 is therefore not engaged.

15. HMRC have considered Special Reduction in accordance with para 16 of Sch 55. In the absence of any further information, HMRC do not think there are any special circumstances which allow the penalties to be reduced.

The relevant legislation

16. The ATED regime was introduced from 1 April 2013 by the enactment of the Finance Act 2013 ('FA 2013'), with s 94 providing for the annual ATED tax charge and s 159, for the filing of an ATED return, wherein sub-s 159(2) states:

'A return under subsection (1) must be delivered by the end of the period of 30 days beginning with first day in the period on which the person is within the charge with respect to the interest.'

17. Schedules 33, 34 and 35 to FA 2013 came into force from 17 July 2013, and extended the penalty provisions of Schedules 55 and 56 to FA 2009 for the late filing of a return and the late payment of tax respectively to the ATED regime.

18. Schedule 55 to FA 2009 provides, *inter alia*, the following:

'1(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).'

19. The imposition of the daily penalties is provided for under para 4 of Sch 55:

'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.

4 (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).'

20. The imposition of the 6-month late filing penalty is under para 5 of Sch 55:

‘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.

5(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.’

21. Although the imposition of the 12-month late filing penalty is not in point here, it is relevant to the discussion of the application of para 17(3). In contrast with para 5 provisions for the 6-month late filing penalty, the provisions for the 12-month penalty are much more involved and include provisions concerning the withholding of information under subsequent enactments as paras 6A, 6AA, 6AB, and 6B to 6D, while para 6 itself provides 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.

6(2) Where, by failing to make the return, P deliberately withhold 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-paragraph (3) and (4).

6(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.

6(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is –

- (za) for the withholding of category 0 information, 100%,
- (a) for the withholding of category 1 information, 125%,
- (b) for the withholding of category 2 information, 150%,
- (c) for the withholding of category 3 information, 200%.

[...]

6(5) In *any other case*, 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.’

22. It should be mentioned that a superseded version of Schedule 55 has been provided in the bundle. Paragraph 6 (as above) is substantially different from the version provided, and so is para 17, on which the appeal relies, is provided as follows:

‘17 *Interaction with other penalties and late payment surcharges*

(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to ‘any other penalty’ does not include –

- (a) a penalty under any other paragraph of this Schedule, or
- (b) a penalty under Schedule 56 (penalty for late payment of tax), or
- (c) a penalty under Part 4 of FA 2014 (penalty where corrective action not taken after follower notice etc), or
- (d) a penalty under Schedule 22 to FA 2016 (asset-based penalty).

(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax.

(4) The relevant percentage is –

- (a) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 3 information, 200%,
- (b) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 2 information, 150%,
- (c) if one of the penalties is a penalty under paragraph 6(3) or (4) and the information withheld is category 1 information, 125%, and
- (d) in all other cases, 100%.’

23. Under para 16 of Sch 55 FA 2009, it is provided that if HMRC think it right because of special circumstances, they may reduce a penalty. Under para 22 of Sch 55 FA 2009, the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

24. Paragraph 23 of Sch 55 FA 2009 provides that liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

Discussion

25. Having considered the representations from both parties, the issues for determination in this appeal are:

- (1) Whether HMRC have met the onus in imposing the penalties under the relevant provisions of Sch 55;
- (2) Whether para 17(3) of Sch 55 provision applies to discharge any of the penalties;
- (3) Whether a reasonable excuse and / or special circumstances existed for cancelling or reducing the penalties or part thereof.

The onus of proof

26. HMRC have the onus to prove that the various penalties imposable have met the conditions under Sch 55. The burden is then on the appellant to prove that it had a reasonable excuse or special circumstances for failing to submit the return on time. The standard of proof is the civil standard of the balance of probabilities.

27. It is common ground that an ATED return was due on 30 April 2016 and that the return was filed on 30 January 2017, and as such the return was filed more than 6 months after the due date. There is a *prima facie* case for the fixed penalty of £100 for the initial failure. By settling the £100 fixed penalty for the late filing of the return, the appellant has acknowledged the return was due and that it was late.

28. For the daily penalties to be imposable, three conditions are stipulated under para 4 of Sch 55, the third of which is that HMRC ‘give notice to [the taxpayer] specifying the date from which the penalty is payable’ (sub-para 4(1)(c)).

29. The legislation is emphatic that a taxpayer is liable to a penalty under paragraph 4 ‘if (and only if)’ the required notice has been given. For the daily penalties to be imposable, HMRC therefore have an additional burden to prove that the condition under para 4(1)(c) of Sch 55 has been met.

30. The Court of Appeal decision in *HMRC v Donaldson* [2016] EWCA Civ 761, to a large extent, is about whether this onus has been met by HMRC in imposing the daily penalties. Decisions from the First-tier Tribunal have concluded that where the burden is not met, the daily penalties are invalidated, see for example *Mohammed Samuel Islam t/a Zainub Takeway v HMRC* [2017] UKFTT 0337 and *Thomas Richter v HMRC* [2017] UKFTT 0339.

31. In the instant case, HMRC’s letter of 22 December 2017 notifying the appellant that daily penalties have been imposed cannot be construed as giving the requisite notice in terms of para 4(1)(c). Whilst the letter stated that the daily penalties of £900 are in relation to the period of delay between 1 August and 29 October 2016, the notice was retrospective in timing. This is contrary to the requirement of a notice under para 4(1)(c), which is intended to be prospective in timing so that the taxpayer can take remedial action during the currency of the daily penalty period.

32. The forewarning of daily penalties being imposable is routinely contained in the initial fixed penalty notice of £100, which specifies the date the daily penalties will start to accrue. After the initial penalty notice of £100, there is a 3-month period for the relevant return to be filed before the daily penalty period commences. In the instant case, the £100 penalty notice was only issued to the appellant on 27 October 2017, a year after the end of the daily penalty period, and would not have given the requisite notice under para 4(1)(c).

33. For these reasons, HMRC have not discharged the burden for the daily penalties to be imposable in this case. The daily penalties of £900 are cancelled accordingly.

Whether para 17(3) of Sch 55 to FA 2009 applies

34. It is the appellant’s case that para 17(3) of Sch 55 applies. It is unclear whether the appellant contends that para 17(3) is capable of cancelling the 6-month late filing penalty of £300, or all of the penalties inclusive of the daily penalties of £900. For the sake of clarity, it is worth emphasising that para 17(3) is not relevant to the imposition of daily penalties under para 4, given that the daily penalties are ‘fixed’ penalties in nature. In any event, the daily penalties have been discharged in this case, albeit for a reason unrelated to the interpretation of para 17(3).

35. As a matter of statutory construction, I disagree with the conclusions drawn in the decision of *Jackson* on the application of para 17(3) of Sch 55. The reasons for my disagreement, in summary, are the following:

(1) Paragraph 17(1) sets out the scope of the provisions under para 17, which is how a ‘tax-gearred’ penalty imposed under Sch 55 interacts with *other penalties and late payment surcharges*.

(2) Paragraph 2(a) makes it clear that ‘any other penalty’ *does not include ‘a penalty under any other paragraph of this Schedule’*, followed by three further exceptions under sub-paras 2(b) to (d).

(3) The ‘interaction’ anticipated by para 17 is between a tax-gearred penalty under Sch 55 and any other tax-gearred penalties or late payment surcharges imposed *outwith* Sch 55 provisions.

(4) For para 17 to be engaged, the relevant tax-gearred penalties also need to have been determined by reference to ‘*the same liability to tax*’.

(5) The interaction is by reducing the overall Sch 55 ‘tax-gearred’ penalties by the amount that has been imposed as another tax-gearred penalty under other statutory provisions which have not been excepted.

(6) Paragraph 17(3) then provides for all the tax-gearred penalties imposed under Sch 55 to be capped at the maximum percentage as determined by the relevant percentage set out in para 17(4), which can be up to 200% where the information withheld is classified as category 3.

(7) Where a 6-month late filing penalty under para 5 is imposed at £300, the £300 is a *fixed* penalty for the purposes of Sch 55. Where the penalty is determined by reference to 5% of the tax liability, for being the greater amount than £300, then the penalty becomes a tax-gearred penalty.

36. In the present case, the 6-month late filing penalty is determined at £300 for being greater than 5% of the tax liability in question, and as such, the penalty remains a fixed penalty. Since it is a fixed penalty, para 17(3) is not engaged. Paragraph 17(3) is only engaged if the para 5 penalty is the greater of £300, which then renders the penalty a ‘tax-gearred’ penalty at 5% of the tax liability.

37. The reasoning in *Jackson* is flawed by concluding that para 5 penalty (or para 6 for that matter) is *solely* determined by reference to a tax liability. The 5% of the tax liability in question is a comparator, which means the 6-month or 12-month late filing penalty can be determined either as ‘fixed’ at the lowest minimum of £300, or as ‘tax-gearred’ at 5% of the tax liability in question, whichever is the greater.

38. It has been noted that HMRC have provided the Tribunal with a superseded version of Sch 55. It would seem that *Jackson* (a decision of the year 2018) has cited from a superseded version of para 17, since the capping provision under para 17(3) is no longer at 100% (as quoted at [34] of *Jackson*), but at ‘the relevant percentage’ as listed under the current version of para 17(4).

39. In terms of the Sch 55 provisions as a whole, it would seem that the capping provision under para 17(3) is envisaged to interact with the determination of a penalty imposed under para 6, and of the highly articulated provisions subsequently enacted under paras 6A, 6AA, 6AB, and 6B to 6D.

40. Insofar as para 17(3) capping provision applies to a para 5 penalty, it is only to the much more limited extent when the para 5 penalty is assessed at 5% of the tax liability in question.

41. Schedule 55 provisions are there to deter non-compliance and to promote timely filing of returns and documents. The minimum penalty for a continual failure to file a return is to be £300 at the end of the 6 months and again at 12 months. The conclusion drawn by *Jackson* is at variance with the purpose of Sch 55 provisions: it would mean a taxpayer with no tax liability would not be deterred from prolonging the delay.

42. In my judgement, the reliance of *Jackson* is misguided. The fixed penalty of £300 remains valid. The penalty is imposable under para 5 ‘*if (and only if) P’s failure continues after the end of the period of 6 months beginning with the penalty date*’. This being the only condition and is satisfied as a matter of fact, the fixed penalty of £300, being the lowest minimum, has been correctly imposed.

43. It is necessary to consider whether there existed any reasonable excuse or special circumstances for the fixed penalty of £300 to be cancelled or reduced.

Reasonable excuse or special circumstances

44. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse is ‘a matter to be considered in the light of all the circumstances of the particular case’ (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

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

‘The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

46. In view of the subjective attributes of both directors of the appellant company, who are a solicitor and an accountant, it is reasonable to expect that the directors would have the experience and attributes to be aware of the ATED regime and the associated compliance obligations on the appellant becoming the owner of the Fulham property.

47. Notwithstanding that an ATED return has a narrower filing window from 1 April to 30 April of each tax year compared with an annual self-assessment return, the directors are professionals who should have the knowledge and the capacity to enquire into the compliance obligations.

48. The appellant has not advanced any ground on reasonable excuse, and I can find none either. The ground of appeal is staked on special circumstances that the appellant had not been given the opportunity to remedy the failure due to the timing of the penalty notifications. That is a fact which has been addressed in discussing the onus of proof, and it is not a fact to be considered again for special reduction.

49. In any event, Mr Bruckhurst's argument that he had met the obligation to file the ATED return *before* HMRC issued a penalty notice has no merit whatsoever. Unless and until Mr Bruckhurst took the step to file the said return, HMRC could not have known a return was due in the first place, since the year 2016-17 was the first year when an ATED return was due by the appellant.

50. Furthermore, it is plain that the responsibility for filing a return on time rests squarely with the taxpayer. Mr Bruckhurst's argument has the implication that HMRC are somehow responsible for alerting the taxpayer that a return is due or is late by sending timely penalty notices.

51. Mr Bruckhurst has also raised the question of proportionality, which is not a matter that can be considered by the Tribunal; see *HMRC v Hok* [2012] UKUT 363.

Disposition

52. The daily penalties of £900 are cancelled.

53. The fixed penalty of £300 is confirmed.

54. The appeal is allowed in part.

55. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 09 JANUARY 2019